

LEGAL PROTECTION OF INDUSTRIAL DESIGN

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Abstract: *This paper discusses the legal protection of industrial design with particular reference to the crime of unauthorized use of someone else's design, which falls under Chapter XX of the Criminal Code of Republic of Serbia in the group of offenses against intellectual property. The starting point is the fact that the intellectual property rights contains the industrial property right, namely, a business organization right to assign itself as a manufacturer of certain products, to rake in other income and to enjoy other rights which belong to the domain of industrial property. The importance and the legal nature of legal protection of industrial property determined the content and structure of this study which analyzed the administrative and forensic prosecutorial aspects of design rights.*

Keywords: *intellectual property, industrial design, legal protection, the Criminal Code.*

1. INTRODUCTION

The right to design by nature is one of the industrial property rights which means the right of a manufacturer to exclusively use his patented invention, to assign himself as a manufacturer of certain products, to use hallmarks of labeling for this purpose, trademarks, geographical indication of products, the right of sample and model, to make profit out of it and enjoy other rights that belong to the domain of industrial property.

The industrial property rights include patent, the right to patent plant sorts, the right to protect topographies of integrated circuits, trademark, the right to protect design, the right to protect geographical indications. The protection of these rights is regulated by the Patent Law, Trademark Law, Protection of Design Law, Gographical indication of product Law , and other laws and regulations that regulate this matter legally.

In the international and comparative law, increasingly in the local theory and practice too, the term intellectual property is widely accepted as a generic term (common name)

for the right to industrial property and copyright. Thus, industrial property right, along with the copyright and related rights, makes intellectual property be conceived as a complex subjective right which, among other things, protects in a way that violations of certain individual rights that are part of the given property are incriminated into the criminal law. The protection of industrial property right is primarily of economic importance to the holder of this right because it provides the use of this right and better marketing of proprietary products on the market based on the determination of the quality of a product, therefore higher success in business operations and achievement of economic gains.

In any case, the enforcement of the intellectual property right involves the use of effective and proportionate administrative, civil measures and sanctions by the competent authorities against those involved in counterfeiting and piracy in order to create equal business conditions for the rights holders. Any unauthorized use of objects of intellectual property right is a violation of intellectual property right.

2. RIGHT TO DESIGN

The term “design” in the etymological sense refers to a plan, an idea, a sketch or a complete definition of an item. At the beginning the work on design meant work on the unique item. Switching onto the industrial production, design gets a special role in creating the look of the product. It is the industrial design that is generally defined as a creative activity whose aim is to determine the formal quality of industrially produced items. It refers to determining the shape, color, line etc, but also the structural and functional level of quality through which a product participates in the consumption [5].

Therefore, design is a three-dimensional or two-dimensional appearance of the entire product, or of its part, which is defined by its features, especially the lines, contours, colors, shape, texture and materials of the product itself or its ornamentation, as well as their combination [1]. The product is an industrial or handicraft item, including the parts which are intended to be assembled into a complex product, packaging, graphic symbols and typographic typefaces, excluding computer programs, whereas the complex product is composed of multiple components that can be changed and allow assembling and reassembling of the product.

Design protects itself by the exclusive right (the design right) if it is new and has individual character. In addition, design is considered new if no identical design has been made available to the public before the date of filing of the approval of the design, or if there is no previously filed registration of an identical design. Designs are considered identical if their features differ only in unimportant details and there is a difference in unimportant details an informed user, at a glance, notices no difference in designs. To evaluate the news it is started from the distinctiveness of external characteristics which means that the item of protection may not be entirely new, but can be made of elements that were known, provided that the author combined and brought together in a new way so that it achieves the impression of a new design [3].

Design is considered to have individual character if the overall impression it makes on an informed user is different from the overall impression that any other design produces on that user, which was made available to the public before the date of filing for approval, or the date of the recognized priority of the competitive design. In assessment of the individual design character, the degree of freedom and objective limitation while designing

a specific product are taken into account, due to technological and functional characteristics of the product.

Design applied to or incorporated in a product which is a component part of a complex product, is considered to have a new and individual character: if an integral part, which is embedded in a complex product, remains visible during a regular use of the complex product and if visible features of the component part satisfy the requirements of a new and individual character. Regular use means the use by the end user, excluding maintenance, service or product repair.

