

COMMON COMUNICATION
CRITERIA FOR ASSESSING
DISCLOSURE OF DESIGNS ON THE
INTERNET

APRIL 2020

1. BACKGROUND

The IP Offices of the European Trade Mark and Design Network continue to collaborate in the context of the Convergence Projects. They have now agreed on the third Common Practice on Designs, and the tenth overall, with the aim to identify common criteria for assessing disclosure of designs on the internet and to provide recommendations thereof.

This Common Practice is made public through this Common Communication with the aim of providing clear and comprehensive guidance for assessing disclosure of designs on the internet and consequently, increasing transparency, legal certainty, and predictability.

It is meant to serve as a reference for the European Union Intellectual Property Office, the Intellectual Property Offices of the EU Member States and Benelux, other relevant authorities, user associations, applicants, right holders, representatives and other interested persons.

2. THE COMMON PRACTICE

The following text summarises the key messages and the main statements of the principles of the Common Practice.

The complete text of the Common Practice and all the examples used can be found at the end of this Communication.

In order to access disclosure of designs on the internet the following criteria are considered:

Criterion	Sources of design disclosure on the internet
	Article 6(1) of the Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs does not indicate any limitation as to where an event of disclosure must take place in order for a design to be considered as having been made available to the public. Therefore, in general, a design can be disclosed anywhere in the world, including the internet.
Common Practice	<p>The most common sources of design disclosure on the internet are the following:</p> <p>a) Websites</p> <p>There is a large variety of websites where a design can be disclosed, e.g. online shops, social media sites or online databases.</p> <p>The Common Practice recommends <i>inter alia</i>:</p> <ul style="list-style-type: none"> • 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 relevant date can be established from the contents of the document or from any other evidence.
- When assessing evidence of disclosure of a design originating from websites the information regarding the purpose and the main characteristics of the website in question could be of relevance.

b) Apps

Disclosure of designs can be established through apps, in particular, those associated with online sales, auctions, social networking, etc.

The Common Practice recommends *inter alia*:

- When apps also have a website version, it is preferable that the relevant information is extracted from this version rather than from the app itself.
- If a website version is not available, a screenshot from a mobile device can be used as evidence.

c) Electronic mails

The exchange of electronic mails is widely used in commerce and can be a source where designs are disclosed.

The Common Practice recommends *inter alia*:

- If possible, the evidence of the e-mail communication should show a representation of a design, in particular when it was contained in the attachment sent.
- The date relevant for assessing disclosure should be clearly indicated, in particular, when the e-mail contains references to several dates.
- The recipient of the e-mail communication and its purpose should be taken into account as it might serve as an indication as to whether it was addressed to the circles specialised in the sector concerned.

d) File sharing

Making a file that incorporates a design available through a file sharing system (e.g. peer to peer (P2P) or file hosting platforms) might constitute an event of disclosure.

	<p>The Common Practice recommends <i>inter alia</i>:</p> <ul style="list-style-type: none"> • When proving disclosure through file sharing, any additional evidence when available, such as e-mails informing users of a new upload, etc., should be submitted. • 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.
Criterion	<p><i>Establishing the relevant date of disclosure</i></p> <p>When assessing disclosure of the design on the internet, it is necessary to establish the date when it was made available to the public.</p>
Common Practice	<p>In respect of the relevant date of disclosure, which could be established through various available tools, the Common Practice recommends <i>inter alia</i>:</p> <ul style="list-style-type: none"> • For the purposes of proving disclosure of designs, in particular as regards the relevant date, website archiving services are preferred rather than search engine services. • Timestamping could be used as a precautionary measure in order to secure the evidence of disclosure of designs. • When several steps are required in order to obtain the evidence of design disclosure, the entire browsing session could be timestamped. • When submitting evidence extracted using forensic software tools, information explaining the tool, how the information was obtained, which kind of information was extracted and from which content it was taken should also be submitted.
Criterion	<p><i>Means for presenting the evidence obtained from the internet</i></p> <p>The Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs does not provide any specific form in which the evidence on disclosure of designs must be submitted. In general, any means able to prove an event of disclosure of a design can be submitted.</p>
Common Practice	<p>Regarding the means for presenting evidence obtained from the internet, the Common Practice recommends <i>inter alia</i>:</p> <p>a) Printouts and screenshots</p> <ul style="list-style-type: none"> • Printouts and screenshots should ideally contain information on the source where the content was taken (e.g. URL address), the relevant date and disclosed design, and should not be manually modified. • When several dates and/or designs are displayed in a printout or a screenshot, it should be clearly indicated which is the relevant date/design.

	<ul style="list-style-type: none"> • Images of a design should be precise and of sufficient quality to allow the definition of its features. <p>b) Images and videos</p> <ul style="list-style-type: none"> • The information on the source where images or videos displaying a design originate from should be provided. • The date when an image or a video displaying a design was made public should be established. • The image showing the design could be presented in a printout or a screenshot. • The video itself (e.g. as a file) or only captures of the relevant parts where the design is perceived could be presented. Submitting only URL of the video would not be sufficient. <p>c) Metadata</p> <ul style="list-style-type: none"> • When metadata is submitted as evidence, information explaining how it was obtained, what kind of information was extracted and from which source it was taken should preferably be provided. <p>d) URL addresses and hyperlinks</p> <ul style="list-style-type: none"> • When the URL address or a hyperlink is submitted, a printout or a screenshot of the relevant information contained therein should also be provided. <p>e) Statements in writing</p> <ul style="list-style-type: none"> • 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.).
<p>Criterion</p>	<p><i>Exceptions to the availability of the design on the internet</i></p> <p>Once the event of disclosure of a design is proven, there is a presumption that such a design has been made available to the public. Taking into account the global nature of the internet, in general, online content is available worldwide.</p> <p>Only under certain circumstances events of disclosure would 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.</p> <p>In order to refute the presumption of disclosure, these exceptions to the availability of the design have to be proven by submitting the respective evidence.</p>
<p>Common Practice</p>	<p>Regarding the exceptions to the availability of the design on the internet, the Common Practice states <i>inter alia</i>:</p>

- 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.
- Depending on the sector concerned, languages might affect the possibility of the specialized circles operating within the European Union to become aware of the event of design disclosure on the internet.
- When assessing searchability of a design on the internet, it should be considered whether a particular source of disclosure 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 when assessing whether the relevant information on the internet could have been found.
- 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.
- Those situations where the design has been disclosed under implicit or explicit conditions of confidentiality will not constitute disclosure.

3. IMPLEMENTATION

As has been the case with previous common practices, the Common Practice will take effect within three months of the date of publication of this Common Communication.

Implementing offices may choose to publish additional information on their websites.

List of implementing offices

www.euipn.org



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1 INTRODUCTION

1.1 Objective of this document

The document aims to identify common criteria for assessing disclosure of designs on the internet and to provide recommendations thereof (hereinafter “Common Practice”).

It is meant to serve as a reference for the European Union Intellectual Property Office (hereinafter “EUIPO”), the Intellectual Property Offices of the EU Member States and Benelux (hereinafter “MS IPOs”), other relevant authorities, user associations (hereinafter “UAs”), applicants, right holders, representatives and other interested persons.

The Common Practice will be made widely available and will be easily accessible, providing a clear and comprehensive guidance for assessing disclosure of designs on the internet. It is designed to be generally applicable and aims to cover the majority of cases. Although the respective evidence will always have to be assessed on a case-by-case basis, it is important that the same criteria are followed when assessing disclosure of designs on the internet throughout the European Union.

1.2 Background of the project

In December 2015, the European Parliament and the Council adopted the EU trade mark reform package. The package contained two legislative proposals, namely the new Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union Trade Mark (hereinafter ‘Regulation’ or ‘EUTMR’) and the EU Trade Mark Directive No. 2015/2436 (hereinafter ‘Directive’ or ‘EUTMD’), which aims to approximate the laws of the Member States relating to trade marks. Alongside new provisions on substantive and procedural matters, the texts established a stronger legal basis for the cooperative work. Under the terms of Article 151 EUTMR, cooperation with the MS IPOs to promote convergence of practices and tools in the fields of trade marks and designs became a core task for the EUIPO; 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 June 2016, the Management Board of the EUIPO agreed the launch of the European Cooperation Projects. Reflecting the different activities provided in the EUTMR, the projects were designed to build on past successes while at the same time improving processes and extending the reach of collaboration.

In the area of convergence, it included a project dedicated specifically to the identification and analysis of potential new harmonisation initiatives. The project analysed the trade mark and design practices of the MS IPOs in order to detect areas where divergence existed, and, through an evaluation of likely impact, feasibility of possible scope, existing legal constraints, levels of interest among users and practicality for IPOs, determine those areas where a Common Practice would be most beneficial for stakeholders. The analysis was carried out in cycles, with each cycle resulting in the recommendation for the launch of a new convergence project.

