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Nature and extent of overlapping Copyright, Trademark, and Industrial Design protection.

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Abstract

This dissertation was written as part of the MA in Art Law and Arts Management at the International Hellenic University.

In this paper, we aim to untangle the phenomenon of overlapping Intellectual Property rights by examining two specific interfaces, that of Design Law with Copyright and Trademark Law with Copyright.

On the first part, we will focus mostly on the theoretical structure of overlapping rights, identifying their various types and forms, as well as, the possible problems they can pose to the balance of the IP system. On the second and main part of the paper, we will try to analyze in detail the two cases of overlap by underlining the key differences of those regimes along with the most important problems caused by the clashes between them, we will explain the legislative attempts to regulate those interfaces, and we will examine the approach of CJEU to solve the complications. After this thorough study, we will conclude with an assessment of the general nature and extend of this phenomenon.

Keywords: Overlapping Rights, Copyright, Design Law, Trademark Law.

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Introduction

Cumulation of different intellectual property segments is extremely complex and a yet not fully explored field. As the technological advances and discoveries evolve the ways of creativity and expression and the intellectual property rights are in a constant marathon to stay up to date, the task of identifying the meeting points between them is without a doubt getting even more difficult. However, such attempts are crucial in order to ensure that intellectual property rights are able to fulfill their designed functions while striking a fair balance between the interests of the rightsholders and the public. To achieve this end, both sets of rights have to be carefully tailored so as to cover not only cases of overprotection but under-protection as well.

The present paper strives to illuminate the phenomenon of overlapping intellectual property rights by closely examining two pairs of such interfaces, that of design law with copyright and trademark law with copyright. The importance of those two examples of overlapping rights can be found in the relationship of the corresponding subject matters with the world Art and by consequence in the philosophy around the protection of such works depending on their role in the market.

The main objective is to better comprehend the whys and hows of the overlapping situation in the EU framework. To achieve this goal, we are going to examine core parts of the EU legislation, the different approaches of the theory, as well as CJEU's jurisprudence on relevant cases. With all that being said, the paper will be organized as follows:

Firstly, we will examine the overlap of IPRs in a more theoretical and general manner in order to define and categorize them properly as well as to demystify the dangers they pose to the intellectual property structure. Secondly, we will analyze one of the most problematic cases of overlapping rights, that of trademark law and copyright overlap, by focusing mainly on the subject matter expansion and the interface between the public domain and eternal protection of a trademark. Lastly, we are going to deep dive into the specifics studying the interface of design law and copyright, more specifically, why it is allowed, under what prerequisites, and what can be the nature of their future interconnections.

In the end, an evaluation of the different characteristics of the aforementioned interfaces is very much needed in order to draw safe conclusions not only about the nature of this phenomenon but also regarding its extent in EU level.

1. General Overview of the Overlapping Rights Phenomenon

Before we start examining the specific cases of copyright/design interface and copyright/trademark interface some groundwork is necessary. The following chapter will focus on how the theory defines the overlap of intellectual property rights phenomenon, how it is organized into different archetypes, and lastly what problems it may cause to the general balancing system of intellectual property.

1.1. Definition and Origin

Even with a shallow glance to the products of today's market, one can easily come to the understanding that there are multiple intangible goods embodied in a single product. From the design and the distinguishing appearance to an indication of origin, to a logo, or even a patent for the functional features of the product¹. Furthermore, some of those intangible assets might be protected by more than one intellectual property right, despite the fact that each IPR has a fixed function aiming to protect its "specific subject matter", in accordance with CJEU's jurisprudence²

Even though trademarks largely protect the name of products and services, copyright original artistic and literary works, patents, new products, etc., the borderlines between them are not always conspicuous. A perfect example of a meeting point of different IP segments can be the works of applied art³ that can attract copyright and design protection for their appearance as well as patent protection for their functionality. In this case according to Art. 1(7) of the Berne Convention (the first regulation for overlapping rights at an international level) double protection was discretionary⁴ but only regarding the interface between copyright and design law, leaving the overlap with patent law unregulated. The examples of situations like the aforementioned are

¹ Regarding intangible goods and Intellectual Property in general see: Rahmatian, A. (2011), 'Intellectual Property and the Concept of Dematerialised Property'. In: Bright, S. *Modern Studies in Property Law*. 6. pp. 383

² Case 78/70, Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG., 1971, ECLI:EU:C:1971:59 at para 11

³ "Term describing the design or decoration of functional objects so as to make them aesthetically pleasing. It is used in distinction to fine art, although there is often no clear dividing line between the two areas." - "Applied art" in The Oxford Dictionary of Art, Online edition, Oxford University Press, 2004, retrieved from www.oxfordreference.com.

⁴ See also Art. 7(4) of Berne Convention for the Protection of Literary and Artistic Works.

increasing, as technology keeps the lead, making the need for a solution more and more vital for the stability of the IP structure.

The accumulation of intellectual property rights, better known as overlapping rights, is the situation where two or more IP regimes co-exist in protecting a single type of endeavor. It is worth noting that intellectual property overlap can become apparent not only when at least two different types of protection subsist on the same subject matter (e.g., the protection of software under patent law in addition to copyright law) but also as a result of two or more different types of endeavor (e.g., artworks created in order to be registered as trademarks)⁵.

