



INTERNATIONAL
HELLENIC
UNIVERSITY

**The interface between industrial design
protection and copyright protection for
designs under Greek law**

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A thesis submitted for the degree of
Master of Arts (MA) in Art, Law and Economy

February 2018
Thessaloniki – Greece

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February 2018
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Abstract

Applied arts, and in particular industrial design, have always played an important role in human life. During the evolution of human societies, the reasons for protecting intellectual creations or products have been identified, such as providing a financial incentive for the creator or an opportunity to invest in business. In Greece, for seventy years it has been attempted by the legal system to protect the above creations by either the Copyright Act, as works of applied arts, or the provisions on unfair competition. In 1997, a special law for industrial designs and models was voted. The current legal regime of the protection of industrial designs and models in Greece is characterized by the interface of two different laws: copyright law and industrial design law. A design in order to be qualified as a work of applied arts needs to be original, whereas in order to be qualified as an industrial design needs to be new and have individual character. The interpretation of the above concepts is largely made by the national courts and by the European Court of Justice. The application of one or the other law in one case mainly results in different time protection of the design as well as compliance with formalities or not. Consolidation of the different branches of intellectual property law could be the substance of the various issues that arise.

Key words: design, applied arts, copyright, law

Vasiliki Bogiatzi

14-2-2018

Acknowledgements

I would like to thank my supervisor for her excellent guidance and support during this process. I also wish to thank the Library of the Athens Bar Association for providing me with its rich record in order to conduct my research.

Preface

This dissertation has been written to fulfill the graduation requirements of the MA in Art, Law and Economy at the International Hellenic University. My research question was formulated together with my supervisor, Professor Irimi Stamatoudi. This dissertation originated from my interest in intellectual property law, as a growing area of law, and in comparing different institutions. I had a lot of material to use for my research, as many books and articles have been written on this subject and many court decisions have dealt with it. My legal background and professional experience supported me through this process. I was engaged in researching and writing this dissertation from September 2017 to January 2018. This dissertation contains less than 12.000 words. This work is to the best of my knowledge original, except where acknowledgements and reference are made to previous work. Neither this nor any similar dissertation has been or being submitted by me for any other degree at any other university.

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Introduction

Manufactured and commercial enterprises compete in a globally competitive market and must focus on developing methods of reaching customers that appeal to a new generation. Industrial design of their products is one of the key elements that guarantee their success. Thus, a legal system is necessary for the protection of the interests of both enterprises and designers who invest a lot of effort and money to create or fund new and lucrative designs. The aim of this dissertation is to present the current legal system in Greece, which contains more than one applicable laws that intertwine each other.

For this purpose, this dissertation begins, in the first chapter, by referring to the course of applied arts and industrial design over the years, namely from antiquity to present day. Next in the same chapter, it examines its current role in commerce and for which reasons its legal protection has become indispensable. In chapter two and before analyzing the today applicable legal status, it is useful to refer extensively to the history of the designs and models legal protection from 1920, date of adoption of the first Greek copyright law, until 1996, date of adoption of the Greek industrial designs law. The study of this period, which is divided in three shorter time periods, is useful for the experience it gives to its legal practitioners to interpret and address present cases. Then, both in chapter three and four, it is time to examine the protection of designs and models on the one hand under the now applicable Greek copyright law, as works of applied arts, and on the other hand under the industrial designs law. To facilitate the reader's understanding, the two chapters are presented in a similar way separated by the following chapters: their general characteristics, their subject matters and the content of their provided legal protection. In the following chapter five, a comparative analysis is crucial to show the similarities and the differences of the above laws, the advantages and disadvantages of each law, that lead to different ways of correlation between them, their overlapping and friction points. There is, therefore, absolute need to look at the above questions one by one, starting from the beginning.

History of design

PRECEDENTS OF INDUSTRIAL DESIGN

From the ancient times, man has a deep intellectual need to form the world that surrounds him¹ not only in a functional way but also in an aesthetic one. For example, in ancient Greece, we can find a huge number of objects of usable destination which perform an aesthetic function as well, such as jars, amphoras, vases, jewelry.² However, craftsmanship did not permit the reproduction of their external form in a huge number of standardized copies.³

During the medieval period, the growth of trade in combination with the integration of entrepreneurs into trade unions lead to the emersion of large workshops that made objects with common forms through the repetitive duplication of models which defined by their shared training and technique.⁴ The rights upon these common forms belonged to the aforementioned trade unions and not to the particular creator.⁵

The use of drawing to specify how something was to be constructed later was first developed by architects and shipwrights during the Italian Renaissance.⁶ Furthermore, in the 17th century, in centralized monarchical states such as France, hundreds of specialists craftsmen worked continuously under the patronage and auspices of the King in order to product every kind of luxury items ranging from tapestries and furniture to metal-work and coaches.⁷ As long as reproduction remained craft-based, however, the form and artistic quality of the product remained in the hands of the individual craftsman, and tended to decline as the scale of production increased.⁸

¹ Selekos P., *The Right to Industrial Design and Model*, Publications Ant. Sakkoulas, Athens-Komotini 1999, p. 20.

² *Ibid.*, p. 20.

³ *Ibid.*, p. 20.

⁴ Antonopoulos V., *Industrial Property*, Sakkoulas Editions, Athens-Thessaloniki, 2005, 2nd ed., pp. 32-33, Heskett, John, p. 11.

⁵ *Ibid.*, p. 33.

⁶ Heskett, John, pp. 11-12.

⁷ *Ibid.*, p. 12.

⁸ *Benton Ch., Design and Industry, in Kemp M., The Oxford History of Western Art, Oxford University Press, 2000, pp. 380–383.*

Industrial revolution began in the middle of the 18th century in Great Britain with the advent of mechanized mass production.¹⁰ The critical element, which distinguishes craft-based design from industrial design, is the time when the creative act of determining and defining a product's form takes place. In the case of craft-based design, the form of the product is determined by the product's creator at the same time of its creation¹¹, whereas, in the case of industrial design, the form of the product is separated from manufacture, taking place in advance of the physical act of making a product, which consists purely of repeated, often automated, replication.¹²

The rise of industrial manufacture changed the way objects were made. At the same time, urbanisation changed the patterns of consumption. The growth of empires broadened tastes and diversified markets whereas the emergence of a wider middle class created demand for fashionable styles from a much larger and more heterogeneous population.

After the First World War and its effect to the German economy, German industrialists benefited.¹³ Particularly, the increase of the inflation favored the exports of products enabling the industrialists to gain a lot of money.¹⁴ However, the phenomenon of the saturation market, caused by the huge number of industrial products that flooded the commercial market, lead to the production of objects that could cover aesthetic and not just practical needs, thus causing new demand for the same commercial goods.¹⁵

At this historical juncture, the Bauhaus artistic School was founded. According to the artistic trend of the Bauhaus School, whose goal was to conciliate art with industrial production, "*there is no distinction between the monumental and decorative art.*"¹⁶ The consequences of the Bauhaus School effect were at first the promotion of the common perception for the aesthetics of the products thus new principles

⁹ Labraki – Plaka, *Bauhaus*, Athens, 1986, p. 75 et seq.

¹⁰ Kirkham, Pat, Heskett, John, p. 10.

¹¹ Noblet J., *Design in Progress*, in Noblet J. *Industrial design: reflection of a century*, Paris: Flammarion/APCI., 1993, pp. 21-25

¹² *Ibid.*, p. 21-22.

¹³ Selekos P., p. 21.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, p. 23.

¹⁶ *Ibid.*, p. 21.

concerning the formation of the objects were initiated. Stereotypical standards for many practical objects have been created to be applied to products of wide consumption that people use in every day's life. Secondly, the upgrading of the self-contained economic value of their own formation was witnessed.

Today's market

The traditional method, applied previously in order to enhance the commercial competition, of lowering prices isn't any more effective because of the existence of high class consumers that could buy a series of more appealing and thus expensive products.¹⁷ On the contrary, the possibility of aesthetic diversification of their forms may not only be critical for the promotion strategy of manufacturers but also for their implying final commercial success in the markets.¹⁸

First, the "industrial design" is a distinct qualitative characteristic of the products, resulting from the mere observation of their form without requiring any special certification of it, as happens with other characteristics of the industrial products.¹⁹ We may really say that it is the psychological component of the identity of the industrial products.²⁰

Second, the external form of the commercial goods provides a range of critical information about their other qualities²¹. The exploitation of the design as a communication and advertising medium serves the most in emerging sales, such as those that are carried out without the intermediary of the seller, namely the on-line and the impulse sales.²² In addition to this, the advertising function of the external shape of the product is not exhausted as soon it is sold, but also throughout its continuous use by the buyer.

Need for legal protection of "design"

As it was expected, most developed countries recognized the imperative need to adopt or amend already existing laws, that would protect the interests of societies

¹⁷ Ibid., p. 24.

¹⁸ Ibid, p. 23 et seq.

¹⁹ Ibid., p. 25.

²⁰ Ibid., p. 24.

²¹ Rokas N., «Exploitation and protection of the value of advertising», EEmpD 1999, p. 1 et seq.