The Common Practice outlined in this document relates to the third convergence project launched by the Management Board, and the tenth overall. **CP10: “Criteria for assessing disclosure of designs on the internet”** was one of the projects recommended for launch as a result of the second cycle of convergence analysis, which had included analysis of design practices.

1.3 Practice scope

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, giving rise to questions of how to prove online disclosures. This is particularly pertinent given that the content placed on the internet is considered as generally available to the public.

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 project Working Group, composed of representatives from six MS IPOs, the EUIPO, three UAs and a representative from the European Patent Office (hereinafter “EPO”), worked closely on developing the principles of the Common Practice based on settled case-law and existing practices and by taking into account the feedback received from MS IPOs, non-MS IPOs and UAs.

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, applications (hereinafter “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. When drafting this document, emerging and future technologies have been taken into consideration where this was possible.

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.

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.

However, it should be noted that 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 (hereinafter the “Designs Directive”) is out of scope of this project.

There is a glossary (Annex) at the end of this document aiming to define the terms used throughout the Common Practice. The respective terms found in the text, which are underlined and in blue font, are linked with the glossary¹.

¹ When read in digital format, readers can access the relevant definition by giving the ‘ctrl + click’ command over the indicated terms. To return to the point of lecture, press ‘Alt + left button’ on the keyboard.

2 THE COMMON PRACTICE

2.1 Key concepts

A [design](#) shall be protected to the extent that it is new and has individual character². It shall be considered to be new if no identical design has been previously disclosed to the public and to have an individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any previously disclosed design³. Thus, disclosure might be relevant when assessing whether a design meets the requirements for protection.

When assessing disclosure of the design on the [internet](#), the standard two-step test established in Article 6(1) of the Designs Directive must be taken into consideration. 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 Union⁴.

Moreover, further exceptions contained in Article 6 of the Designs Directive may apply when a design will not be considered as having been made available to the public, namely when it 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 period preceding its date of filing or priority; *(iii)* as a consequence of an abuse against the designer.

There is a general presumption that a design has been made available to the public if the existence of an event of disclosure is established, unless it is shown that the aforementioned exceptions apply.

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

(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 internet⁵. When assessing disclosure of designs on the internet, the following should be taken into account:

- possible sources where the disclosure of designs may take place, e.g. [websites](#), file-sharing, etc.;
- particulars of the source of disclosure.

² Article 3(2) of the [Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs](#)

³ Articles 4 and 5 of the Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs

⁴ 14/03/2018, T-651/16, Footwear, EU:T:2018:137, § 48

⁵ 13/02/2014, C-479/12, Gartenmöbel, EU:C:2014:75, § 33

(ii) The design disclosed

A design disclosed on the internet forms part of the prior art. As a general rule, it is irrelevant whether a design was disclosed as a trade mark, copyright work, patent, utility model or otherwise⁶.

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 the evidence originating from the internet.

(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 (hereinafter the “relevant date”).

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

- 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;
- how to determine the relevant date when the date indicated is the amount of time (e.g. number of minutes, hours, days, weeks or months) since the information was published (relative date) and not the exact date and time (absolute date).

2.2 Sources of disclosure

As provided in Article 6(1) of the Designs Directive, a design shall be deemed to have been made available to the public if it has been published following registration or otherwise, or exhibited, used in trade or otherwise disclosed.

It should be noted that the aforementioned provision only gives examples of possible events of disclosure (i.e. ‘published following registration or otherwise’, ‘exhibited’, ‘used in trade’), but not an exhaustive list of such events (i.e. ‘otherwise disclosed’). Moreover, there is no limitation as to where an event of disclosure must take place in order for a design to be considered as having been made available to the public.

The most common sources of design disclosure on the internet are the following:

- websites;
- [apps](#);
- [electronic mails](#);
- [file-sharing](#).

⁶ 21/05/2015, T-22/13 and T-23/13, Umbrellas, EU:T:2015:310, § 24

The source of disclosure of a design on the internet must be properly identified in the evidence submitted.

Account should be taken of the fact that the way of presenting the information obtained from the aforementioned sources might vary and thus they will be addressed separately in the sections below.

2.2.1 Websites

There is a large variety of websites available on the internet, such as private, corporate, institutional or organisational websites. The following types are highlighted below because of their specificities when assessing their contents for the purpose of disclosure of designs:

- [E-commerce platforms](#);
- [Online databases](#);
- [Social media](#).

2.2.1.1 E-commerce platforms

The constant growth of e-commerce is reshaping trading habits, in particular in the retail sector. Many of the existing websites are dedicated to various forms of e-commerce, such as online retailing, online auctions, online marketplaces, and online marketing.

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. In practice, a growing number of designs are made available to the public by displaying them on websites dedicated to e-commerce.

2.2.1.2 Online databases

For the purpose of this document, online databases will be 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.

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 availability, addressed in Section 2.5 of this document. This includes, for example, online publications of design, trade mark or patent registrations by IPOs⁷.

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.

⁷ 16/12/2010, T-513/09, Ornamentación, EU:T:2010:541, § 20; 15/10/2015, T-251/14, Doors (parts of), EU:T:2015:780, § 22

2.2.1.3 Social media

[Online media](#) has significantly changed the way the information is created and shared. A number of online media services are available on the internet. For the purpose of design disclosure, the most relevant online media services are those related to social media, in particular social networking, [blogs](#) and [vlogs](#).

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

Some of the key features of social media are that its content is created by users and that the dissemination of information might be very fast and extensive. When assessing disclosure of designs on various social media services, aspects such as its purpose or nature might be relevant. Moreover, some social media services provide the possibility to retrieve historical information or even search for content. In other cases, the content might only be available for a short period of time.

It should be noted that apart from the mentioned types of websites the recommendations below could also be applicable to other websites not specifically addressed in the Common Practice.

Recommendations:

- *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 relevant 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.*

2.2.2 Apps

A considerable part of online activity entails the use of apps (e.g. online retail sales, online auctions, social networking, instant messaging, etc.). Therefore, this medium has to be taken into account for the purposes of assessing the disclosure of designs.

It should be observed that some websites also have an [app version](#). This is because it is a common practice for website owners to create an app version of their website, enabling it to be more easily accessible on mobile devices.

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 that do not have a website version 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.

Recommendations:

- *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 relevant 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.*

2.2.3 Electronic mails

Electronic mails (hereinafter “e-mails”) can be another source of disclosure of designs on the internet. Traditionally, an e-mail is perceived as private correspondence. However, e-mails are also widely used in e-commerce.

An e-mail which aims to promote a product, including to a limited circle of persons, should not be considered as private correspondence. For instance, an e-mail sent by a producer of a certain product to selected retailers with the offer of putting it on the market would normally be considered as an event of disclosure of a design incorporated in that product. 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 form⁸.

⁸ 27/02/2018, T-166/15, Cases for mobile phones, EU:T:2018:100, § 93

In addition, 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.

It should be observed that e-mails usually contain confidentiality claims. However, their effectiveness should be assessed with caution. For instance, the contents, the recipients and the purpose of e-mails might affect the veracity of such claims (see Section 2.5.5 below).

Recommendations:

- *If possible, the evidence of the e-mail communication should show a representation of a design, in particular when it was contained in the attachment sent.*
- *The date relevant for assessing disclosure should be clearly indicated, in particular when the e-mail contains references to 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. Even if the list of recipients is undisclosed, the content of the e-mail might still help to determine whether it was intended as a private communication or actually targeted a broader audience⁹.*
- *The veracity of the confidentiality claim contained in an e-mail should be assessed considering the contents, recipients and purpose of an e-mail.*

2.2.4 File sharing

Making a file that incorporates a design available through a [file sharing](#) system, in principle, constitutes an event of disclosure.

For the purposes of this document, two of the most common services for file sharing have been considered, namely [peer to peer \(P2P\)](#) and [file hosting](#).

These services are similar to the extent that in both cases the files available for downloading would be listed on a sharing platform and by following their hyperlinks, users would be able to download them.

The key difference between them is principally technical in nature. In the case of the P2P file sharing, the files are downloaded directly from the computer of one user to another, whereas in the case of file hosting those files will have to be first uploaded on the sharing platform.

It should be noted that the contents of the files shared through either of the aforementioned systems would normally not be visible to users until the files have been downloaded and opened.

⁹ 27/02/2018, T-166/15, Cases for mobile phones, EU:T:2018:100, § 93

Therefore, 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.

The evidence should also indicate the date of disclosure. In general, the date when the file has been made available for sharing would be considered as the date of disclosure, unless it is proven that no file has actually been downloaded using that hyperlink. 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.

It should be noted that the fact that certain file sharing systems restrict access with a [password](#) or are subject to a [payment](#) of a fee, does not, in principle, prevent a design from being considered as disclosed (see Section 2.5.1 below).

