

# THE NEW ITALIAN LAW ON DESIGNS AND MODELS

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The systems that have been adopted on various occasions up to the present in different legislations to protect designs and models can be summarised in two basic types:

**The first system** is similar to the law of copyright (the so-called the copyright approach), and considers the design and the model as a work of the intellect, compatible in many ways to a work of art. In this system, it is difficult to have a co-ordination of the general protection of the copyright and the specific protection of the design and the model. This co-ordination is dealt with in different ways in the various national legislation's, so that some (for example the French System) extend the copyright protection to all designs and models, whereas others (for example the German system) qualify designs and models as "lesser works of the intellect", hence containing a lesser degree of creativity.

**The second system**, in force in Italy before the new law, connects the discipline of designs and models to the rights of patents of invention (patent approach). Protection is conditional on requirements such as novelty and originality.

The new design and model law sets up a system to protect designs and models by adopting a pragmatic criterion, the so-called market approach. This approach is based on the perception of the informed user (and not, therefore, the average consumer) and the aesthetic impact the design or model has. It makes the protection of the form subordinate to the presence of external characteristics connected to the appearance of a product.

The legislative decree n. 95, of 02 February 2001, effective as 19 April 2001, concerning the juridical protection of designs and models, is the actuation of the Community Law pursuant to Directive 98/71/EC. The new law modifies the requirements for the registration of an industrial model or design (there is no longer any mention of patent), and states that the model or design must be new and must possess an individual character. This decree also provides the possibility of accumulating other protections such as copyright, trademark, and patent for a utility model.

The definition now given to designs or models protects the appearance of a product, or part of it, as it appears from the characteristics of the lines, the contours, the colours, the form, the surface structure, and/or the materials that make up the product and/or the ornamentation of it. The products may be artisan or industrial. They may be finished products or components, which have to be assembled (for example spare parts) to form a complex product. Protection is given to the product or component provided that it is visible during normal use.

The concept of novelty now introduced states that, on the filing date of an application's registration, the design or model must be different from known experiences, and this difference must not be limited to irrelevant details. The law allows a derogation to the general rule of novelty where it is established that a divulgation of the design - occurring in the twelve months prior to the date of filing of the application - does not preclude the possibility of a subsequent successful filing by whoever has the right to do so.

According to the new law, the further element required is individual character. Individual character is deemed present when the impression made by a design or model on the informed user differs from the general impression made on the same user by a previously published design or model. To evaluate novelty and to evaluate individual character, the overcrowding which may be present in the specific field of the product must be taken into account. It is clear that, in an overcrowded sector, the gradient of difference in the product of a third competitor entering the market after the application for registration has been filed, can be sufficient not to create interference with the design or model registered.

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# 意大利外观设计和实用新型保护法律制度之新发展

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时至今日，意大利通过不同时期的立法行为已制订了一系列实用新型和外观设计保护制度，这些制度可以概括为两个基本类型。

第一种制度与著作权保护类似（即所谓的著作权法），认为实用新型和外观设计作为智力劳动成果，在许多方面与艺术作品相一致。但该制度很难将对著作权法的一般保护和实用新型与外观设计的特殊保护这两者协调起来。不同国家的立法者处理上述协调关系时采取不同的方法：一些国家（比如法国）将著作权保护扩展至所有的实用新型和外观设计，而另一些国家（比如德国）则认为实用新型和外观设计在智力劳动成果中要处于次要地位，即其创造力相对来说也要弱一些。

第二种制度在意大利新法实施前已适用，该制度认为实用新型和外观设计保护与发明专利保护类似（专利法），即保护有一定的条件和要求，如应具有新颖性和创造性。

新的实用新型和外观设计法确立了以实用主义标准保护实用新型和外观设计的制度，既所谓的市场法。这一方法以资深消费者的理解（不是普通的消费者）及实用新型和外观设计所具有的美感为基础。该制度既保护产品外形及其附属存在的外部特点，又保护产品的外观。

依据欧共体98/71号指令，在欧共体法律的推动下，立法机关于2001年2月2日颁布了关于对实用新型和外观设计进行司法保护的法律，该法律于2001年4月19日生效。新法对实用新型和外观设计的登记条件进行了修改（不再提及专利权），并且规定实用新型和外观设计必须具备新颖性和创造性。法令同时还对其它著作权、商标权及实用新型专利权的保护作了可行性规定。

该法对实用新型和外观设计的保护范围为产品的外观保护或者部分保护，具体体现在产品的线条、轮廓、颜色、形状、表面结构或者产品的生产原料及产品装饰等方面。产品的作者多为艺术家或技工，他们可能生产整个产品、部分产品或者将零部件装配成合成产品。该法仅限于保护有形的产品或者部件。

新颖性是指拟申请的外观设计和实用新型不得与在申请注册日前已有的外观设计和实用新型雷同，前者与后者的不同之处不限于不相关部分。该法还规定了新颖性一般标准的例外情形，即如果在专利申请日前12个月内外观设计被泄露，权利人仍有可能成功申请登记。

根据新法规定，取得专利权还应具有创造性。创造性是指同一资深使用者认为该外观设计或实用新型比已授权的外观设计或实用新型有显著的进步。在评估新颖性和实用性时，应考虑到在某些特殊产品的领域内专利过多的问题。显然，解决某些领域内专利过多的问题，比较明智的做法是在专利申请提交后对第三方竞争者的产品进入市场给予倾斜政策，而不应该干涉外观设计和实用新型的注册。