Design right can not protect outside product appearance that is solely dictated by its technical function. Also, the right to design can not protect the appearance of a product which must be reproducible in its exact form and dimensions so that it could be mechanically connected to or placed in, around or by another product so that either product may perform its function. However, if the statutory conditions are fulfilled, design can be protected, which allows multiple assembling or mutual connection among interchangeable products within a modular system.

Finally, design can not be protected: if its publication or use is contrary to public order or morality; if it violates copyright or industrial property rights of another person; if it contains the state or other public coat of arms, flag or symbol, name or abbreviation of the name of a country or an international organization, religious or national symbols, as well as their endorsement, unless approved by the competent authority, and if it is a face of a person, unless explicitly conceded by the person. The design which is the figure of a deceased person may be registered only with the consent of his parents, spouse and children. A design that represents the historical figure or other deceased famous people can be protected with the permission of the competent authority and the consent of relatives within the third degree of kinship.

The right to protect industrial design belongs to the author or his legal successor, or in cases prescribed by law, the employer. Foreign and natural and legal persons in respect of design protection enjoy the same rights as domestic natural persons and legal entities, if it is derived from international agreements or the principle of reciprocity. Design right is acquired by registration in the Register of Design and lasts 25 years from the date of filing the application, provided that the fees for the maintenance of law are paid. The right to design is valid from the date of application filing to the administrative authority of the Council of ministers that is in charge of intellectual property rights (competent authority). Finally, the holder of the design right (the designer or his successor who may be a natural or legal person) has the exclusive right to use a protected design economically and the ability to deny the right to a third party [3].

3. LEGAL PROTECTION OF DESIGN

The adoption of the Law on Legal Protection of Design [8] is a result of harmonization with the EU where a special significance in the field of legal protection of designs belongs to the Directive on the legal protection of designs which was passed in 1998 and the Regulation on Community Design from 2001. At the international level in the field of legal protection of designs there are also the Hague Agreement on International registration of samples and models of Industrial Designs adopted in 1925 and Locarno Agreement on Establishing an International Classification of industrial samples and models adopted in 1968 [2].

Directive on the legal protection of designs determines by the design concept and on which product it can be applied, then, as a condition of protection provides novelty and individuality, which means that the conditions of industrial property rights and copyright are combined, where the novelty is defined as absolute, and individuality as the overall impression that design gives to the informed user, the scope of protection includes any design that leaves no different impression on the informed user than the impact of actual protected design (negative definition). Finally, the period of protection is 25 years.

On the other hand, the reason for the adoption of the Regulation on Community design was the intention of creating a unified, supra-national right design in a way that is envisaged that through a single application or registration the right to design is acquired on the whole territory of the EU which will have the same effect in all countries.

In the legal system of the Republic of Serbia the authorities responsible for the enforcement of intellectual property rights in Serbia are divided into directive (administrative) and forensic-prosecutorial .

Directive-legal protection of design is implemented in the procedure led by a competent administrative authority. The procedure for the registration of the design is initiated by filing an application for registration of the design which must include: a request for recognition of the design; description of the design and 2-dimensional design layout. If the application is valid, the application is filed and the date and hour of its reception to the competent authority is recorded and that the applicant is issued a certificate. The application to which the filing date is recorded is recorded in the appropriate registry.

The applicant from the date of filing enjoys the right of priority in relation to all other persons who the filed an application for the same design later (the priority right). After that, the competent authority examines whether the conditions for the registration of the design are fulfilled. If the application meets the requirements for the registration of the design, the competent authority invites the applicant to pay the fee for the first five years of protection and the costs of publishing and design to provide evidence of payment. When the applicant has submitted evidence of payment, the competent authority records the granted right to design together with the prescribed information, into the Register of design, a certificate of design is issued to the design holder. Documents on the design have a character of decision in the administrative proceeding. The recognized right of the design is published in the official magazine of the competent authority [3].