²² Selekos P., pp. 25-26.

for the enhancement of culture development and the stipulation of a competitive economy. Legal protection of intangible goods, such as “*design*”, has been pursued in the majority of these countries either by the conferral of absolute and exclusive rights to their creators by copyright law or/and specific law of industrial designs and models, or by the combating of unfair practices.

However, a more critical view points to the danger of the limitation of free competition by the creation of unwanted monopoly rights.²³ Free competition is a fundamental economic principle in the European Union. However, the above absolute rights are monopoly rights only in the sense of exclusive exploitation of intangible goods, as all rights, and not in the sense of the antitrust legislation²⁴ Additionally, society has profited by the possibility of other creators to use and evolve the already achievements. Consequently, it is left to the legislator and judge to find the golden intersection between the protection of the creator on the one hand and society and economy on the other. For the above reasons, the legal protection is in both laws, copyright and specific law of industrial designs and models, limited in scope and time.²⁵

History of design protection under Greek law (1920-1996)

Since industrialization of production delayed in Greece, so did the legal protection of industrial designs. Specifically, until 1996, when Greece adopted a special legislative regime for industrial designs and models,²⁶ their protection was based on other, already existing, legal provisions such as mainly copyright law and unfair competition law. In this dissertation, we will deal only with the absolute rights conferred either by the copyright law or/and by the specific law of industrial designs and models. On the contrary, we will not refer to other parts of the industrial property legal system, such as unfair competition, trademarks, distinctive features and utility models, which under particular conditions may protect them as well. The way theory and case law faced in the past (1920-1996) the issue of the legal protection of designs

²³ Selekos P., p. 19.

²⁴ Rokas N., p. 5.

²⁵ Ibid, p. 7.

²⁶ Minoudis M., *The Protection of Industrial Designs*, in the collective project "Evolution of industrial property law", A. Argyriadis, Beier, Georgakopoulos, Ant. Sakkoula, 1988", *ibid.*, *The draft law on industrial models*, EEmpD 1980 p. 382-395.

can be divided in three periods. The first one from 1920 to 1975 is characterized by a restricted and sometimes contradictory legal protection, the second one from 1975 to 1993 is characterized by overprotection²⁷ and the third one from 1993 to 1996 is characterized by the establishment of the most important and up to nowadays applicable copyright law.

First period (1920-1975)

Law 3483/1909²⁸ has been the first copyright law ever introduced in Greece, which applied only to theatrical plays and did not mention at all designs.

The first important Greek copyright law No 2387/1920²⁹, as amended, was maintained for more than 70 years until 1993. The above law did not refer to any special criterion of the works as a requirement for their legal protection. However, both theory³⁰ and the case-law³¹ established in practice the criterion of “originality” of the works. Particularly, they supported that the originality of a work is “*the result of creative intellectual work and the personal contribution of the creator, according to which the work presents a unique peculiarity that distinguishes it from the common everyday spiritual creations*”.³²

Apart from the above criterion of originality, the main characteristics of this law were as follows: It referred to a non-indicative list of creators, and not of works, such as “designers”, whom it entitled with the right to exploit economically their right by reproducing their works (article 1). How much more extensive the list of the previous law was, however, it did not include among the “designers” the industrial designers. The duration of the legal protection of the economic right of the creator lasted during his life and for 50 years after his death (article 2) and in case of cooperation after the death of the surviving partner (article 3). On the contrary, the creator’s moral right is

²⁷ Stamatoudi I., Papadopoulou M.-D., *Industrial designs and models and the interface between copyright law and industrial property law*, DiMEE, 2016, p. 518 et seq.

²⁸ L. GYPG’/1909, “On literary rights of theatrical plays” (FEK A’ 296/16.12.1909).

²⁹ L. 2387/1920 “Copyright” (FEK A’ 148/03.07.1920).

³⁰ Koumantos G., *Copyright Law*, Ant. N. Sakkoulas, 1984, 4th ed., pp. 3, 111.

³¹ Prosecutor Athens’ FIC 3/1959, ArchN 1960,305-306 = ND 1960,219-221, note Sakellaropoulos J., Athens’ FIC 3402/1968 NoV 196, p. 572-575, note Asprogerakas-Grivas K., Order Athens’ CA 1989/1937 EEN 1938, p. 216-217, note Papanikolaou

³² Ibid.

quenched on his death while his heirs acquired upon his death their own moral right which lasted during their lifetime.³³

The issue of the legal protection of industrial designs and models has been a keen interest in both theory and case law. On the one hand, theory spawned a wide controversy. Some supported that industrial designs and models should be protected as works of applied arts by the legal provisions of the Greek copyright law and/or the Greek law of unfair competition³⁴. Some others stated that only the Greek law of unfair competition should be applied to industrial designs and models³⁵. On the other hand, the case law was uniform,³⁶ meaning that only the legal provisions of unfair competition should be applied to industrial designs and models. As said before, the applicable copyright law of that period had provided protection only for a non-indicative list of creators. Consequently, since the industrial designs and models were not explicitly referred to, they could not be protected by the above law.

However, during the above period there was a key court decision, namely the no 3651/1962 decision of the Three-Member Court of First Instance of Athens, which held that works are protected regardless of the purpose of their production, namely regardless of whether they were produced for aesthetic pleasure or practical use, and in particular for industrial production.³⁷ This has opened the way for the protection of "works of applied arts" from copyright law.

During the first period of the history of the legal protection of "designs", the first and unique attempt to legislate the industrial designs and models was in 1963, when the minister of commerce decided the foundation of a legislative committee which

³³ Kallinikou D., *Copyright law and related rights*, Law and Economy P. N. Sakkoulas, 2008, 3rd ed., p. 229, Koumantos G., *Intellectual Property*, 5th Edition, Athens-Komotini 1991, p. 274-275.

³⁴ Minoudis M., "The draft law on industrial models", EEmpD 1980,382, Minoudis M., "The Protection of Industrial Designs» pp. 89-90, Papadrosou-Archaniotaki P., "Utility Models and Designs Industrial Designs and Designs of aesthetic form according to the Paris Convention", Arm 1986,310-311, Mikrulea, *Utility models*, Nomiki Vivliothiki", 1999, p. 84, Rokas N., *Unfair Competition*, Nomiki Vivliothiki, 1996, p. 147, Liakopoulos T., *Industrial Property*, Publications P.N. Sakkoulas 2000, 5th ed., p. 276, Koumantos G., *Modern Problems of Copyright Law*, NoV. 1953, p. 216, *ibid.*, Koumantos G., *Greek copyright law after the Stockholm revision of the Berne International Convention*, ECD 1969,152, *ibid.*, *Copyright Law*, Ed. N. Sakkoulas, 2002, 8th ed., pp. 124, 72, Tsotsos N., *The Recent Reform of the Law of Patents and Industrial Models*, Arm 1980, 943.

³⁵ Selekos P., *The Right to Industrial Design and Model*, Publications Ant. Sakkoulas Athens-Komotini 1999, p. 51, Kotsiris L., *Copyright Law*, Sakkoulas, 2005, 4th ed., p. 69, Karavas K., Empor. C. vol. A, pp. 649-650, Rokas N., *Industrial Property*, Nomiki Vivliothiki, 2nd ed. p. 69.

³⁶ Athens' FIC 3599/1974, NoV 1974, 1085, Athens' FIC 5498/1974, EEmpD 1974, 270.

³⁷ Three Member Athens' FIC 3651/1962 EPBI 1962 p. 39.

would draft a bill for the industrial designs and models, completing in this way the already existed legal regime of industrial property.³⁸

Second period (1975-1993)

The second period began with the ratification by the Greek Law 100/1975 of the Berne Convention for the Protection of Literary and Artistic Works, signed in 1886 and revised in Paris in 1971³⁹. According to the article 2 paragraph 7 of the above Berne Convention “... Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union only to such special protection as it is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works.” Additionally, according to the first article of the Legal Decree 4264/1962⁴⁰ Greek citizens could rely on the legal provisions of an international convention, that Greece has ratified, and which are more favorable than current Greek law. Therefore, as in Greece there was no special legislation at that time, industrial designs created by both foreign and Greek citizens enjoyed in Greece the protection already afforded to “artistic works”.

The majority of theory believed that originality, as it was considered until then, was not any more a requirement for the protection of these designs as artistic works.⁴¹ However, it has been argued by part of the theory that it is not a notional assimilation of the assumptions of a work but of the fictitious incorporation of the designs into the class of works that can be protected if they meet the requirements of the Copyright Act.⁴²

The case-law of that period is relatively heterogeneous concerning the criteria of the legal protection provided for industrial designs and models. Specifically, Greek

³⁸ P. Papadrossou - Archaniotaki, Arm 1986,310.

³⁹ Law 100/1975, Validation of a) the Convention on the formation of the World Organization of protection of property of intellectual works, signed in Stockholm on July 14th, 1967 and b) the Diplomatic Conference of Paris, carried out in July 1971 for the revision of the Berne Convention of 1886 (FEK A' 162 / 01.08.1975).

⁴⁰ Legal Decree 4264/1962 on Copyright (FEK A' 187/12.11.1962).

