QUALITATIVE ANALYSIS ON THE PROTECTION OF INDUSTRIAL DESIGN IN EUROPE

Lourdes Moreno Liso(*)
Department Private Law, Commercial Law, Universidad de Extremadura, Badajoz.
(*)Email: lmoreno@unex.es

ABSTRACT
In this paper it analyzes the legal issues that have arisen since the adoption of the Law on Industrial Design. The Office for Harmonization in the Internal Market and the Court of Justice of the EU have resolved disputes that have been submitted by companies and individuals, defining concepts and content as opposed to three-dimensional marks.

Keywords: industrial design, OAMI, mechanics protection.

INTRODUCTION
The industrial design protects the appearance of part or all of a product resulting from the features of, in particular, the lines, contours, colors, shape, texture or materials of the product itself or its ornamentation.

Industrial property offers a different answer depending on the characteristics of the shape object of protection possible, including the trademark and industrial design. There are certain cases where the trademark right invalidate the exclusive right of industrial design. This can occur in the following situations: 1st) collected as a sign design and trademarked; and 2nd) you want to trademark and protected as a form design (either registered or unregistered). You can either get a trade mark or design right on the same sign or form, provided it meets the legal definition of brand and design and meets the requirements imposed for the protection of each of them, even able to produce an overlap of protection. The dual protection, but may not offer added advantages, so it will be desirable, depending on suitable ratios, decide which of the two forms of protection is right (Martínez-Abarca, 2006). We opted to further analyse the prism of competition law (Ghidini, 2002).

Moreover, the possibility that the same form can be found through protection of industrial property and intellectual property or copyright varies the regulatory framework (Sempere, 2011). Thus, the Berne Convention reserves to Member States the regulation concerning the works of applied art and industrial design, as well as regarding the protection requirements of these works, drawings and models. In Spain the rights of intellectual property are independent, compatible and accumulate. So our legislation expressly recognizes both copyright law and the law of industrial design (Lence 2004).

The diversity of rights that can use the creator of an industrial design to protect your job requires you to make a proper selection to prevent others, especially their competitors, taking advantage of the exclusivity that guarantees the law. And after the dispute arises must again choose between defense in the court order or defense through alternative dispute resolution procedures. In our work we opted for the defense through mediation.
METHODOLOGY

Regarding the first decision the author of industrial design (how do I protect my design?), Should be analyzed the concept and protection requirements laid down in national law of each State in the Community (Regulation (EC) No. 6 / 2002 of the Council of 12 December 2001 on Community designs and Regulation (EC) No. 207/2009 of 26 February 2009 on the Community trade mark) and internationally the Hague Agreement, Act 1999. In compliance function set in these rules may be extended design protection. The vicissitudes experienced during the legislative process of the Community industrial design would ensure that the rule would sleep the sleep of the just. Traditionally the values that inspire the creative industrial design (creativity of the work and purpose or economic value involved, are protected by copyright, when acquiring a high level of creativity and originality and artistic creation; the tendency to imitate everything that occurs and the strong competition that occurs between companies, oriented towards the protection of industrial property rights, registering with a very similar patents (Sáez, 2003) system. Until the Council of the European Union could achieve a common choice unanimously to approve the regulation which would serve as own regulation, specifically for community designs, both registered and unregistered. The regulation allows the creator to decide on the disclosure of its products testing the acceptance will occur in public. During this time of grace, 12 months after the first release, available protection as unregistered design or model. If you choose to extend protection by recording its creation may include a multiple application or registration may be requested independently. It may also request the deferment of publication and keep the secret for 30 months.

If not ultimately protect her, there would still be the possibility of appeal or defense through rules of unfair competition. Industrial design has become a competitive tool that generates added value to the product and factor becomes industrial company policy. But it is also an asset that generates a self-image and gives rise to an exclusive right. Focusing on the image function, the author could protect as a trademark, giving the exclusive right on the design of a stay above the characteristic of the rules governing industrial law. In the EU, for example, protection may reach a maximum of 25 years (art. 12 Regulation on Community Design, DRC), whereas if it is protected as a trademark right can be indefinite in time if it is renewed every 10 years (Articles 46 and 47 Regulation on the Community trade mark RMC). In advanced economies, the design is a rising star, an unavoidable for companies to grow and its products and services in tune with the demands and expectations of its customers factor.