Legal protection of design by forensic prosecutorial authority is reflected in the sphere of criminal law protection of intellectual property, which is regulated by the provisions of Chapter XX of the Criminal Code of the Republic of Serbia [7]. All of these offenses reflect as a breach of intellectual property rights, thereby harming the rights and property interests of the holders of intellectual property rights, and they are committed with premeditation. Finally, among the most important criminal offenses against intellectual property generally are offenses of unauthorized use of another's intellectual property, which include: 1) unauthorized use of copyrighted work or objects of the related right; 2) A violation of patent rights; and 3) the unauthorized use of someone else's design.

4. THE CRIME OF ILLEGAL USE OF DESIGN

The safety object of the offense of unauthorized use of designs from Article 202 of the Criminal Code of the Republic of Serbia is the design right as a subjective and exclusive right to the product appearance which means the overall visual impression of the product

on an informed consumer or user, i.e. any natural person who regularly meets the product. The object of the operation is design, which is someone else's and is registered, i.e. protected.

The consequence of the offense of unauthorized use of the design is the violation of the property rights of a design holder, that is the violation of the rights to the commercial use of a protected design. The criminal offense has two forms, basic and special.

The basic form of the criminal offense of unauthorized use of the design, which is provided in Article 202, paragraph 1 of the Criminal Code of the Republic of Serbia, happens when someone unauthorizedly uses on their product on the market, wholly or partly, someone else's authorized or protected product design. The act is an unauthorized use of someone else's authorized, i.e. protected product design, in trade. Unauthorized use of design in trade refers to industrial and craft manufacture of products for the market, based on the application of the protected design, as well as: the use of such a product in economy; storage of such a product for its distribution; offer of such a product to be placed on the market; the marketing of such a product, import and export of such a product. In addition, the extraneous, registered or protected, design can be used wholly or partly.

The offender can be anyone. However, a criminal act to happen, the act has to be undertaken without authorization, without the permission of the design right holder. The holder of the design is the author of the design, i.e. a natural person (one or more), it can also be his successor, a natural or legal person to whom the author, in accordance with the law, transferred the design right. Here, the guilt implies intent, which includes the awareness that the act is unauthorized with respect to product design. Finally, for this form of criminal act there are alternative penalties, such as fines and imprisonment for three years.

5. CONCLUSION

Legal meaning of intellectual property is reduced to a collection of exclusive, mostly property rights that protect certain intellectual property, under the legally prescribed conditions with certain statutory limitations. These rights are, on the one hand, copyright and related rights, and the industrial property rights, on the other.

The right to design by its nature is one of the industrial property rights where design includes sample and model. Namely, pattern and model are names for intellectual property rights whose object is the creation of industrial design. Samples protect two-dimensional structures (Figure), whereas a three-dimensional structure is protected by model (body). Sample and model are subjective property rights that entitle their holder to commercially use the protected image and body, in the sense that it is the holder who is the only one authorized to produce products that use the protected images and body, to store them, sell them, etc. [6].

Legal protection of designs is achieved principally in administrative proceedings conducted by the competent state authority. The procedure for registration of the design is initiated by filing an application for registration of the design which must include: a request for recognition of the design right; description of the design and a two-dimensional design layout. The application to which the filing date has been recorded is filed in the appropriate registry entry. The document on the design represents a certificate in the administrative proceeding.

In the Criminal Code of the Republic of Serbia intellectual property protection is regulated primarily with the provisions of Chapter XX. One of the most important among these crimes is the unauthorized use of someone else's design from Article 202 of the Criminal

Code of the Republic of Serbia, which has one basic and one special form of expression. The object of that crime is a design that is someone else's and is registered or protected. For the way of proceeding relating to the offenses against intellectual property, including the unauthorized use of design in the Republic of Serbia, the competent public prosecutor's offices and courts of general jurisdiction are in charge and the purpose of their activity is design protection by the forensic prosecutorial authorities.

Finally, it is believed that through the adoption of a set of laws on intellectual property, including the Law on Legal Protection of Industrial Design and the innovated Criminal Code, the protection of intellectual property rights in Serbia is raised to a much higher level. The quality of the adopted laws is that valid international and regional standards are incorporated into the law in terms of evaluation and treatment of intellectual property rights [4].

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