⁴¹ Koumantos G., *Greek copyright law after the Stockholm revision of the Berne International Convention*, ECD 1969, pp. 152, 160, *ibid.*, *Copyright Law*, Ed. N. Sakkoulas, 2002, 8th ed., p. 124 n. 305, Antonopoulos V., *Industrial Property*, Sakkoulas Editions, Athens-Thessaloniki, 2005, 2nd ed., p. 157 et seq., 292 et seq., Marinos M., *Copyright Law*, Publications Ant Sakkoulas, 2nd ed., p. 35, Selekos P., *The Right to Industrial Design and Model*, p. 53 n. 64, *ibid.*, *The substantial requirements for the protection of the industrial designs and models by the PD 259/1997*, EempD 1998, p. 643, n. 2, Liakopoulos T., *Industrial Property*, Publications P.N. Sakkoulas 2000, 5th ed., p. 276 n. 1.

⁴² Kotsiris L., *Copyright Law*, Sakkoulas, 2005, 4th ed., p. 70.

courts insisted on providing protection for industrial designs and models under the Greek Copyright Law (2387/1920 as amended), whether they have a height of creativity or not.⁴³ On the other hand, there were still court decisions that kept on refusing to protect industrial designs and models, either under the necessary condition of originality or without it, on the ground that these designs are not even independent spiritual works.⁴⁴ Thus, the only remaining legal protection was provided once again by the law of unfair competition.

Industrial designs and models enjoyed favorable treatment in relation to other types of works, that were protected by the Greek copyright law under the condition of originality.⁴⁵ Additionally, such protection would be more restricted in comparison to that afforded by a specific legal regime for industrial designs. However, this over-protection,⁴⁶ based on the fact that industrial designs are faced as works of art without having the necessary creativity, is considered to be inappropriate⁴⁷ and thus, “originality” should be a substantial requirement for the legal protection of industrial designs and models as works of applied arts, even under the new circumstances.

In 1975, Greece voted another world treaty, this time the World Treaty of Paris 1883 for the protection of industrial property.⁴⁸ Industrial designs and models appeared for the first time in a Greek law, and particularly in article 1 and 2, as a subject matter but without further provisions. Two other attempts towards the legislation of the industrial designs and models have been done without any result. First, in 1977 another legislative committee was founded by the minister of commerce in order to draft a bill for the industrial designs and models. After a year, the bill was ready but it was never voted. Fourteen years later, in 1991, a similar attempt for the revision of the commercial code failed.

⁴³ Athens’ FIC 3000/1979, EEmpD 1981 p. 593 et seq., Veroia’s FIC 400/1990, EEmpD 1991 p. 151 et seq., Veroia’s FIC 237/1991, EEmpD 1991 p. 724 et seq.

⁴⁴ Athens’ CA 447/1981, Arm 1982 p. 33 et seq., Athens’ FIC 16073/1979, EEmpD 1980 p. 692 et seq., Athens’ FIC 17299/1982, EEmpD 1985 p. 356 et seq., Athens’ FIC 8773/1983, EEmpD 1984 p. 685 et seq.

⁴⁵ Liakopoulos T., *Industrial Property*, Publications P.N. Sakkoulas 2000, 5th ed., p. 277.

⁴⁶ Koumantos G., Greek copyright law after the Stockholm revision of the Berne International Convention, ECD 1969, p. 160, Selekos P., *The Right to Industrial Design and Model*, p. 52, *ibid.*, The substantial requirements for the protection of the industrial designs and models by the PD 259/1997, EempD 1998, p. 643, Papadrosou-Archaniotaki P., Minoudis M., “The Protection of Industrial Designs», p. 89-90, Athens’ FIC 3599/1974, NoV 1974, 1085 et seq.

⁴⁷ Minoudis M., “The Protection of Industrial Designs», p. 89-90.

⁴⁸ Law 213/1975 on the ratification of the International Convention for the Protection of Industrial Property of 1883 as revised in Stockholm on 14 July 1967 (FEK A’ 258 / 20.11.1975).

Third period (1993-1996)

Although, this time period is rather short, it is important because it is marked at its beginning by the adoption of the current Copyright Act and at the end of it by the adoption of specific legislation on industrial designs.

In 1993, the Greek Parliament voted the Copyright Law 2121/1993⁴⁹, which has been the most important law in the field of copyright and related rights that Greece ever had. It has been applied for almost 25 years. For the first time, it provided legal protection for "*works of applied arts*" among the indicative list of protected works. They perform both aesthetic and utilitarian functions and are used to ameliorate the external appearance of useful objects or even industrial products. According to a basic principle of copyright laws, works can serve aesthetic and utilitarian purposes as well. The adoption of the aforementioned law was not meant to meet the country's international obligation to introduce a specific legislative regime for industrial designs, as 1200/1996 has wrongly ruled.⁵⁰

The article 70 of the above Greek copyright law repealed Article 1 of the Legislative Decree No 4264/1962 which allowed Greek citizens to enjoy the same legal protection for their industrial designs with foreign citizens. Consequently, the above international convention applied only to industrial designs that had international character. On the contrary it did not apply to industrial designs created by Greek citizens and published in Greece or were unpublished.⁵¹ From this point a time period of three almost years began until the establishment of a special legislative regime for the protection of industrial designs, during which Greek citizens enjoyed the copyright protection of their designs only if their works met the requirement of originality.

In 1996, the Greek Parliament voted the Law 2417/1996, which ratified the Settlement of the Hague for the International Registration of the industrial designs and models. The law in its article 3, has made a definition regarding the concept of industrial design and models, and defines that the legal provisions for the patents should be applied to them. According to its article 7, citizens of all participating countries, including Greeks, could make an international filing of their industrial

⁴⁹ N 2121/1993 on "Intellectual Property, Related Rights and Cultural Issues" (FEK A 25 / 4.3.1993).

⁵⁰ Athens' FIC 1200/1996, EEmpD 1996, pp. 411-415.

⁵¹ Athens' FIC 1200/1996, EEmpD 1996, pp. 411-415, Athens' FIC 7518/2000, DEE 2001 p. 708 et seq., Karagianopoulos, note on Athens' FIC 6489/1999, DEE 1999, p. 405 et seq.

designs, but they would not apply to Greece, since it did not yet have specific legislation on them.⁵² This weird situation did not last a lot as its article 4 gave legislative delegation to adopt a presidential decree defining the procedure for issuing a national title for industrial designs.⁵³

Within this legislative authorization, Presidential Decree 259/1997⁵⁴, which is the basic legislative framework for the protection of industrial designs in the Greek legal order, was adopted. Presidential Decree 259/1997, although adopted prior to Directive 98/71 / EC on the Legal Protection of Designs⁵⁵, has taken into account the Proposals for the Community Plan Directive and Regulation.

The article 30 of the PD 259/1997 establishes the system of 'conditional or partial cumulative protection' whereby a design registered in accordance with the provisions of that presidential decree is not deprived of the protection under copyright law under the conditions laid down therein. However, this does not mean that in order to protect a design with these provisions it must necessarily be registered as an industrial design.

A separate analysis of the copyright law and the law of industrial designs and models must be conducted in order to understand their similarities and their differences. Despite the aforementioned rule of the typical priority, the order we follow for their examination will be based on the chronological one of their adoption.

Copyright protection for designs (Law 2121/1993)

General characteristics of copyright law

The main goal of the Greek copyright law is to protect the author against unauthorized copying and exploitation. Thus, it gives to the authors a financial incentive to continue to create, and particularly independently from any patrons.⁵⁶ The professional exploitation of such rights entitles the holder on the one hand to

⁵² Koumantos G., *Copyright Law*, Publications Ant. Sakkoulas, Athens-Komotini, 2002, 8th ed., p.125.

⁵³ Ibid.

⁵⁴ Presidential Decree 259/1997, (FEK A 185), which was adopted under the legislative delegation of article 4 of Law 2417/1996.

⁵⁵ Directive 98/71 / EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs, OJ 1998 L 289/28.

⁵⁶ Kallinikou D., *Copyright law and related rights*, Law and Economy P. N. Sakkoulas, 2008, 3rd ed., p. 1, Koumantos G., *Copyright Law*, Ed. N. Sakkoulas, 2002, 8th ed., p. 7, Rokas N., *Industrial Property*, Nomiki Vivliothiki, 3rd ed., p. 5-6.

write off the relevant costs of work and capital and on the other hand to make a reasonable profit out of it. Furthermore, the increase of the creativity leads to the cultural development of the country⁵⁷ which is in favor of its society.⁵⁸ Additionally, the economy is supported through the profitability of cultural enterprises.⁵⁹

The Greek Copyright Act is the basic source of intellectual property law, while the provisions of the Civil Code are applied in addition either directly or proportionally. It incorporates many Community law provisions and provides authors with equal, if not more, protection than that provided by international instruments, such as the Berne Convention. It is a progressive text, favorable to the creator, as shown from the correlation of the articles 13 par. 5, 14, 29 par. 1, 65, 66, 66A.