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 (see Section 2.3.2 below) or public notary services could be used.*

2.3 Establishing the relevant date of disclosure

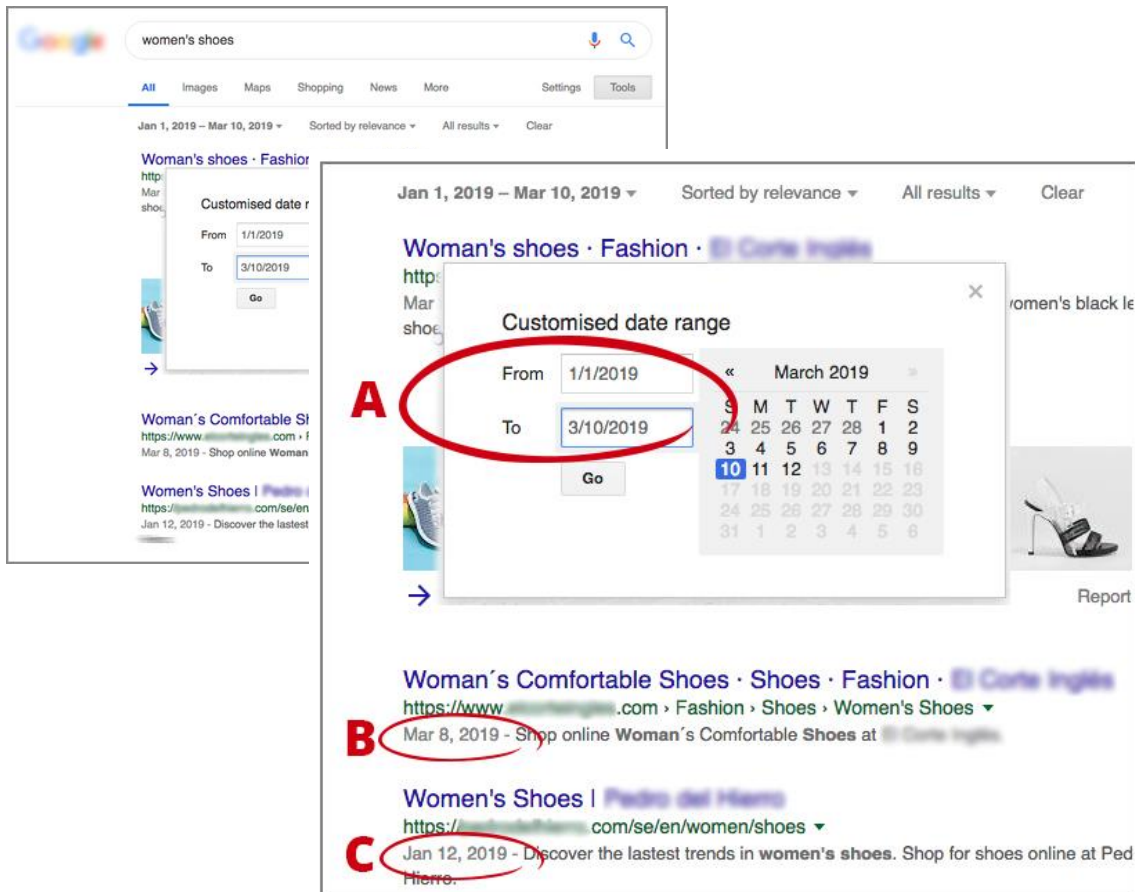
The other necessary criterion for assessing disclosure of a design is the establishment of the date of disclosure; that is, the date on which the design has been made available to the public.

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.

2.3.1 Dates provided by 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.

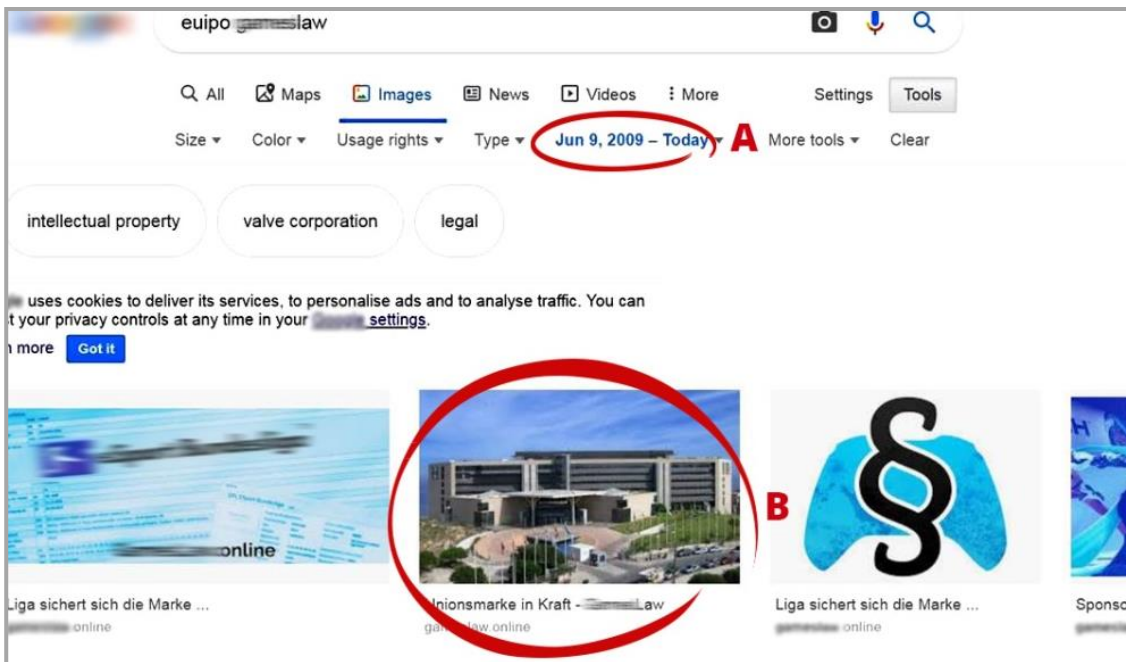
Search engines allow users to search for the information within a specific time frame (see indication 'A' in Example 1 below)¹⁰. The obtained results may constitute a preliminary indication as to when the respective content was available online. However, in order to prove disclosure, the relevant date should be corroborated by further information, ideally the dates contained in the contents of the particular websites listed in the search results.



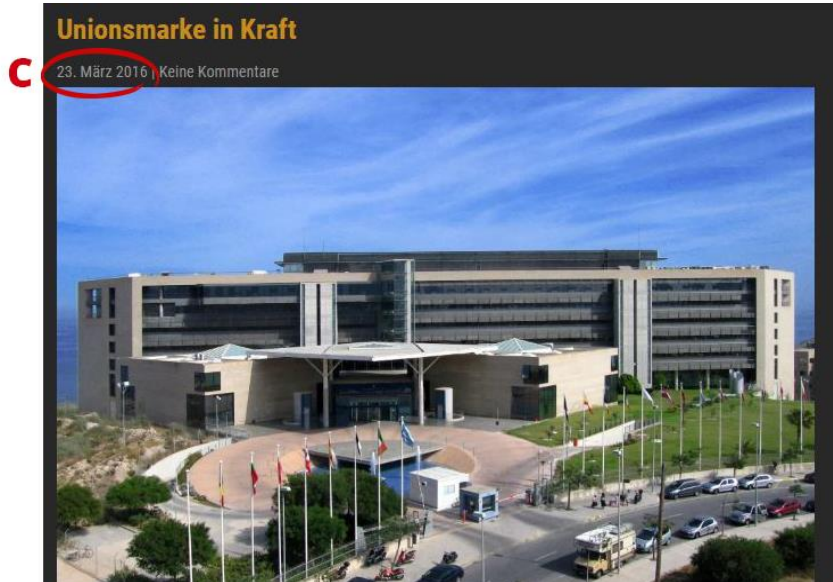
Example 1

Due to the limitations mentioned below, search engines should be relied on with caution. First, when searching within a period of time (see indication 'A' in Example 2), the obtained date might not necessarily be the date when the relevant content was published (see indication 'C' in Example 2), but the date the tool cached or captured the particular website (see indication 'B' in Example 2). Secondly, the contents of a website showing a design might not relate to the date shown, but to the most recent version of that website.

¹⁰ Some search engines temporarily store information - or [cache](#) - websites. This is done through a program called a "web crawler", which scans the internet, visits every website it can and stores information (such as the publication or creation date of the site or its contents) about those webpages in an index.



When you enter the corresponding website containing the picture, you discover that the date of disclosure of the image is 23 March 2016.