The close correlation between the level of competitiveness and the degree of development of the design becomes more evident in neighboring countries (Germany, Britain, Norway, Sweden) and in others as far as dynamic (Australia, Korea, Japan). Beyond its obvious economic implications, the design is also a factor of improvement for the whole society, which helps to raise the progress, quality of life and wellbeing of people, and all this in a sustainable manner. While it does not yet have conclusive results, yes there is instead a general consensus costs "no design" and the loss of opportunities and advantages ignore its potential (Ministry of Industry, 2005). Companies are aware of the increase in turnover or image that causes the design and increase year after year investments in this game, engaging national and international designers.

Moreover, if a breach of the exclusive right on industrial design, the author or the company should select the method that best suits your defense strategy arises. Mediation is a voluntary, private and discreet, quick procedure, which are possible imaginative and more effective than mere law enforcement solutions. Companies that have invested in design come to mediation
to avoid damaging the good image of your model or drawing without harming the added value produced him.

The mediator, freely chosen by the parties in conflict, is an independent, neutral person who will keep confidential any matter covered by the procedure. Their role is to assist the parties to reach a voluntary agreement that is mutually satisfactory. Has no authority to resolve the matter, nor can it provide legal advice or represent any of the parties. The Office for Harmonization in the Internal Market (OHIM) has a list of mediators from which the parties may provide, in his office in Alicante (Spain) and Brussels.

If the parties are of different nationality, unless the parties agree otherwise, the language of proceedings shall be the appellant, who initiated mediation.

Draws attention to the Rules on Mediation published by OHIM clause disclaimer of mediators: "The mediator or the Office will not be responsible for the outcome of mediation conducted under these rules, or the legality and the enforceability of the settlement agreement" However, the Spanish Law of Civil and Commercial Mediation Law 5/2012, of July 7, 2012, in his art. 14 states that "The acceptance of mediation requires mediators to faithfully fulfill the task, incurring, failure to do so, in liability for damages caused. The injured have direct action against the mediator and, where appropriate, the institution of mediation appropriate actions regardless of reimbursement to attend this against mediators. The responsibility of the institution of mediation result from the appointment of the mediator or the breach of the obligations. We understand therefore that the clause becomes OHIM as contrary to Spanish law void.

RESULTS AND CONCLUSIONS

The results of this study will demonstrate what is the best way to protect the industrial design in the European Union, and what is the most suitable method of legal defense against invasion of the rights protected.

We agree with Martinez-Abarca (2006) that if the aim is to protect the aesthetic appearance of a product, given the changing fashions and tastes of the company, is sufficient protection Industrial Design at Community or international level, according to the distribution to be performed the product and its new look; on the contrary if that appearance or sign has distinctive and vocation to become a character element to identify and distinguish the goods or services the employer in respect of other similar or the same sector, it would be appropriate to apply for protection of trademark rights leaving open the possibility of possible renewals indefinitely.

The registration procedure is simpler design than the brands and can apply for protection of various designs simultaneously in a multiple application provided that the goods to which the design is applied are of the same class of the International Classification of Drawings Industrial Designs (art. 37 RDC). Also if protected as a design and passed a few years comes to acquire distinctiveness may be requested registration as a trademark.

If you choose not to protect industrial design, could still defend their use by the creator relying on the rules of unfair competition, allowing prohibit its use by third parties if produce is qualified as an act of imitation or exploitation of another's reputation, of comparison, denigration, deceit or mislead the consumer, or trade secret violation. In Spain deemed to be unfair behavior that is objectively contrary to the requirements of good faith (art. 4 Law 3/1991, of January 10, on Unfair Competition). The Act allows qualifying bring an action as
the act of unfair competition (through the declaratory action of disloyalty). On the other hand, allows the act to require the cessation or prohibition thereof and the removal of the effects produced by it, and require misleading, incorrect or false information corrected and, finally, bring actions of reparations for damages and damages and unjust enrichment.

Moreover, it is proved that the procedure offered OHIM Mediation is an effective method for resolving disputes between companies, leaner, cheaper and more flexible than judicial.

The cheapness of alternative dispute procedure is proven and contributes to the dissemination. Decision No EX11-04 the President of OHIM of 1 August 2011 concerning the administrative burdens related to mediation, states that the procedures will be free on the premises of the Office of Alicante; whether mediation should be developed on the premises of the Brussels Office, the parties will share the administrative burden of € 750 lump sum that is established for the payment of the expenses of the mediator, including travel and accommodation.

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