Subject matter of copyright law

For the first time, a definition of “work” is given in a Greek law.⁶⁰ According to this definition a work is “*any original intellectual literary, artistic or scientific creation, expressed in any form*” (art. 2 par. 1). The intellectual creation is important for the Law from the moment that it has a sensible substrate, stable or fleeting.⁶¹ The term “intellectual” makes a significant distinction between the work, as an intangible good, and the physical carrier, that embodies it.⁶² This distinction is less apparent as far as concerns the works of unique embodiment, such as the works of fine art.⁶³ Such work is ruled by the Copyright Act whereas the physical carrier of it by the Civil Code.⁶⁴ What is copyright protected is the form of expression and not the idea or the content of the work.⁶⁵ However, this distinction between idea and form of expression is not evident in the case of works of fine art.⁶⁶

We have been given by the law only three vast categories of works (literature, art and science) and an indicative list of examples of works, without any further

⁵⁷ Kallinikou D., p. 1.

⁵⁸ Rokas N., *Industrial Property*, Nomiki Vivliothiki, 3rd ed., pp.5-6.

⁵⁹ Kallinikou D., p. 1-2.

⁶⁰ Kotsiris L., “Intellectual Property Law and Community acquis», 6th edition, Ed. Sakkoulas, Athens-Thessaloniki, 2011, p. 65.

⁶¹ Koumantos G., *Copyright Law*, Ed. N. Sakkoulas, 2002, 8th ed., p. 101, Manthos A. p. 110.

⁶² Marinos M., *Copyright Law*, Publications Ant Sakkoulas, 2nd ed., 2004, p. 70.

⁶³ Koumantos G., p. 104.

⁶⁴ Koumantos G., p. 103.

⁶⁵ Koumantos G., p. 113-115.

⁶⁶ Koumantos G., p. 115, Manthos A. p. 108.

reference to which of the three vast categories each example belongs.⁶⁷ This open list facilitates the inclusion of new creations resulting from new technological developments⁶⁸ and the evolution of contemporary art.⁶⁹ Assigning a work to one of the main categories is relevant only if special rules apply to works in this category.⁷⁰ Works of applied arts are referred explicitly in the law and belong to the vast category of works of art. However, they are opposed to the fine arts as not only they cover aesthetical needs but they also serve practical purposes.

For the first time in a Greek law, the criterion of originality, as a necessary condition for the application of the law, is explicitly referred to. However, there is no legislative definition of it, and the interpretation of this criterion is left to the theory and case law.⁷¹ In addition to this, we must clarify that the use of the above term of “original work” is sometimes used as opposed to “derivative works” or to “copies of works of fine art” (art. 5).⁷²

Before examining the two proposed criteria of originality that prevailed in Greek case law until recently, it is interesting to examine the different legal trends worldwide. Particularly, in Anglo-Saxon countries more lenient criteria have prevailed, whereas in continent Europe stricter ones.⁷³ This has to do with their legal tradition and financial interests.⁷⁴ On the one hand, in Anglo-Saxon countries the most important factor for the recognition of originality in a work is the skill and labour for its creation.⁷⁵ However, even in these cases minimum creativity is required.⁷⁶ On the other hand, in continent Europe, the work expresses the personality of the author and thus has a specific individuality.⁷⁷

Upon this assumption the theory of “statistic uniqueness”, namely the first criterion of “originality”, is based. The above criterion, which prevails in Greek case law, means that, under similar circumstances and with the same objectives, no author

⁶⁷ Kotsiris L., p. 76.

⁶⁸ Marinos M., p. 68.

⁶⁹ Kotsiris L., pp. 60-61.

⁷⁰ Koumantos G., p. 128, Marinos M. pp. 68, 87.

⁷¹ Koumantos G., p. 107, Kotsiris L., p. 71.

⁷² Koumantos G., p. 105-106, Marinos M. p. 76 n.23.

⁷³ Koumantos G., p. 108.

⁷⁴ Koumantos G., p. 108.

⁷⁵ Koumantos G., p. 108, Marinos M. p. 76.

⁷⁶ Koumantos G., p. 108.

⁷⁷ Marinos M. p. 76.

would, in reasonable probability, create a similar work because every human inspiration and creativity is unique and reflects the personality of its author.⁷⁸ Furthermore, statistical uniqueness is not enough for a work to be qualified as an original one. The work must additionally have certain creative height, namely the minimum threshold of creative input required to distinguish a work from other works of everyday life or even other similar works.⁷⁹ Both criteria show an individualized bond with the author.⁸⁰ However, it is also argued that the criterion of originality should be disconnected from the author's personality and value judgments which are underpinned by this concept,⁸¹ because this is contrary to the principle of evaluative neutrality underlying all copyright law. Additionally, it is difficult to be estimated by Greek courts.

It is argued that the two criteria complement each other and are not independent conditions for the existence of originality.⁸² It is also supported by the Supreme Court 537/2010⁸³ the minimum creative height is merely another formulation of the criterion of statistical uniqueness. Statistical uniqueness requires a comparison with the existing works or what could exist and implies a freedom of divergence from it.⁸⁴

According to theory and case law, it has been accepted that only some parts of the work or some contributions of collective works, that (parts or contributions) are original, may be copyright protected and not the whole work.⁸⁵

According to recent jurisprudence of the European Court of Justice, originality is defined as the only precondition for protecting a work with copyright law.⁸⁶ No other criterion applies. Furthermore, the EU originality criterion, already applied to photographs, software and databases by EU law, is extended to all intellectual works, regardless of the category each work belongs to.⁸⁷ Thus, it can also apply to designs.

⁷⁸ Koumantos G., p. 109, Manthos A. p. 103, Stamatoudi I.- Papadopoulou M.D., p. 518 et seq.

⁷⁹ Manthos A. p. 105, Stamatoudi I.- Papadopoulou M.D., p. 518 et seq.

⁸⁰ Manthos A. p. 103.

⁸¹ Marinos M. p. 77-78.

⁸² Manthos A. p. 102.

⁸³ DiMEE 2010, 381.

⁸⁴ Marinos M. p. 78.

⁸⁵ Marinos M. p. 82.

⁸⁶ C-5/2008, Infopaq International A/S v Danske Dagblades Forening, Judgment of 16 July 2009 DiMEE 2009 p. 426 et seq., Stamatoudi I., *Originality in copyright law of European Union*, DiMEE 2016, p. 49 et seq.

⁸⁷ Ibid.

According to this criterion, the work must be the personal intellectual creation of its author.⁸⁸ As interpreted above, the criterion must be identified in a single, autonomous and independent way in all EU Member States, which, consequently, can no longer maintain their own national criteria, at least to the extent that they do not comply with the above EU criterion.⁸⁹ Additionally, the author must have done free and creative choices⁹⁰ and stamp his work with his personal stamp.⁹¹ The above originality criterion is obviously more akin to the tradition of continent Europe than to that of Anglo-Saxon countries. The above court decisions are relatively recent and thus we have not yet important Greek case law applying their rulings.

According to the principle of evaluative neutrality (art. 2 par. 4), that governs the whole Greek Copyright Law, the value of a work is of no importance for its copyright protection. That means that, first of all, a work may be protected despite its illegal character or its unethical content.⁹² Even the derivative work that offends the copyright protection of a preexisting work may be protected by copyright law.⁹³ However, the exploitation of such works may be prohibited or restricted by other, strange to the copyright, legal provisions.⁹⁴ Furthermore, the aesthetic or artistic value of a work does not play any role when deciding its protection. However, judging for declaring or denying the originality of a work involves inevitably some kind of evaluation. This principle has, however, many deviations because many times the court judgement is based on less or more evaluation.⁹⁵ A work is copyright protected regardless of the purpose or the reason for its creation, namely whether it is livelihood, promotional, charitable, practical or purely for art.⁹⁶ Thus, a work may be protected when except from its aesthetic destination serves practical purposes as well. This assumption by the legislator is very critical for the works of applied arts.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ C-429/2008, Football Association Premier League Ltd and Karen Murphy, Judgement of 4 October 2011, DiMEE 2011 p. 406 et seq., Stamatoudi I., *Originality in copyright law of European Union*, DiMEE 2016, p. 49 et seq.

⁹¹ C-145/2010, Eva-Maria Painer v. Standard VerlagsGmbH and others, Judgement of 7 March 2013, curia.europa.eu, Stamatoudi I., *Originality in copyright law of European Union*, DiMEE 2016, p. 49 et seq.

⁹² Koumantos G., p. 119-120, Manthos A. p. 111.

⁹³ Koumantos G., p. 120, Manthos A. p. 111.

⁹⁴ Manthos A. p. 111.

⁹⁵ Koumantos G., pp. 121-122.

⁹⁶ Marinos M. p. 116, Manthos A. p. 111.

Despite the clear wording of the above rule, the legislator chose to explicitly include the case of the applied arts in the otherwise indicative list of protected parties.