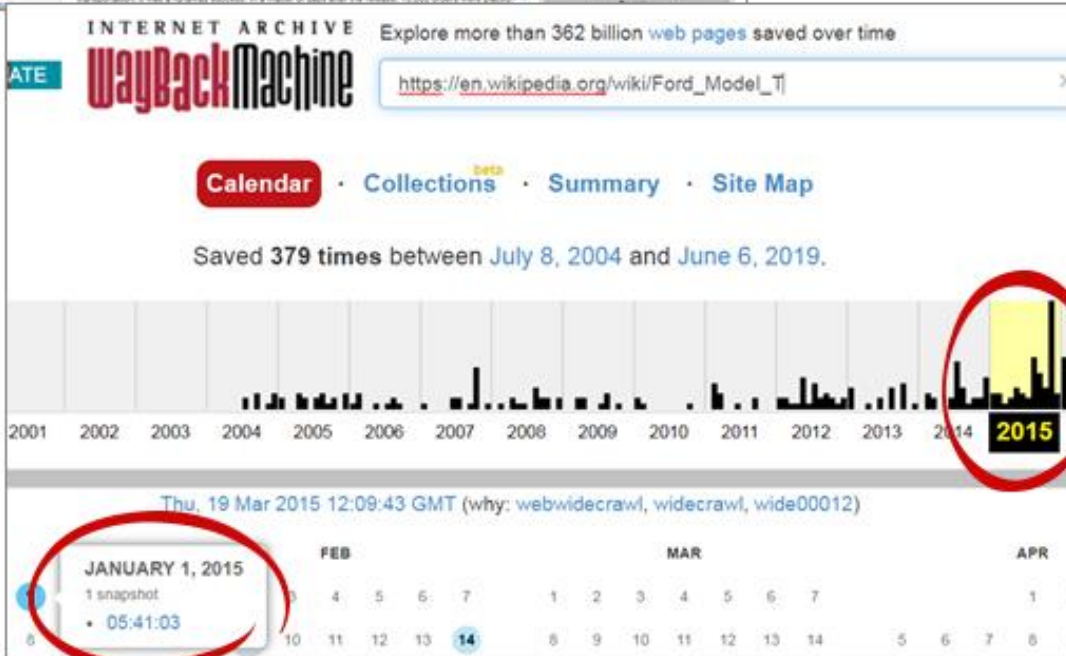
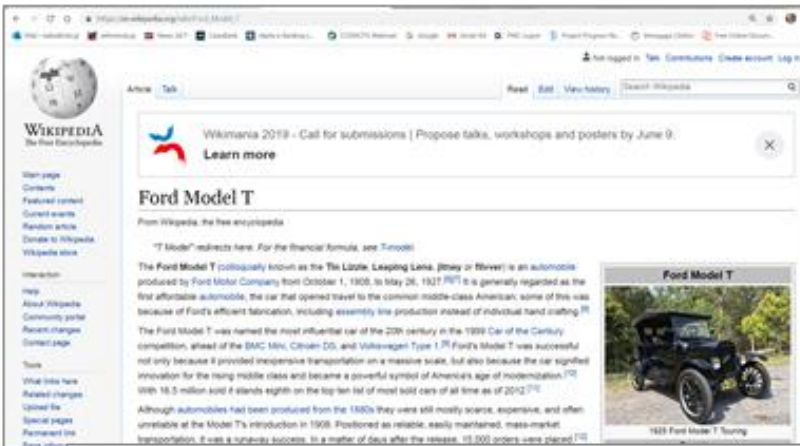
Example 2

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 3 below). Moreover, website archives also provide the possibility to view and navigate them.

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.



A



Example 3

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.*

2.3.2 Computer-generated timestamp information

An [electronic timestamp](#) assigns an exact time to a file, a message, a transaction, an image etc., giving evidence that the content existed at a point in time.

Various services providing [timestamps](#) are available. Some of them have the European Commission's recognition that they comply with the requirements of the Regulation (EU) N°910/2014 on electronic identification and trust services for electronic transactions in the internal market (hereinafter the 'eIDAS Regulation'¹¹). Providers of those services can issue [qualified electronic timestamps](#).

The European list of [qualified timestamp providers](#)¹² is made available to the public by the European Commission.

A qualified timestamp issued by one Member State shall be recognised as such in all Member States. Furthermore, it shall enjoy the presumption of the accuracy of the date and time it indicates and the integrity of the data to which the date and time are bound¹³.

Timestamping can secure the content contained in a screenshot or a printout (see indications 'A' in Examples 4 and 5 below) from the possibility of it being later amended or removed from its original source. Furthermore, this type of evidence is not subject to any territorial limitations.

When a timestamp is requested for a specific website, the service will provide a certificate verifying the timestamped content, such as the URL address and the date, all related to that website at the moment it was timestamped (see indication 'A' in Example 5 and indications 'A' and 'B' in Example 6 below).

Both static websites and browsing sessions can be timestamped.

When timestamping static websites, generally speaking, the timestamping service issues a digital certificate that features the content visible on a specific URL at certain moment, specifying the exact date and time. This type of timestamp serves to guarantee that the screen capture submitted has not been modified, since the certificate, which is digitally signed and timestamped, includes the visual information provided by the URL and the HTML code as an attachment to the certificate.

¹¹ [Regulation \(EU\) N°910/2014 on electronic identification and trust services for electronic transactions in the internal market \(eIDAS Regulation\)](#). Adopted on 23 July 2014 and revoked Directive 1999/93/EC

¹² Trusted list: <https://webgate.ec.europa.eu/tl-browser/#/>

¹³ Article 41 of the eIDAS Reg. No. 910/2014

Timestamping a static website

es:Opiniones de cliente- X

← → ↻ https://www.amazon.es/Artemide-Eclipse-Blanca-Lámpara-de-Mesa/product-reviews/B000Q6QWSI/ref=dpx_acr_txt?showViewpoints=1

Todos los departamentos

Enviar a Sergio Alicante E-03003

Todos los departamentos

Volver a comprar

Amazon.es de Sergio

Ofertas

Nuevo: Chollos

Cheques regalo

Vender

Ayuda

Amazon.es

Los más vendidos

Ofertas

Productos Reacondicionados

Lista de deseos

Cheques regalo

Amazon Prime

Apps de Amazon

Vender en Amazon

Artemide Eclipse Blanca Lámpara de Mesa > Opiniones de clientes

Opiniones de clientes

★★★★☆ 3
3,7 de 5 estrellas

5 estrellas 67%
4 estrellas 0%
3 estrellas 0%
2 estrellas 33%
1 estrella 0%

Artemide Eclipse Blanca Lámpara de Mesa
por *isabel*
Color: Blanco | Cambiar
Precio: 112,90 € *prime*

Escribir una opinión

Q Buscar opiniones de clientes **Buscar**

ORDENAR POR **FILTRAR POR**

Mejor valora...
Todos los autores de o...
Todas las estrellas
Todos los formatos
Texto, imagen, vídeo

Mostrando 1-3 de 3 opiniones

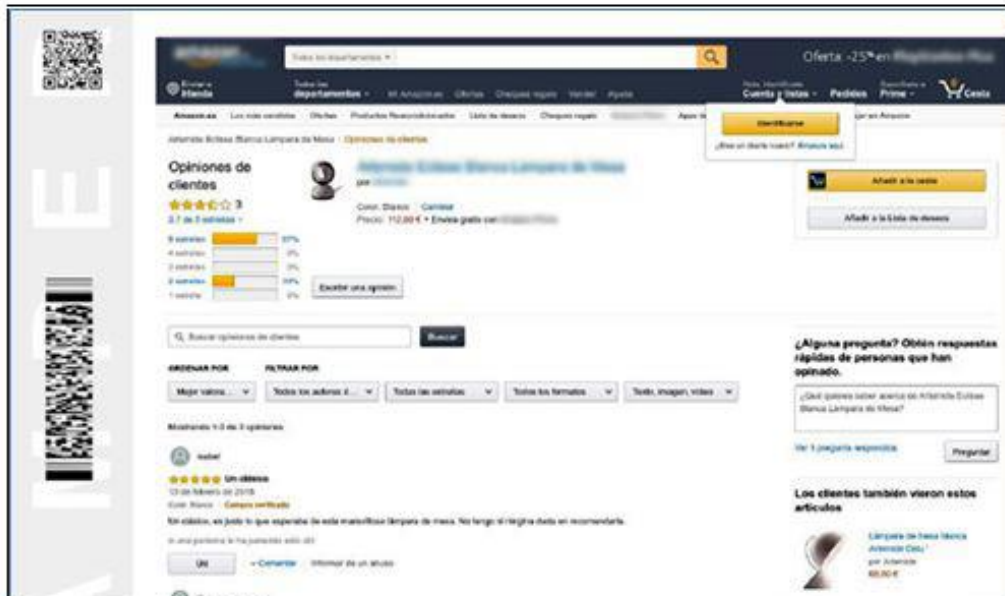
isabel
★★★★★ **Un clásico**
13 de febrero de 2018
Color: Blanco | **Compra verificada**
Un clásico, es justo lo que esperaba de esta maravillosa lámpara de mesa. No tengo ni ninguna duda en recomendarla.
A una persona le ha parecido esto útil
Útil | Comentar | Informar de un abuso

Thischarmingman
★★★★★ **preciosa lámpara**
23 de diciembre de 2018
Color: Rojo | **Compra verificada**
Perfecta para el espacio que le tenía destinado, da una luz preciosa y con un diseño que me encanta.

