ABSTRACT

The Nexus Between Creativity and Innovation: A Comparative Approach to Copyright and Industrial Design Protection

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Within the legal framework of the intellectual property (IP) rights regime, designs have been conceptually depicted as falling in between the two classic paradigms of literary and artistic works, on the one hand, and industrial property, on the other. "Design" generally connotes the appearance of an object, and its definition makes it susceptible to an overlapping approach between the traditional pillars of copyright and patent protection. The merger of aesthetic and utilitarian qualities in objects of design reflects this interface between the copyright and patent paradigms, thereby leading to its characterization as a legal hybrid. For these reasons, various jurisdictions have adopted different approaches to the protection of designs, ranging from the express recognition of overlapping protection with copyright, to the adoption of a patent approach initially intended for inventions and utility models.

National and regional protection systems are, therefore, still largely heterogeneous as regards the standards and scope of protection they adopt. Ideally, design protection should strike a balance between sufficient protection against free-riding and the provision of adequate incentives for investing in industrial designs, on one hand, and a certain degree of freedom for subsequent designers to use prior designs, on the other. Incremental improvements or slight modifications of existing designs are predominant practice in the design industry. Protection regimes should grant sufficient exclusive rights while allowing for further innovation that would facilitate greater competition within the market.

Considering this concept of incremental innovation vis-à-vis exclusive rights, the copyright and industrial regimes in the United States and the European Union present various implications for the design holder and subsequent designers. The principal reason for protecting industrial designs

coincides with the essential objective of the entire IP system — to increase innovative and creative activities by providing incentives to develop such designs. But, in doing so, a careful balancing act must be undertaken in order to ensure that such objective is achieved rather than hindered. When there is too much protection, an unduly expansive right is accorded, stifling creativity and innovation further. But, when there is too little protection, statutory grants are rendered meaningless and impractical in light of the costs attendant to procuring such protection.

Perhaps in no other object of IP rights is this balancing act more imperative than industrial designs. Because of its hybrid nature as susceptible to multiple forms of IP rights protection, policymakers have struggled with determining the appropriate form and degree of protection for designs. A regime of industrial design protection, in order to be truly effective, must first consider the object of protection and the nuances of such subject matter. To force the concept of designs within the rubric of copyright protection not only presents certain disadvantages to design right-holders, but also has anti-competitive effects. The same applies to attempts to adopt a patent approach to designs, which means the wholesale transposition of burdensome requirements, which do not necessarily apply to designs. In the final analysis, an effective industrial design regime should acknowledge its hybrid nature, while recognizing the design process as involving incremental innovation.