Content of legal protection conferred by copyright law

According to the principle of truth, the right to the work is acquired by its author primarily by the creation of the work (art. 6 par. 1). Consequently, no formalities are required for the acquisition of copyright (art. 6 par. 2), such as registering in a register or by mentioning a symbol.⁹⁷ Therefore, no payment of fees is needed. However, it would be prudent for any creator to testify to the purpose of making it easier to prove the paternity of his work. There is also a presumption of copyright and consists of registering the name of the author on the physical carrier of the work (art. 10 par. 1). Agreement that a third person will be referred to as his author is invalid.⁹⁸

A legal person may obtain the right only in a derivative way.⁹⁹ In the case of the creation of a work in the execution of an employment contract in the private sector, a transfer of the powers of the copyright provided for in the contract shall arise automatically and by the law (art. 8 par. 1).¹⁰⁰ In the case of the creation of a work in the execution of a public official's duty, the copyright of the author is automatically enforced (art. 8 par. 2).¹⁰¹ In both the above cases, these provisions are not binding law and, therefore, contradictory agreements are permitted (art. 8).¹⁰² However, it is widely acceptable that the employer is under no obligation to exploit or use the work.¹⁰³ Articles 12 et seq. are applied proportionally, as the law has as a model the free and not remunerated author.¹⁰⁴

In case of works of joint authorship, namely those that are the result of the direct collaboration of two or more authors, initial right holders are the coauthors in equal shares¹⁰⁵ (art. 7 par. 1). In case of collective works, namely those that are the result of the independent contribution of several authors under the intellectual direction of a

⁹⁷ Kallinikou D., p. 66, Koumantos G., p. 168 n. 410, Kotsiris L., p. 103, Manthos A., p. 47, Marinos M., p. 213 n. 158.

⁹⁸ Koumantos G., p. 164, Manthos A., p. 47.

⁹⁹ Manthos A., p. 47.

¹⁰⁰ Kotsiris L., pp. 103-104, 107.

¹⁰¹ Kotsiris L., pp. 106-107.

¹⁰² Kotsiris L., pp. 107-108.

¹⁰³ Kotsiris L., p. 108.

¹⁰⁴ Kotsiris L., p. 108.

¹⁰⁵ Kotsiris L., pp. 111-113.

natural person, the initial right holder is the natural person¹⁰⁶ (art. 7 par. 2). However, if the independent contribution can be exploited separately, the author of each of them can be the initial right holder of them.¹⁰⁷ In the case of composite works, namely those that are composed of parts created separately, the initial right holders are the coauthors in equal shares¹⁰⁸(art. 7 par. 3). However, if the independent contribution can be exploited separately, the author of each of them can be the initial right holder of them.¹⁰⁹ In these last cases, the independent or separated contribution must meet the qualification of originality. In both the above cases, these provisions are not binding law and, therefore, contradictory agreements are permitted (art. 7).

From the legal relationship of the author with his intellectual work, two absolute, exclusive and independent between them rights derive. These are both the economic right that results in further ways of economic exploitation of the work and, on the other, the moral right deriving powers of protection of the creator's personal bond with it. (art. 1 par. 2 in combination with art. 3 and 4). An absolute right is directed against any third person, and an exclusive one excludes from the exploitation of the work everyone else (art. 1 par. 1). It is also considered to be a right in principle unlimited, although there are some limitations by the law.¹¹⁰ Intellectual property rights, economic and moral, are independent of each other. There are however many times when the exercise of the economic right serves moral interests while others where the exercise of the moral right serves property interests.

The economic right, according to the article 3 of the Greek Copyright Act contains an indicative enumeration of forms of economic exploitation. This means that the law protects the economic right of the author even in forms of economic exploitation that were not yet known when it was adopted.¹¹¹ The already listed forms of the economic right, that can be applied to works of applied arts, are the fixation and reproduction (art. 3 par. 1a), the alteration (art. 3 par. 1c), the distribution to the public (art. 3 par. 1d), the import of copies of their works created abroad (art. 3 par. 1i). The fixation is the first material incorporation of the work on a solid material

¹⁰⁶ Kotsiris L., pp. 113-115.

¹⁰⁷ Manthos A., p. 106.

¹⁰⁸ Kotsiris L., pp. 113-115.

¹⁰⁹ Manthos A., p. 106.

¹¹⁰ Kallinikou D., p. 27.

¹¹¹ Kotsiris L., p. 206.

substrate, which is the basis for further production of copies. It is worth noting that especially in the case of the applied arts, the registration of a work is not necessarily the same as its creation. Distribution to the public involves the transfer of ownership of the objects (prototypes or prints) incorporating the spiritual creation. The owner of such an object may, of course, be able to lease it to third parties, rendering the corresponding power for rental and public lending not applicable to works of applied arts. Subsequently, copies of copies produced abroad are protected.

The economic right can be transferred between living persons and mortis causa (art. 2 par. 1). The major difference between the contracts of exploitation and the licenses is that the first requires the contractor, except for the right, to undertake the corresponding obligation (art. 13 par. 1). Additionally, the contracts and licenses must be concluded in writing, otherwise they will be null and void, upon invocation of the author (art. 14). The parties may decide upon their exclusivity, their restriction concerning their scope, duration, geographical application and the extent or means of exploitation (art. 15 par. 1). It is worth noting that after the transfer of the entire economic right, new rights and modes of exploitation remain to the author. However, economic right in future works may be contracted out in advance (art. 13 par. 5).¹¹²

The law contains some limitations for the economic right (art. 18-28C), that have been in favor of the interests of society. Above them, the limitation that may apply directly to works of applied arts is that of the occasional reproduction and communication of the mass media of specific works that are sited permanently in a public place (art. 26).

The moral right, unlike the economic right, is not transferred between living persons, but it can be transferred mortis causa (art. 12 par. 2). The moral right includes the author powers of publicity, paternity, distortion, access and rescind (art. 4 par. 1).¹¹³ The mention of the author's name on each copy may not be possible in the case of the works of applied arts. Contrary to the economic right, Greek copyright law does not provide for any limitation on moral right. However, the contractual limitation of the exercise of the right is permissible (art. 16). It should not be confused with the

¹¹² Kotsiris L., pp. 204-205.

¹¹³ Kotsiris L., pp. 142-155.

concept of abusive exercise of the moral right in accordance with the provisions of the Civil Code.

The duration of copyright is one of the longest one in the west world. Both economic and moral rights last during the lifetime of the author and for 70 years after his death, calculated from the 1st day of the following the death year (art. 29 par. 1). The powers, deriving from the moral right, of integrity and paternity of the work may be exercised after the expiry of that period by the Minister of Culture (art. 29 par. 2). Additionally, there are special provisions that better fit nature and purpose of the legal protection of works of joint authorship and the anonymous or pseudonymous works (art. 30, 31).

Articles 59 to 64A include measures to prevent infringements. Furthermore, article 65 par. 1 incorporates civil claims, such as the recognition of the author's right, the discontinuation of the infringement and its omission in the future. According to the same paragraph, specific measures are provided such recall from the channels of commerce of goods that they have found infringing rights, definitive removal of them and even destruction of them. The indemnification, which requires intent or negligence, should cover material and moral damages (art. 65 par. 2). However, regardless of whether the infringement was committed by intent or negligence, the claimant has the right to repayment of unjust enrichment or gained profits (art. 65 par. 3).

Industrial design protection for designs (Presidential decree 259/1997)

General characteristics of industrial design law

As "*industrial designs and models*" we call the two-dimensional and three-dimensional, respectively, configurations of the external form of goods.¹¹⁴ Being considered as a specific field of applied art, they are the process of design applied to products that are to be manufactured through techniques of mass production.¹¹⁵

The goal of the specific law of industrial designs and models is to increase human creativity in the particular domain of trade and industries. The creativity leads

¹¹⁴ Selekos P., p. 18.

¹¹⁵ Kirkham, Pat (1999). "*Industrial design*". *Grove Art Online*. Oxford University Press Heskett, John. *Industrial Design*, Thames & Hudson, 1980, p. 10.

furthermore to the improvement of the quality of the products, thus increasing the aesthetic pleasure of the consumers but most importantly facilitating the sale of these products¹¹⁶. With a higher competitiveness of industrial products the development of economy is granted.

Subject matter of industrial design law

According to the art. 3.1a of Law 2417/1996 in combination with the art. 2.1 of the Presidential Decree No 259/1997, “*design or model means the outward visible appearance of the whole or part of a product resulting from the specific features of, in particular, the lines, contours, colours, shape, form and/or materials of the product itself and/or its ornamentation*”. What is protected is the intangible asset embodied either in the first graph or in its first embodiment or application to the industrial product for which it is intended.¹¹⁷ Neither the first graph nor its first incorporation or application to the industrial product is protected.¹¹⁸

Their notion is, furthermore, restricted by the establishment of two substantial requirements (art. 3 par. 2 Law 2417/1996 in combination with art. 12 of the P.D. 259/1997). Specifically, the external form of the products must be new and have an individual character. The above criteria of protection, which are cumulative, have to be examined in succession, namely the control of the criterion of novelty is preceded by that of the individual character.¹¹⁹ Excluded are cases where designs are clearly not of an individual character, so neither the status of "new" is considered.

The establishment of the criterion of “novelty” serves the first purpose of the above Presidential Decree, which is giving a reward to the designer for his contribution to the enrichment of the already existing form of designs.¹²⁰ According to article 12 par. 3 of the PD 259/1997 a design is new if “*no identical design has been made available to the public*”. Under the same paragraph, identical means that there are no important differences with another.¹²¹ Thus, an evaluative criterion is introduced, that

¹¹⁶ Minoudis M., The Protection of Industrial Designs, in the collective project "Evolution of industrial property law", A. Argyriadis, Beier, Georgakopoulos, d., ed. Ant. Sakkoula, 1988, p. 87.