A

Example 4

Timestamping a static website: the certificate



This is the information provided by the address https://www.amazon.es/Artemide-Eclisse-Blanca-L%C3%A1mpara-Mesa/product-reviews/B00OQ6QWSI/ref=dpx_acr_txt?showViewpoints=1, responding from IP address 216.137.57.191, when queried on Mar 15, 2019 6:32:25 PM (UTC) from the IP address 54.247.116.13.

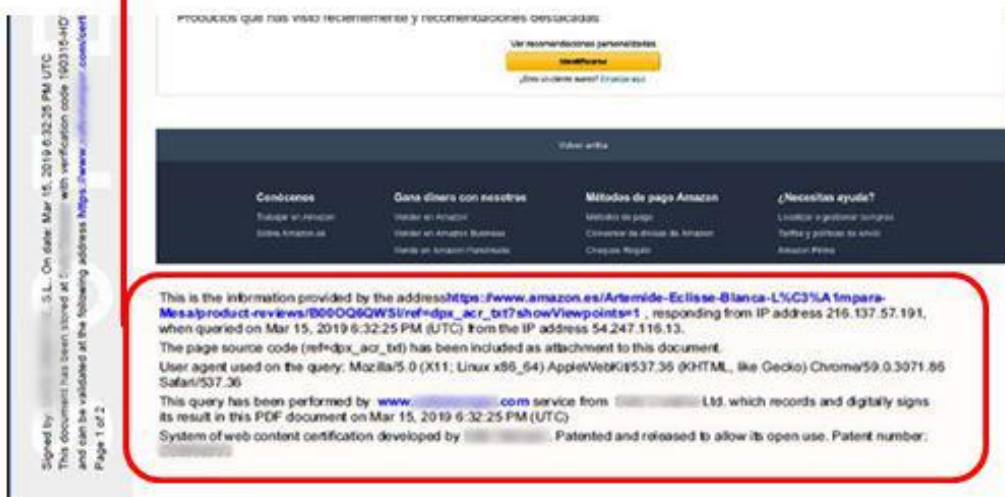
The page source code (ref=dpx_acr_txt) has been included as attachment to this document.

User agent used on the query: Mozilla/5.0 (X11; Linux x86_64) AppleWebKit/537.36 (KHTML, like Gecko) Chrome/59.0.3071.86 Safari/537.36

This query has been performed by www.verifone.com service from www.verifone.com Ltd. which records and digitally signs its result in this PDF document on Mar 15, 2019 6:32:25 PM (UTC)

System of web content certification developed by www.verifone.com. Patented and released to allow its open use. Patent number: [US 2015/0100000 A1](#)

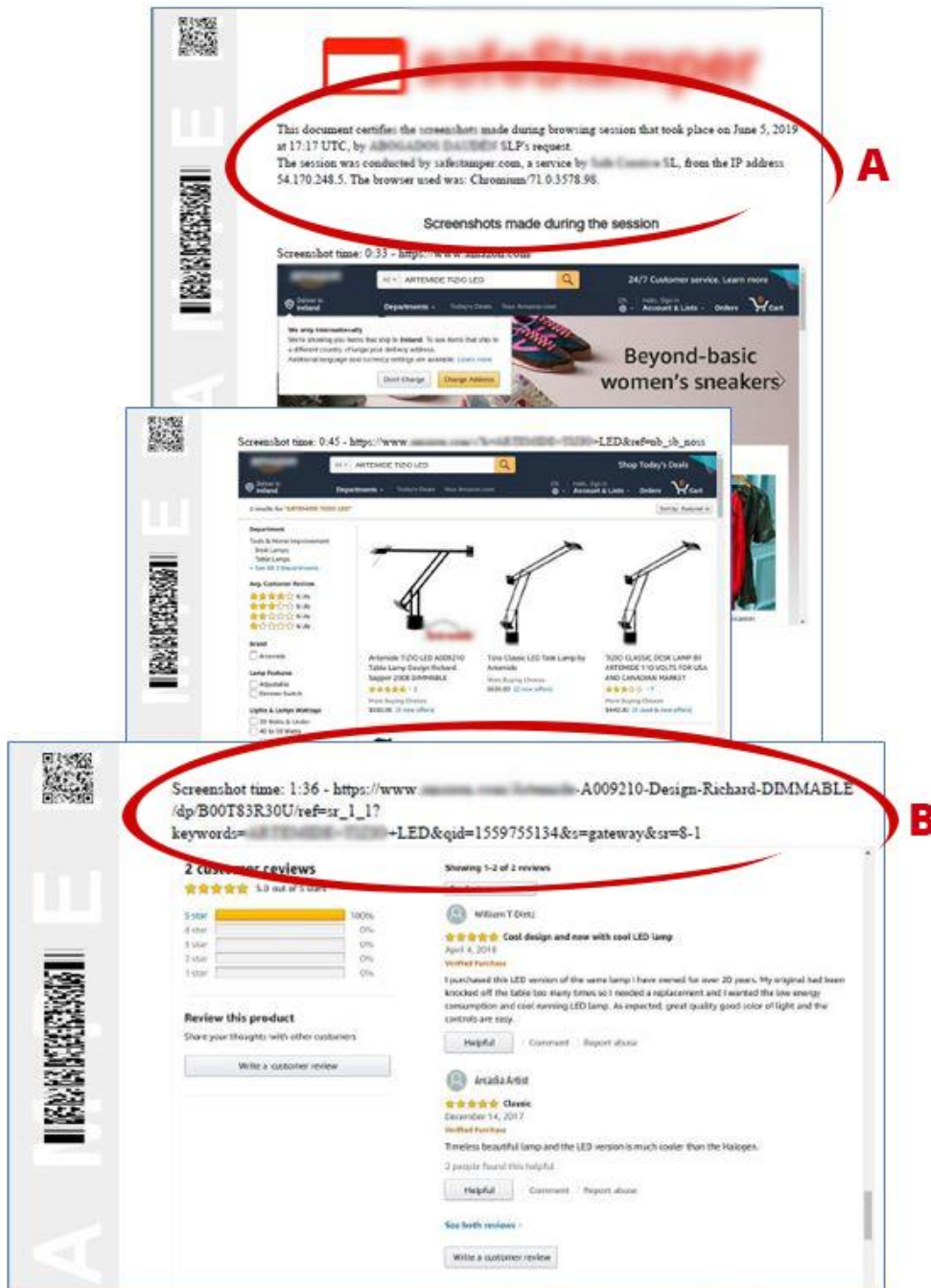
A



Example 5

Timestamping browsing sessions (or 'dynamic webpages'), allows 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 Example 6 below).

Timestamping a browsing session



Example 6

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.*

2.3.3 Forensic software tools

[Forensic software tools](#) are used to acquire digital and computer generated evidence. Some are targeted at non-expert users and are freely available on the internet.

These tools can be used, in particular, 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 (see Section 2.4.3 below).

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.*

2.4 Means for presenting the evidence obtained from the internet

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. 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 items¹⁴.

Evidence proving disclosure of a design extracted from the internet can be submitted with other pieces of evidence (irrespective of the source of the information), as the event of disclosure should be assessed taking into account all evidence provided.

However, it should be recalled that an event of disclosure of a design 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 design¹⁵.

¹⁴ 09/03/2012, T-450/08, Phials, EU:T:2012:117, § 25, 30-45

¹⁵ 09/03/2012, T-450/08, Phials, EU:T:2012:117, § 24

Moreover, for the purposes of establishing disclosure of the particular design, all the evidence should relate to the same design invoked as prior design. Several features disclosed in various pieces of evidence relating to different designs cannot be combined for the purposes of disclosure of a single design¹⁶.

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 doubt¹⁷.

Recommendations:

- *The evidence extracted from the internet should clearly indicate the source of disclosure of the design and, 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.*

2.4.1 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.

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.*

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.

¹⁶ 21/09/2017, C-361/15 P and C-405/15 P, Shower drainage channel, EU:C:2017:720, § 69; 19/06/2014, C-345/13, Karen Millen Fashions, EU:C:2014:2013, § 35

¹⁷ 27/02/2018, T-166/15, Cases for mobile phones, EU:T:2018:100, § 64, 90

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.*

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 7 below) will be assumed as the date of disclosure, unless an earlier relevant date can be established from the URL address, the contents of the document itself (e.g. 'Available since...', 'Last modified on...') or any other evidence (see indication 'B' in Example 7 below).

12/14/2018 **A** Red Shoes - Shoes for Men and for Women

Red Shoes
Unique Identification Number (UIN):
S-123456
85,00 €
Color: Red
Quantity: 1
Size: 38
ADD TO CART
Available since March 2017 **B**
RETURN & REFUND POLICY
SHIPPING INFO

Example 7¹⁸

It is important to note that a year referring to copyright that is usually shown at the bottom of a website would not be sufficient in itself to establish the date of disclosure.

¹⁸ The top of this printout displays a printing date (see indication 'A' in Example 7), but another date is shown in the actual contents of the document, i.e. March 2017 (see indication 'B' in Example 7). Since it is earlier, the date indicated in the contents of the document will be considered as the date of disclosure of the design.