¹¹⁷ Selekos P., p. 182.

¹¹⁸ Selekos P., p. 182.

¹¹⁹ Selekos P., pp. 89-90.

¹²⁰ Ibid, p. 86.

¹²¹ Ibid, p. 104.

of sufficient diversification, the application of which requires more judgment on the existence or otherwise of differences in the essential or insignificant details and characteristics of the forms.¹²² For this purpose, the design or model under consideration, most accurately the whole impression it creates, is compared separately to each one of individually defined formations (individual comparison),¹²³ which apply to the same or to similar craft or industrial products.

Furthermore, the law (article 13 par. 1), adopting a relatively objective concept, interprets the phrase “*made available to the public*”. It rules that an external form has to be made known by specific means of publicity, to a specific circle of persons concerned, who develop their professional activity in a certain geographical area and during a certain period of time. It is widely accepted that as “specific circle of persons concerned” we mean the professional craft and industrial designers, producers and traders.¹²⁴ There is some controversy about what happens when the form is not known to the above people but it is known to the specific designer.¹²⁵ Additionally, despite the fact that trade is now very internationalized, there are still local markets where the Community professional designer, producer or trader does not have access.¹²⁶ These markets are excluded from the geographical area where the form is made known. Accordingly, the critical time on the basis of which the “novelty” substantial requirement will be considered shall be the filing date or date of claimed priority.¹²⁷ Ways to disclose industrial designs that do not remove their new character are in accordance with the law that resulting from unlawful conduct against the right holder and that resulting from the presentation of the designs in an officially recognized report.¹²⁸ A special case is the deposit of an industrial design with the postponement of its publication.¹²⁹ It is argued that this statement is not considered to be a notification to the professional circle and therefore does not remove the character of the new one.¹³⁰

¹²² Ibid, p. 104.

¹²³ Ibid, p. 101.

¹²⁴ Ibid, pp. 94-96.

¹²⁵ Ibid, p. 96.

¹²⁶ Ibid, p. 97.

¹²⁷ Ibid, p. 98.

¹²⁸ Ibid, p. 100.

¹²⁹ Ibid, pp. 100-101.

¹³⁰ Ibid, pp. 100-101.

The establishment of the criterion of “individuality” serves the second purpose of the above Presidential Decree, which is giving a financial incentive to the enterprises to increase the demand of their products through their aesthetic improvement.¹³¹ By introducing the essential requirement of “individuality”, the legislator sets the required degree of creativity, which characterizes an external form to be considered as being protected.¹³²

According to article 12 par. 4, “A design or model shall be considered 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 design or model which has been made available to the public before the date of filing of the application for registration, or, if priority is claimed, the date of priority.” It is examined without any special qualitative considerations.¹³³ On the contrary, it relies basically on objective judgments and therefore promotes trade security. However, perceptual neutrality is not avoided either at aesthetic or technical or legal level.

First, the impression that is caused to the informed user is sought, and not to the common one, who is the final recipient or buyer of the particular product¹³⁴. In this way, the crucial for the market success of the product is the distinctive ability of its external appearance through the differentiation in the overall impression it causes to the prospective purchaser. Indeed, the degree of differentiation of the product must be such that the informed user supports his purchasing decision in this different appearance of the product.¹³⁵ Thus, the criterion of individuality is stricter than that of the “new” one, because the design must differ not only in the eyes of experts but also in the eyes of the informed user.¹³⁶ Second, since the buyer has neither the knowledge nor the time to shape his decision on the basis of a detailed comparison of the similarities and differences of the offered products, as the specialists do, the comparison is conducted on the basis of groups of products that are suitable to meet the same economic need of buyers. Thus, the inventory of known structures of the external appearance of the relevant product group, that meet the same economic

¹³¹ Ibid, p. 86.

¹³² Ibid, p. 112.

¹³³ Ibid, p. 119.

¹³⁴ Ibid, p. 121.

¹³⁵ Ibid, p. 145.

¹³⁶ Ibid, p. 123.

need of buyers, is sought. In this case, we must also take into account the aforementioned article 13 par. 1.

The margins of expression of the designer's personality are also taken into account, which are too small as his work is due to technical limitations (art. 12 par. 5) (mechanical or physical constraints, safety specifications) or for marketing purposes (standardization needs, deep-rooted customer requirements, fashion trends).¹³⁷ Thus, it is questioned by part of the theory whether even the objects in which the technical functionality prevails can be protected as industrial designs.¹³⁸

Consequently, the comparison method is used to control the existence of both the new and the individual character.¹³⁹ Only in the first case the comparison is individual and in the second case it is grouped.¹⁴⁰ In both cases, the resulting overall impression is investigated and not the number of differences between the products. In the first case, the opinion of the professionals is of interest, while in the second of the consumers.

Content of legal protection conferred by industrial design law

An industrial design or model is protected by the law if it is previously registered in the Design and Model Register of the Industrial Property Organization (OBI).¹⁴¹ The protection title provided is the relevant registration certificate.¹⁴² The procedure of registration, which is simple and brief, is regulated by articles 20 to 25 of the above P.D. An application filled with the necessary content is required (art. 20 par. 2). The formal - constitutive system of acquiring the right of industrial design, as discussed below, requires that the subject matter of the right is determined on the basis of its graphic or photographic representation.¹⁴³ Conversely, descriptive analysis is not recommended.¹⁴⁴ More designs may be included in a single application (multiple application), provided that they do not exceed a total of fifty and the products to which they are to be incorporated and to which they are intended to be applied belong

¹³⁷ Ibid, p. 124.

¹³⁸ Liakopoulos T., *Industrial Property*, Publications P.N. Sakkoulas 2000, 5th ed., p. 273.

¹³⁹ Selekos P., p. 91.

¹⁴⁰ Selekos P., p. 91.

¹⁴¹ Liakopoulos T., p. 279, Selekos P., p. 163.

¹⁴² Liakopoulos T., p. 279, Selekos P., p. 163.

¹⁴³ Selekos P., p. 182.

¹⁴⁴ Selekos P., p. 184.

to the same category or composition (art. 20 par. 5). Protection is provided against specific fees such as the deposit and registration fee, protection and publication fees or postponement fees (art. 29 par. 2). Provided that the application is complete, the registration certificate is issued by OBI in a four months period after the date of filing of the application. No prior checking of the terms of articles 12-15 will take place under the responsibility of the applicant (art. 24 par. 1). The lack of control of these substantive prerequisites is offset by the possibility of the judicial recognition of the relevant design or model as invalid (art. 16).

The designer himself or his successor in title have the right to register a design or model (art. 17 par. 1). The law establishes a presumption concerning the person who files the application for the registration of a design or model who is deemed to be its owner (art. 17 par. 1). However, according to article 18, the real author can seek legal remedies within two years of publication on register the recognition of the rights resulting from the application or, if a registration certificate has been granted, the transfer of the certificate. In case two or more persons have created a design or model under a common creative effort, provided that no different agreement has been concluded, the right to the design or the model shall vest in them jointly and in equal parts (art. 17 par. 2). On the contrary, if two or more persons have created substantially similar designs or models independently the one from the other, the right shall vest to the person who first filed the application for registration of a design or model or to the one who has a priority right over the rest pursuant to Article 22 of the present Presidential Decree (17 par. 4).

If the design or the model has been created by an employee, paragraphs 4, 5, 6, and 7 of Article 6 of Law 1733/1987 shall apply accordingly. These provisions establish the general rule that a design or model made by an employee shall belong to him (art. 6 par. 4), containing however two important exceptions. In case a design or model is the outcome of a contractual relation between the employee and the employer, it entirely belongs to the employer (art. 6 par. 4, 5). However, if the design or model is particularly profitable to the employer, the employee shall have the right to request an additional reasonable recompense (art. 6 par. 4, 6). In case a design or model is made by an employee with the use of materials, means or information of the enterprise in which he/she is employed, it belongs by 40% to the employer and by 60%

to the employee (art. 6 par. 4, 6). The employer shall be entitled to exploit the design by priority against compensation to the design, proportional to the economic value of the design and the profits it brings. The above is not binding law (art. 6 par. 7).

The conferred right is an absolute, exclusive and timely restricted one. The PD explicitly provides only for an economic right (art. 26). However, it is widely accepted that owners of designs or models have also a moral right. Thus, the relevant provisions of Law 2121/1993 on Copyright and Related Rights are applied proportionally to industrial designs and models.¹⁴⁵

Its holder has the exclusive right to use it, thus excluding any third party from the relevant rights without his/her consent (art. 26 par. 1). The PD provides for an indicative list of powers, namely the making, offering, putting on the market, importing exporting or using of a product in which the design is incorporated or to which it is applied, or stocking such a product for those purposes (art. 26 par. 2). Article 26 par. 3-5 contain some limitations to the rights conferred with a design or model upon registration. The most important one is that third parties are banned to use the design only for commercial purposes (art. 26 par. 3).

The moral right derives from the personal bond of the designer with his work. By analogy with the application of copyright law, it contains five powers: publicity, paternity, integrity, access, rescind. The power of publicity is applied in the same way to industrial designs as to the works of applied arts. The power to effectively recognize the paternity of the design does not differ from copyright law. On the contrary, the power to display the name on the work contrasts with commercial practice both because of the practical difficulties and the lack of interest of the buyers.¹⁴⁶ As concerns integrity, it must be accepted that, in view of the particular economic and commercial function of the designs, the improvements are permitted.¹⁴⁷ In particular, the need to change the external form of products often arises either because of the growing consumer purchasing preferences or the evolution of technology and production methods.¹⁴⁸ Instead, modifications that harm the professional image and

¹⁴⁵ Liakopoulos T., p. 280, Selekos P., *The Right to Industrial Design and Model*, p. 174 et seq.

¹⁴⁶ Selekos P., p. 177.

¹⁴⁷ Selekos P., p. 178.

¹⁴⁸ Selekos P., p. 179.

reputation of the designer are prohibited.¹⁴⁹ In this case, the key is played by the name on the products.¹⁵⁰ The powers of access as well as the power of rescind cannot be applied to industrial designs.¹⁵¹

Both the right to the registration of a design or model and to the registered design or model may be transferred upon written agreement or inherited (art. 19 par. 1). Additionally, the holder of a registered design or model may license his design or model to third parties upon written agreement (art. 19 par. 2). Every transfer, license or certificate of inheritance shall be registered in the Design and Model Register and published in the EDBI (art. 19). We must clarify that the moral right may only be inherited and not transferred between living persons.

The right to industrial designs and models is in principle valid for five years from the date of normal filing of the application to OBI but is renewable every five years and is valid for up to twenty-five years (art. 29 par. 1). However, renewal provides for the payment of the relevant fees to OBI (art. 29 par. 2) There are cases that either the period of five years is too excessive for them, such as the fashion products, or that a period of twenty-five years is not enough for them, such as products with long term commercial success.¹⁵² These designs may be protected by other legal provisions, such as those concerning the unfair competition.¹⁵³

In case a third party illegally exploits a registered design or model, the holder of the design may appeal to the civil courts and request the removal of the infringement and its failure in the future. In the event of damage to the holder of the design, the latter may claim restoration or reimbursement of the benefit acquired by the third party from its unlawful use or reimbursement of an amount corresponding to the license fee. He may even ask for the destruction of the third party's products or their performance to himself.

¹⁴⁹ Selekos P., p. 179.

¹⁵⁰ Selekos P., p. 179.

¹⁵¹ Selekos P., pp. 180-181.

¹⁵² Selekos P., pp. 166-168.

¹⁵³ Selekos P., pp. 167-168.

Comparative analysis of the above legal systems

Subject matter

Both copyright and industrial designs laws confer to the author or designer a right upon intangible assets, such as intellectual creations or products. In the first case, we talk about works of applied arts and in the second case we refer to industrial designs or models. Both share the characteristic of practical use. Since these intellectual creations or products consist by themselves a very large category, it is important for the two laws to define accordingly the subject matter to which they should apply. In the first case, works of applied arts in order to be protected need to be original whereas in the second case, industrial designs and models need to be new and additionally have an individual character.

Greek copyright law defines the subject matter of it to be original without giving a definition or some sort of interpretation of this word. This is due to the fact that by 1993, date of adoption of the today applicable copyright law, the notion of "originality" had already been established and shaped by Greek case law for at least seventy years. According to the first criterion of "originality", the theory of statistical uniqueness, as discussed above, the reduction is made in this work that any other creator could have hypothetically created if he was under the same conditions and if he pursued the same objectives. Then, according to the second criterion of the claimed creative height, what is being considered is the difference that the work in question presents in relation to the objects of everyday life. A work must reflect the creator's personality, making it unique, and show some creative height.¹⁵⁴ Thus, it introduces a contradictory rating criterion which is contrary to the principle of evaluative neutrality governed by Greek copyright law and difficult to apply by the courts.¹⁵⁵ Copyright law is indifferent whether another work preexists from the one in question or whether it differs from it.¹⁵⁶ Thus, an original design may not be necessarily a new one. However, it will surely have an individual character. According to the EU criterion, that currently applies, the work is the author's personal intellectual

¹⁵⁴ Ibid.

¹⁵⁵ Ibid, p.111.

¹⁵⁶ Stamatoudi I.- Papadopoulou M.D., p. 518 et seq.

creation. Furthermore, the author has done free and creative choices and to stamp his work with his personal touch.

On the contrary, industrial design law provides guidelines on what exactly “new” or “individual character” mean. In this case, these concepts were introduced for the first time to the Greek legal community and had additionally to be distinguished from the term “originality” of the copyright law. Secondly, industrial designs law should be governed by the principle of speed and security of transactions, which could not be applied without the necessary certainty of which the subject matter of the law.

As regards the examination of the existence or not of the status of "new" in an industrial design or model, the comparison is not hypothetical but a real one. More specifically, the comparison must be conducted with all the already existing objects and not only with the objects of every day's life. The comparison must, indeed, be individual, namely with each applied design or model separately. If only one of them is found identical, then the design or model under consideration cannot be attributed the status of “new’. The status of “new” is examined without any special qualitative judgements but its examination is based mainly on objective criteria, which are easier to be applied by the courts. For example, there is no need to judge which are the objects of every day's life since we have to refer to all the preexisting designs.

As regards the examination of the “individual character”, the comparison is not a quantitative one but a qualitative one. That means that it is not examined how many differences a design or model has but the general appreciation of the overall picture and characteristics of the design or model being judged.¹⁵⁷ Thus, the comparison is based on a subjective assessment.¹⁵⁸ In this case, standardization is created in the design of the entire product category. According to article 12 par. 5, the freedom of the designer from the above limitations is taken into account. However, these choices have not to be additionally creative ones, as this happens with the intellectual works that fulfill the criterion of “originality”, as it is interpreted by the Court of Justice of the European Union. Furthermore, the “individual character” differs from the “originality” criterion in that industrial designs with individual character do not necessarily express the aesthetics of their creator, as happens with the original works,

¹⁵⁷ Stamatoudi I.- Papadopoulou M.D., p. 518 et seq.

¹⁵⁸ Stamatoudi I.- Papadopoulou M.D., p. 518 et seq., Thessaloniki's FIC, DEE 2008 p. 320.

but they accept the aesthetic criterion of the consumer.¹⁵⁹ Thus, a design which is new and/or has an individual character, may not be necessarily original.

It is worth noting that in the very rare case that there are two similar or even close designs, the designer who registers it at OBI will also be the beneficiary of it.¹⁶⁰ On the other hand, if there are two identical or even similar works of art, then both authors are entitled,¹⁶¹ even if the author can prove that his work has been created before the other one.

As clear as the distinction between the three concepts of the theory of legal science seems to be, so problematic is the inclusion of a particular case in one or the other rule of law by the courts. This is partly due to the fact that it involves evaluative judgments, which clearly include the element of subjectivity, but also the fact that national judges are not specialized in intellectual property law. In many law cases, there is a phenomenon of confusion of the above-mentioned concepts, namely of "originality", "novelty" and "individual character".¹⁶² Specifically, the courts do not correctly and clearly distinguish the above-mentioned concepts, while at the same time they do not make clear what the essential requirements of each law are. This leads to wrong legal judgments.

Although rare, there are still court decisions that attribute to the concepts of "originality" on the one hand and to "novelty" and "individual character" on the other their consistent with the law content.¹⁶³ For example, Athens' CA 2398/2008¹⁶⁴ rules that the design of the disputed jewelry is both new and original, and consequently, it must be protected by both copyright law and special legal regime for industrial designs and models. The Court based its ruling to the interpretation of the following proven facts: the design of the jewelry is new because it there was not identical to any previous design, has an individual character because it the whole impression caused to the informed user is different from any other preexisting products, is original because of its designer intellectual work and creative contribution.

¹⁵⁹ Rokas N., *Industrial Property*, Nomiki Vivliothiki, 3rd ed., p. 79.

¹⁶⁰ Koumantos G., *Copyright Law*, Ed. N. Sakkoulas, 2002, 8th ed. p. 107.

¹⁶¹ *Ibid.*

¹⁶² Athens' CA 4091/2010, ChrID 2011 p. 455 et seq., note Kallinikou, Piraeus' CA 484/2008, DEE 2009 p. 322 et seq., note Tsene, Athens' FIC 6489/1999, DEE 1999 p. 405 et seq., note Karagianopoulos, Athens' FIC 1486/2007, DiMEE 2007 p. 257 et seq., note Papadopoulou.

¹⁶³ Stamatoudi I.- Papadopoulou M.D., p. 518 et seq.

¹⁶⁴ Athens' CA 2398/2008, DEE 2009 p. 572 ep., note Apostolopoulos.