A printout or screenshot can also have embedded the date when it was made, depending on the type of computer and/or device used (see Section 2.4.2 below). This date can be relevant for disclosure.

Recommendations:

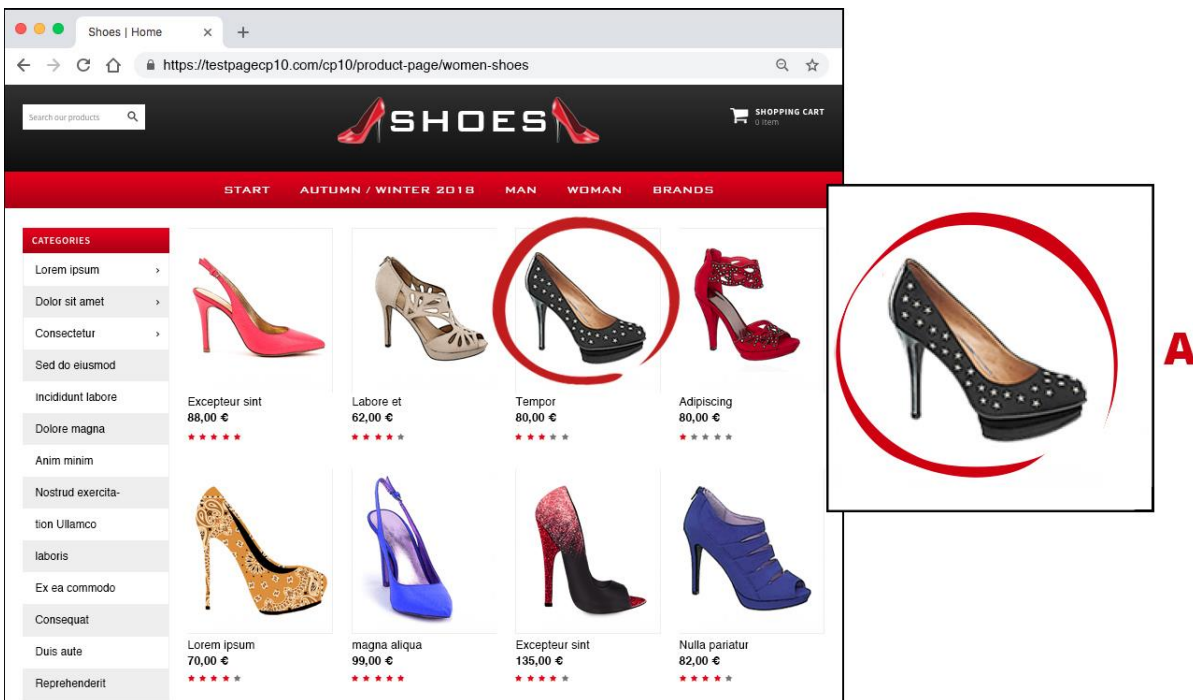
- *When several dates are indicated in a printout or a screenshot, it is advisable to clearly indicate which is the relevant date.*

The disclosed design:

A printout or a screenshot may show several designs, in particular when it represents internet search results or is a printout or screenshot of a retailer website.

If designs of several products are displayed in a single printout or a screenshot, it should be clearly indicated which is the relevant design (see indication 'A' in Example 8 below).

Images of a disclosed design should be precise and of sufficient quality to allow the definition of its features¹⁹.



Example 8

Recommendations:

- *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.*

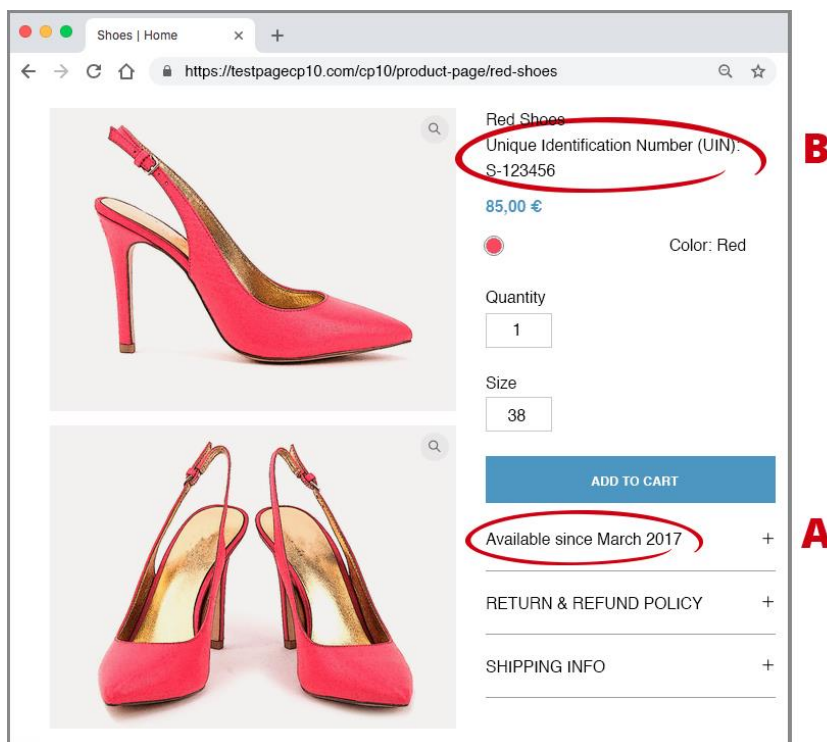
¹⁹ 21/09/2017, C-361/15 P and C-405/15 P, Shower drainage channel, EU:C:2017:720, § 65

- 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.

2.4.1.1 Printouts and screenshots from e-commerce platforms

E-commerce platforms very often indicate the date when the particular product was first available for sale (see indication 'A' in Example 9 below). This information contained in printouts or screenshots can be relevant when establishing the date of disclosure of a design incorporated in that product.

Moreover, 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 other evidence (see indication 'B' in Example 9 below).



Example 9

Evidence of disclosure originating from e-commerce platforms might have evidential value even in the absence of the design's representation, provided that a unique code identifying the relevant product can be linked to the particular design²⁰.

²⁰ 27/02/2018, T-166/15, Cases for mobile phones, EU:T:2018:100, § 59-63

It should be noted that some e-commerce platforms would maintain the same “available from” date and even the same reference number to the new versions of a product, which might include a different design.

Recommendations:

- *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 the 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).*

2.4.1.2 Printouts and screenshots from online databases

For the purposes of proving disclosure, the publication date specified in the printouts or screenshots from the online databases (see Section 2.2.1.2 above) will be considered as the relevant date (see indications ‘A’ in Example 10 below).

It should be noted that in certain cases the mere filing or registration date indicated in the online database would not necessarily mean that the intellectual property right incorporating the relevant design has been published (see indications ‘B’ and ‘C’ in Example 10 below).

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1 / 1

201930021153.8 - 玩具变形车

Status: ACT

(19) Identification, using the two CN

(11) National Registration Number 305038032

(15) Date of the national registration 2019-02-15

(21) Application number 201930021153.8

(22) Filing date 2019-02-15

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(22) Date of filing: **25.09.2002** **B**

(84) Designated Contracting States: ... (72) Inventors: ...

DesignView

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Find term

Search by Indication of the Product / Application number / Design number.

Advanced search | Filters

List of results **EM 001534215-0001**

Expand all sections | Collapse all sections

Design

(19) Registration office code	EM
Design number	001534215-0001
(21) Application number	001534215
(25) Application language code	cs
Second language code	en
(22) Application date	03-06-2009
(43)/(44) Application published	
Application reference	200737202
(11) Registration number	
(15) Registration date	03-06-2009
Publication date	08-07-2009
(57) Design description	Yes
(46) End of deferment	
Renewal current status code	Not to be renewed
(18) Expiry date	03-06-2014

Click here or the logo below to view this design in the office of origin

EUIPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

**B
A
C**

Example 10

As a general rule, designs published in the online databases administered by public authorities will be considered disclosed as from the indicated publication date, unless evidence showing an earlier date is provided. However, the relevant date may vary if the disclosure took place in a private online database, as the date the information was uploaded or posted therein does not necessarily coincide with the date the information was published on the official register.

Recommendations:

- *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 the 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](#) (see circles in indications 'A' in Example 10) as this number refers to the date of making a design available to the public.*

2.4.2 Images and videos

A design might be disclosed by sharing on the internet the images and videos that show a product incorporating that design.

In terms of the relevant date, it shall be either the date when an image or a video has actually been viewed or, alternatively, when it has been made available for viewing or downloading, e.g. in an online platform. Moreover, in certain cases the relevant date might be when an image or a video has been recorded. This information can be obtained by analysing the metadata of the respective file (see Section 2.4.3 below).

While an image would normally be represented in a printout or a screenshot, the way to present the evidence contained in the video might vary. It could be the video itself submitted as the evidence (e.g. as a file) or only captures of the relevant parts where the design is perceived.

Submitting only a URL of the video would not be sufficient as its contents might be removed or altered. It must be accompanied by the relevant captures of the design contained in that video.

Recommendations:

- *When the video itself is submitted, information on when and where the video was made available to the public (e.g. to provide 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 images or videos are contained should be provided.*

2.4.3 Metadata

The evidence of disclosure of designs on the internet can be constructed through analysing metadata (or [EXIF data](#), see indication ‘C’ in Example 12 below) embedded, for instance, within images, videos and websites. For example, an image may include information about itself, such as the author, the date created or modified or the location it was taken (see indications ‘A’, ‘B’ and ‘C’ in Examples 11 and 12 below).


Such information can be useful in terms of providing evidence of designs disclosure, particularly as to the relevant date (for example, the date the image was uploaded to a specific website) or the location the image was taken.

There are different ways to obtain metadata. Depending on the device (such as a smart phone or a digital camera) and where the relevant file is saved, it may be possible to access the metadata either by simply selecting the “information” option on the image itself or by using more specialised software (i.e. metadata viewers). The type of metadata that can be extracted depends on how the device stored the file and its capabilities.

Metadata extracted from digital camera photo

Basic Image Information	
Target file: Alicante_EUIPO6.JPG	
Camera:	Olympus VG170
Lens:	4.7 mm (Max aperture f/2.8) (shot wide open)
Exposure:	Auto exposure, Creative (Slow speed), 1/1,000 sec, f/2.8, ISO 80
Flash:	Auto, Did not fire
Date:	December 1, 2018 11:41:04AM (timezone not specified) (3 months, 10 days, 20 hours, 14 minutes, 12 seconds ago, assuming image timezone of US Pacific) A
File:	4,288 × 3,216 JPEG (13.8 megapixels) 3,192,982 bytes (3.0 megabytes)
Color Encoding:	WARNING: Color space tagged as sRGB, without an embedded color profile. Windows and Mac browsers and apps treat the colors randomly. <small>Images for the web are most widely viewable when in the sRGB color space and with an embedded color profile. See my Introduction to Digital-Image Color Spaces for more information.</small>

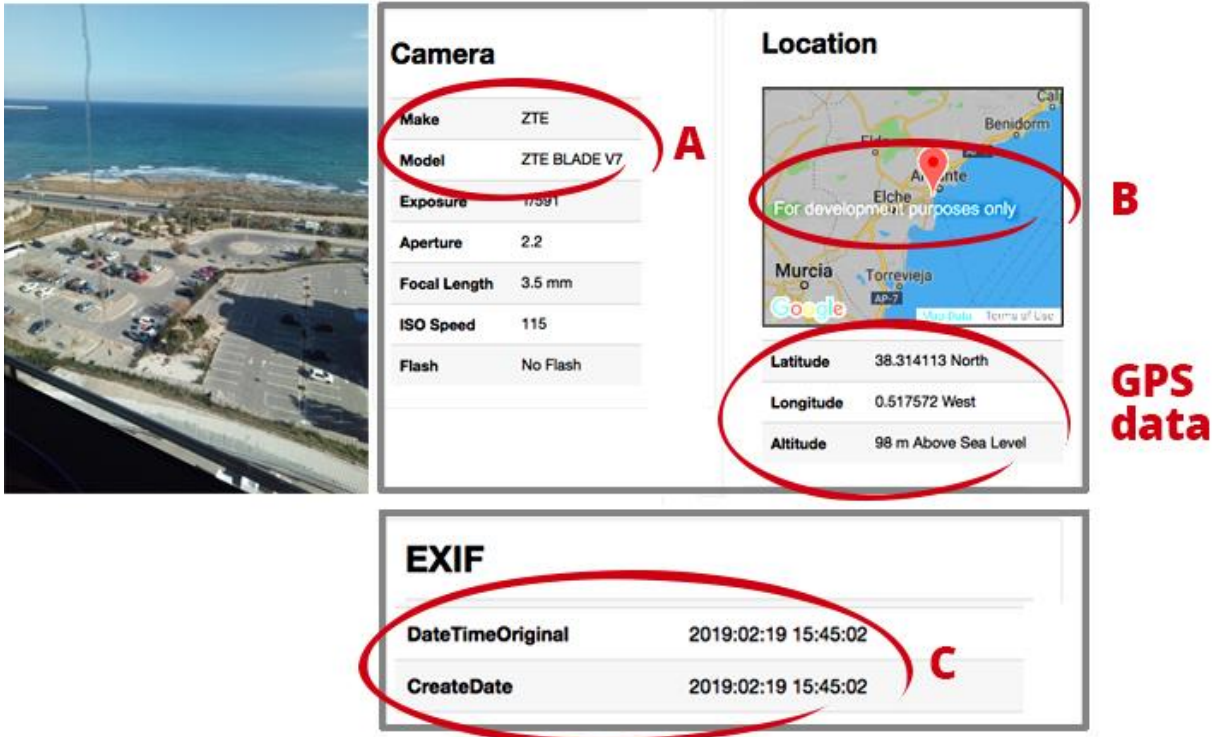
Extracted 640 × 480 74-kilobyte “MakerNotes:PreviewImage”
JPG Displayed here at 70% width (1/9th the area of the original)



Click image to isolate; click this text to show histogram

Example 11

Metadata extracted from a smart phone image



Camera	
Make	ZTE
Model	ZTE BLADE V7
Exposure	1/391
Aperture	2.2
Focal Length	3.5 mm
ISO Speed	115
Flash	No Flash

Location	
Latitude	38.314113 North
Longitude	0.517572 West
Altitude	98 m Above Sea Level

EXIF	
DateTimeOriginal	2019:02:19 15:45:02
CreateDate	2019:02:19 15:45:02

Example 12

Recommendations:

- 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.

2.4.4 URL addresses and hyperlinks

URL addresses or hyperlinks *per se* cannot be considered as sufficient evidence for proving the disclosure of a design. They should be supplemented with additional evidence.

This is because the information accessible through a URL address or a hyperlink might be later altered or removed. Moreover, it might be difficult to identify the relevant information (the design, date of disclosure, etc.).

Recommendations:

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

2.4.5 *Statements in writing*

As a matter of principle, statements in writing, sworn or affirmed, such as affidavits, would not be sufficient *on their own* to prove an event of disclosure or, alternatively, that a design has not been made available to the public. The fact they are made by an independent third party might increase their probative value²¹ but only provided that they are accompanied by additional evidence showing disclosure²².

Recommendations:

- *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.).*

2.5 **Exceptions to the availability of the design**

Once the event of disclosure is proven, i.e. when the design has been published following registration or otherwise, or exhibited, used in trade or otherwise disclosed, there is a presumption that it has been made available to the public within the meaning of Article 6 of the Designs Directive.

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

- when events of disclosure 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;
- 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 provided or action taken by the designer or his successor in title during 12-month period preceding the date of filing of the contested application or 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.

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.

²¹ 09/03/2012, T-450/08, Phials, EU:T:2012:117, § 39-40 ; 11/12/2014, T-498/13, NAMMU/NANU, EU:T:2014:1065, §38

²² 18/11/2015, T-813/14, Cases for portable computers, EU:T:2015:868, § 29

However, in order to refute the presumption of disclosure, this exception has to be proven by submitting respective evidence²³.

When analysing whether events of disclosure of a design could not have reasonably become known in the normal course of business to the circles specialised in the sector concerned operating within the European Union, it must be examined whether, on the basis of the facts which must be adduced by the party challenging the disclosure, 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, whilst bearing in mind what can reasonably be required of those circles in terms of being aware of prior art²⁴.

Those facts may concern, for example, the composition of the specialised circles, their qualifications, customs and behaviour, the scope of their activities, their presence at events where designs are presented, the characteristics of the design at issue, such as its interdependency with other products or sectors, and the characteristics of the products into which the design at issue has been integrated, including the degree of technicality of the products concerned²⁵.

When the same design is published in multiple sources (e.g. the same design disclosed on a company's website (see indication 'A' in Example 13 below), on social media account (see indication 'B' in Example 12 below) and blogs or other similar websites (see indication 'C' in Example 12 below), the party challenging disclosure would have to rebut the presumption in respect of all the shown events of disclosure.



Example 13

²³ 14/03/2018, T-651/16, Footwear, EU:T:2018:137, § 54

²⁴ 14/03/2018, T-651/16, Footwear, EU:T:2018:137, § 56

²⁵ 21/05/2015, T-22/13 and T-23/13, Umbrellas, EU:T:2015:310, § 29

The following aspects might be relevant when assessing if an event of disclosure of a design has not reasonably become known in the normal course of business to the circles specialised in the sector concerned operating within the European Union:

- Passwords and payments
- Language and [top-level domain](#)
- Searchability
- [Geo-blocking](#)
- Confidentiality

2.5.1 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. Nevertheless, whether such an event of disclosure of a design has not reasonably become known in the normal course of business to the circles specialised in the sector concerned operating within the European Union might depend on the specific circumstances of a particular case.