It is clear from the application of the law by the national court that few cases of registered or not designs or models are protected by copyright as works of applied arts due to the non-fulfillment of the criterion of originality.¹⁶⁵ There is even a court decision, according to which industrial designs and models are «by definition» excluded from the element of statistical uniqueness, otherwise the exclusive artistic and creative height.¹⁶⁶ However, there are few cases where the courts ruled that the disputed industrial designs and models were “original”.¹⁶⁷ It has even been argued that only by way of exception can designs be protected as spiritual works, because in this way both the concept of art and intellectual creation in general are degraded.¹⁶⁸ Thus, many industrial designs and models fail to be protected by copyright law as works of applied arts, often not unfairly, as in fact few designs and models show a high creative height.¹⁶⁹

Content of legal protection

Due to the above differences in the substantive conditions for the protection of each of the aforementioned laws, the system of partial cumulative protection was judged by the Greek legislator to be more correct, compared to the system of absolute cumulative protection, which leads to overprotection, which in turn limits the competition. The consequences of the selection of the law, which should be applied to a particular case, are not others than the sort and the limitations of the conferred legal protection. The two aforementioned laws have several similarities and differences, which are due respectively to the common basic principles of intellectual property laws and to the different purposes the two types of law serve.

¹⁶⁵ Greek Supreme Court (F' Department) 446/1999, DEE 1999 p.1010 et seq., Athens' CA 1445/2006, DEE 2007 p. 49 et seq., note Kyprouli, Athens' CA 4091/2010, ChriD 2011 p. 455 et seq., note Kallinikou, Athens' FIC 6489/1999, DEE 1999 p. 405 et seq., note Karagianopoulos.

¹⁶⁶ Athens' CA 3269/2014, DiMEE 2014 p. 546 et seq., note Velissaropoulou.

¹⁶⁷ Athens' FIC 7475/2008, Chronicles of Private Law 2009 p. 162 et seq., note Kallinikou, Athens' CA 2398/2008, DEE 2009 p. 572 et seq., note Apostolopoulos, Athens' FIC 17390/1999, EEmpD 1999 p. 593 et seq., Athens' FIC 6152/2012, ELID 2013 p. 801 et seq., Athens' CA 6193/2006, ELID 2007 p. 1461 et seq., Pireaus' CA 281/2005, PirN 2005 p. 174 et seq.

¹⁶⁸ Papadrosou-Archaniotaki P., *Utility Models and Designs Industrial Designs and Designs and Designs of aesthetic form according to the Paris Convention*, Arm 1986,310-311.

¹⁶⁹ Koumantos G., *Copyright Law*, Ed. N. Sakkoulas, 2002, 8th ed. pp. 123-124.

Similarities

The aforementioned laws, together with the law against unfair competition, belong to the vast category of intellectual property law. First of all, in addition to the law against unfair competition, that protects entrepreneurs against unfair practices of their competitors, both copyright and industrial designs laws protect the author or designer, accordingly, by conferring him an exclusive, absolute and independent right to exploit his work or design. The content of this right is divided furthermore into an economic and a moral one. It is worth noting, as above, that industrial designs law does not refer explicitly to a moral right, however, the relevant provisions of copyright law are applied to industrial designs and models analogically. Additionally, both laws refer to an indicative list of powers which allow other powers or forms of exploitation to be recognized and protected in the future. Judicial protection is possible and concerns primarily civil claims against the infringer, such as measures to prevent infringements, recognition of the author's right, discontinuation of the infringement, omission in the future, indemnification, unjust enrichment or gained profits, recall from the channels of commerce of goods, definitive removal of them and even destruction of them. In both laws, there is similar provision ruling the status of authorship in case a work is "the result of the direct collaboration" of more than one authors and in case a design is created "under a common effort" accordingly.

Differences

The copyright is acquired automatically by the time the intellectual creation is taken a form of expression without any formalities. On the contrary, the industrial designs law is based on a typical constitutive system, that means that the right on a design is acquired from its registration at OBI. In case of a legal dispute, the author is obliged to prove whether he is the real author of a work or not. Copyright law serves better the truth and it is favorable to the real author, who can at any time prove he is the real author of the work. He certainly has the burden of proving the paternity of his work. Thus, it would be wise for him to ensure the existence or creation of evidence to prove paternity from the moment of the creation of his work, for example keeping a copy of the work in a notary's record. On the other hand, Industrial designs law serves the security and speed of the transactions. Enterprises can invest more money

when they are sure that the design or model they bought is clear of rights. Much many transactions can be concluded. Since they are much more secure that the designer that registered the design is deemed to be the real one. However, even in this case, there is a possibility that a registered design can be null and void, if it is proved that it does not fulfil the substantial preconditions or that it is contrary to accepted principles of morality and public policy (art 16). Additionally, according to article 18, the real author can seek legal remedies on register the recognition of the rights resulting from the application or, if a registration certificate has been granted, the transfer of the certificate, but only within two years of publication. The one who has the burden of proof is the claimant. Another disadvantage of the typical system is that for the applicant is required to pay some costs for the deposit and registration fees, the protection and publication fees, postponement fees. However, this is not an inhibitory factor for the registration. Especially, because we have the option of the multiple application with less cost.

The term of protection of copyrighted works is the author's lifetime and seventy years after his death, calculated from the 1st day of the following the death year (art. 29 par. 1 Law 2121/1993). There are special provisions for the term of protection of the works created by more than one authors (art. 30, 31 Law 2121/1993). On the other hand, the protection of industrial designs and models last for a period of five years, which can be renewed for up to twenty-five years (29 par 1 PD 257/1997). There is no doubt that for both the designer and the enterprise that exploits the design is better to have a longer protection. However, most of the times in the commerce of goods this is not the case. Specifically, enterprises do not need longer protection because their products have already been recognizable and successful, to the point where any copy of competitors is perceived by consumers. Instead, what really matters to them is the quicker registration of their product designs. The configurations of the products need soon enough changes because of the rapid evolution in the consumers' needs and tastes and the ongoing technical improvements of the mass production of goods. Thus, industrial designs and models law is in line with its legislative purpose to strengthen industrial and commercial enterprises in promoting better their products.

Copyright law rules what happens with a work is created under an employment contract in private sector or in the execution of a public duty. Industrial designs law,

implementing the patent law, goes one step further by granting the designer the right to request an additional reasonable recompense in such a case (and only in the private sector) if the design is profitable for the employer. Additionally, the above patent law rules the case a designer-employee uses the materials, means or information of the enterprise-employer. It is worth noting that, under copyright law the employer has only the right to exploit the work whereas under the, applicable in this case, patent law, the employer is also obliged to exploit the design, against relevant compensation.

Conclusions

The stages of the evolution of applied art from antiquity to the present day contains the first tasteful utilitarian objects, their first faithful copying, the birth of the industrial plan and its current role in commerce. Their legal protection has become indispensable because of the need of craft and industrial enterprises to promote products and advertise their features through their image. During these 70 years of history of legal protection of designs in Greece, from 1920, date of adoption of the first Greek copyright law, until 1996, date of adoption of the first Greek industrial designs law, the protection of designs and models was only possible through the enforcement of the accordingly existing Copyright Law and the Unfair Competition Act.

From 1993 until today, designs and models are protected by Greek copyright law as works of applied arts with the only precondition to be original. They are protected against unauthorized copy and exploitation during the life period of the author and for seventy years after his death. Under the industrial designs law, designs and models are protected only if they are new and have an individual character. They are protected against unauthorized copy and exploitation for a time period of five years, which can be renewed for up to twenty-five years. For the creation of the conferred right the registration of the design or model at the Industrial Property Organization is needed. The applicable system of partial cumulation means that an industrial design or model, already registered as such at OBI or not, may be additionally protected by copyright law if fulfills its preconditions and specifically if it is original. The reason for

this is that the preconditions of each of the above laws are quite different between them.

However, the application of both laws is not without problems. In particular, Greek courts get confused, mostly because the terms of “new”, individual character” and “originality” are related concepts, on choosing which of the two above laws has to be applied in each single case. The main differences between the aforementioned laws in relation to the type of granted protection are the automatic acquisition of the right or the use of formalities and the short or longer duration of the right.

After this analysis, we have to point out, as a conclusion, that it is useful to make advantage of the combination of both laws because one fulfils the other. This dissertation could serve as a springboard for the conduction of a new legal research about a single and united intellectual property law that could cover effectively the industrial design part.

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Appendix

List of abbreviations

ArchN	Archeion Nomologhias (Archive of case law)
Areios Pagos	The Greek Supreme Court in civil, commercial and criminal matters
Arm	Armenopoulos (Thessalonika Bar Association Law Review)
CA	Court of Appeal
ChrID	Chronika Idiotikou Dikaiou (Chronicles of Private Law)
DEE	Dikaio Etairion kai Epicheiriseon (Business and Company Law)
DiMEE	Dikaio Messon Enimerossis kai Epikoinonion (Mass Media, Information and Communication Law)
ECJ	Court of Justice of the European Communities
EEmpD	Epitheorisi Emporikou Dikaiou (Commercial Law Review)
EEN	Ephimeris Ellinon Nomikon (Journal of Greek Jurists)
EpiskEmpD	Episkopisi Emporikou Dikaiou (Survey of Commercial Law)
ELID	Elliniki Dikaiossini (Greek Justice)
FIC	Court of First Instance
NoV	Nomiko Vima (Law Tribune)
PeirN	Peiraiki Nomologhia (Piraeus Case Law)