On the other hand, the restricted access to certain internal databases (e.g. those used only by employees of the 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.

2.5.2 Languages and top-level domain names

Although, in general, languages would not affect perception of designs, they might impair the possibility to find them on the internet. Therefore, when assessing disclosure, it has to be established whether in the normal course of business of the specialised circles in question are expected to search for information in the respective language. Depending on the sector concerned, it can be usual or not for the specialised circles operating in the European Union to consult databases in non-EU languages.

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 in the European Union.

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 the 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.

2.5.3 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 specialised 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.

In this regard, it should first be considered whether a particular website was technically accessible²⁶. 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 when assessing whether the relevant information on the internet could have been found.

Furthermore, it should be noted that when search engines index websites, all free-access contents are included. Such indexing serves to provide relevant results when performing an internet search. Therefore, when a search engine indexes an image, it is more likely to be found by the relevant circles. However, when a website is specifically configured to deny or limit access to web crawlers, its contents will not be captured (see Section 2.3.1 above).

2.5.4 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 reasons²⁷. However, there might be other uses of geo-blocking that include blocking malicious traffic, enforcing price discrimination based on access point and, in certain countries, even internet censorship.

2.5.5 Confidentiality

According to the last sentence of Article 6(1) of the Designs Directive, the design shall not be deemed to have been made available to the public for the sole reason that it has been disclosed to a third person under explicit or implicit conditions of confidentiality. Thus, 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.

²⁶ 14/03/2018, T-651/16, Footwear, EU:T:2018:137, § 61

²⁷ [Regulation \(EU\) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market](#)

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 14 below).



Example 14

ANNEX: GLOSSARY OF TERMS

Terms	Definition
Accessibility	The ability to access a website or other internet content.
App (application)	A program or group of programs that is designed for the end user. These include database programs, media players, word processors, web browsers, spreadsheets and other applications. They are designed to carry out coordinated functions, tasks, or activities.
Blog	A website that contains online personal reflections, comments, and often hyperlinks, videos, and photographs provided by the writer.
(Website) Cache	An information technology for the temporary storage (caching) of web documents, such as HTML pages and images, to reduce server lag.
Online database	A collection of information or data placed on the internet that is organised for rapid search and retrieval by a computer.
Design	Design means the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colors, shape, texture and/or materials of the product itself and/or its ornamentation.
Designer	Someone who creates a product design.
E-commerce (Electronic commerce) Platforms	Internet platforms that facilitate online transactions of goods and services through means of the transfer of information and funds over the internet.
E-mail (Electronic mail)	The system for electronic devices to exchange messages ("mail") over the internet.
Electronic timestamp	Data in electronic form which binds other data in electronic form to a particular time establishing evidence that the latter data existed at that time (Article 3 (33) eIDAS Regulation). Some of the timestamping services are based on blockchain technology.
EXIF (Exchangeable image file format) data	A standard that specifies the formats for images, sound, and ancillary tags used by digital cameras (including smartphones), scanners and other systems handling image and sound files recorded by digital cameras.
File hosting	A file sharing service that stores files in a platform where users may subsequently download them. No direct transfer between user's computers takes place.

File sharing	The practice of sharing or offering access to digital information or resources such as documents, multimedia (audio/video), graphics, computer programs, images and e-books.
Forensic software tools	Tools that help investigators retrieve evidence from computers and identify, preserve, recover and investigate the relevant information in line with digital forensic standards.
Geo-blocking	A form of security used on e-mail, web or any other internet servers to restrict access to content based on the user's geographical location. The user's location is determined by checking their IP address (country) or range of addresses that are considered undesirable or hostile.
Hyperlink	A reference to information that the user can directly go to either by clicking, tapping, or hovering over the hyperlink. A hyperlink can be a whole document or a link to a specific element within a document.
INID Code 43 and 45	Acronym for Internationally agreed Numbers for the Identification of (bibliographic) Data, as standardised by WIPO Standard ST.9 (for patents and utility models), ST.60 (for trade marks) and ST.80 (for designs).INID codes are used by IPOs worldwide for indicating specific bibliographic data items on the title pages of patents, patent application or design publications.
Internet	A global system of interconnected computer networks that covers all types of networks irrespective of their accessibility (i.e. freely accessible or closed), area covered (i.e. Wide Area Networks (WANs), Local Area Networks (LANs), etc.), connection type (i.e. wired or wireless), devices connected (i.e. computers, smartphones, game consoles, etc.), ownership (i.e. public or private) and purpose (i.e. education, business, etc.).
Metadata	The data used to describe a certain item's (e.g. photo, image, video or e-book) content.
App (mobile) version	A type of application software designed to run on a mobile device, such as a smartphone or tablet computer, which are frequently aimed to provide users with similar services to those accessed on PCs.
Online media	Online communication technologies used to present or exchange information.
Page hit	A single file request in the access log of a Web server. A request for an HTML page with three graphic images will result in four hits in the log: one for the HTML text file and one for each of the graphic image files.

Page view	A visit to a page on a specific website. If the visitor reloads a page, this counts as an additional page view. If the user navigates to a different page and then returns to the original page, this will count as another page view.
Password	A (secret) sequence of characters that must be entered by a user to gain access to an electronically locked or protected computer, file or program, etc.
Payment	A service that automates a payment transaction between a shopper and merchant. In most cases, there is usually a third-party service that processes, verifies, and accepts or declines credit card transactions on behalf of the merchant through secure internet connections.
P2P (Peer to peer)	A file sharing method where computers can send information directly to one another without passing through a centralised server.
Internet Platform	<p>A group of technologies that are used as a base upon which other applications, processes or technologies are developed.</p> <p>In personal computing, it is the basic hardware (computer) and software (operating system) on which software applications run.</p>
Printing date	Date provided by the computer when the content from a website is "printed out" (whether it is a hard/paper copy or in PDF format). This date is displayed on the top or bottom of the relevant page(s).
Printout	A paper copy or PDF version of information from a computer or similar device produced by a printer.
Qualified electronic timestamp	<p>An electronic timestamp that complies with certain requirements that are established in article 42 of the the eIDAS Regulation, namely, that it:</p> <ul style="list-style-type: none"> a) links the date and time with the data so that the possibility of modifying the data without being detected is reasonably eliminated. b) is based on a temporary information source linked to Coordinated Universal Time (internationally managed unified system of atomic clocks that couples Greenwich Mean Time).

Qualified timestamp provider (Qualified trust service providers – QTSP)	A trust service provider that provides and preserves digital certificates in addition to creating and validating electronic signatures. A trust service provider has been granted a supervisory status and is required in the EU and in Switzerland to regulate electronic signing procedures.
Robot Exclusion	A standard used by websites to communicate with web crawlers and other web robots. Robot Exclusion informs the web robot on which areas of a website should not be processed or scanned.
Screenshot	A digital image created by capturing part or all of the information displayed on a digital display screen (e.g. computer screen, television or mobile device) at a particular moment.
Searchability	The possibility to find a website by entering search terms in a search engine browser or through other means.
Search engines	Computer programs that search for information containing particular keyword(s) on the internet.
Session	An unspecified period of time within which a user is connected to a specific website, either continuously or intermittently. Intermittent connection is included in the definition of a session in order to discount the possibility of multiple, deliberate disconnections and reconnections designed to inflate the number of page views to a site.
Social media	Applications, programs and websites on computers or mobile devices that enable people to communicate and share information on the internet, such as blogs and social networking websites.
Timestamp	A sequence of characters or encoded information identifying when a certain event occurred, usually giving date and time of day.
Top-level domain (TLD)	The last segment of a domain name, or the part that follows immediately after the "dot" symbol. There are a limited number of predefined suffixes, which represent a top-level domain. Examples of top-level domains include: .com – commercial businesses .gov – government agencies .edu – education institutions
URL (Uniform Resource Locator)	A specific reference to a web resource, which can be found on the World Wide Web. URLs are commonly used to reference web pages (http), file transfers (FTP), e-mails (mailto), database access (JDBC), and other applications.

Vlog	Short for "video blog", it is a blog, or web log, that includes video clips. It may be entirely video-based or may include both video and written commentary.
WayBack Machine	An online digital archive that captures, manages and searches for digital content on the World Wide Web and on the internet.
Web archiving (services)	The process of collecting portions of the World Wide Web to ensure the information is preserved in an archive for future researchers, historians, and the public.
Web crawler	An internet bot that systematically browses the World Wide Web, typically for Web indexing.
Website	A collection of accessible and interlinked web pages that share a single domain name.
Website traffic	The amount of data sent and received by visitors to a website.

CASE LAW REFERENCED

- **Floor covering** [21/06/2018] General Court, T-227/16
(Section 2.5.2 Language and top-level domain)
- **Footwear** [14/03/2018] 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 / NANU** [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)
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(Section 2.4 Means for presenting the evidence obtained from the internet, footnote 15)
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- **Karen Millen Fashions** [19/06/2014], Court of Justice of the European Union, C-345/13
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