In the opinion of Tomkowich, the interface between different IP segments has two separate dimensions: there is the *in fact* overlap and the *in law* overlap. The first one refers to the collision of material and intangible aspects of a work through commercialization, and the latter refers to the relationships and interfaces of IPRs. *In fact* overlap does not pose significant problems, contrary to *in law* overlap that brings up questions regarding the handling of IPRs overlap⁶.

On this point it is necessary to clarify that along with IPRs overlaps the cumulation of unfair competition with one or even more IPRs is extremely common. Although this type of cumulation is not considered as *per se* overlap in some cases unfair competition actions seek the same outcomes with IP actions. In particular, it is effectively argued that this case of overlap can be allowed on a case-by-case basis only “when protection under unfair competition is claimed for an achievement that is not, or no longer, protected by intellectual property”⁷. The combination of IP and unfair competition or even other regimes such as contract law, trade secrets or digital management protection etc. is likely to result in disturbances of the innate balance in the IP ecosystem identical to the IPRs overlaps.

⁵ Wilkof, N. and Basheer, S., 2012, *Overlapping intellectual property rights*, pp 1vi-1vii.

⁶ Tomkowicz, R., 2011, *Intellectual Property Overlaps*, pp. 6-9.

⁷ Kur, A., 2013. “What to Protect, and How? Unfair Competition, Intellectual Property, or Protection Sui Generis” in *Intellectual property, unfair competition and publicity: convergences and development* / ed. by Lee, N., 2014, pp. 12, retrieved from <https://ssrn.com/abstract=2268585>.

1.2.Types of Overlapping Rights

According to Derclaye, overlap can be organized into three categories based on the subject matter, the time of the occurrence, and the geographic level. Namely, there are content overlaps (or horizontal), concurrent and sequential overlaps, and level overlaps (or vertical)⁸.

Firstly, the content overlap is referring to the cases when for a single subject matter multiple IPRs can be applied. Nine content overlaps have been observed: Copyright and design, copyright and neighboring rights (together with performers' rights, database sui generis right, rights of sound recording and film producers and of broadcasters), copyright and trademarks, copyright and patents, trademark and patent, patent and design, patent and plant variety right, trademarks and geographical indications, and design with sui generis right on topographies of semi-conductor products. In practice, many products, as seen in the LEGO brick case⁹, can attract more than two IPRs meaning that there can be triple or even quadruple content overlap.

Secondly, overlap can be devised in concurrent and subsequent depending on the time of occurrence. For example, when the artist of a logo goes forth and registered it for a specific period of time the person will be protected by copyright as well as trademark, meaning that the overlap will be concurrent. In the same example when the work falls into the public domain and it will be protected only by trademark the overlap is subsequent or sequential.

At last, there is the case of level overlaps that exists in EU with the creation of community rights (i.e. EU trademarks, community designs rights and community plant variety rights). For instance, a logo can be protected both by a national trademark and an EUTM providing a stronger protection to the rightsholder. It must be underlined that national new plant variety rights are not allowed to overlap with CPVRs in accord with Art. 92 of CPVR Regulation¹⁰. This was the initial

⁸ Derclaye, E., 2017, "Overlapping Rights", in *The Oxford Handbook of Intellectual Property Rights*, ed. by Dreyfuss R. and Pila J., 2018, pp 621-623.

⁹ Case T-270/06, *Lego Juris A/S v European Union Intellectual Property Office*, 2008, ECLI:EU:T:2008:483.

¹⁰ Art. 94 of Council Regulation (EC) No 2100/94 on Community plant variety rights: "Any variety which is the subject matter of a Community plant variety right shall not be the subject of a national plant variety right or any patent for that variety..."

viewpoint of the Commission in regard to the cumulation of national design rights with CDRs as well¹¹, but there is no such provision in today's community design protection system.

1.3.Problems and Concerns posed by Overlapping Rights

It is easy to understand that the vast majority of overlaps cause turbulence to the designated flow of operation of Intellectual Property. Overprotection and regime conflicts are the two main problems of overlapping rights that need to be solved either through legislative measures or judicial remedies.

In detail, regime conflict occurs when the pair of overlapping rights provide different outcomes. For example, in the case of software, the clash of copyright and patent law in regards to the terms of protection leads the strictest regime to override the other and in this example, the result would be the limitation of on public access as copyright's period of protection exceeds the period of protection under patent law¹². The outcome of regime clashes, if they remain unregulated, may be the under-protection, or as it happens in most of the cases, the overprotection of the subject matter.

Overprotection, in a simple way, means that the desired balance between the interest of the creators or rightsholders and the public is tipped. More specifically, in the case of concurrent overlap overprotection means the reduction of free movement of goods and services as a single act of infringement leads to multiple claims. Another example is the sequential overlap of Copyright and trademark which denies or in the best-case scenario delays a work to enter the public domain. Beyond doubt, the seriousness of this problem derives from the fact that it undermines not only the careful balance and distinction between each body of intellectual property law but the balance

¹¹ Green Paper on the Legal Protection of Industrial Design, 1991, Working document of the services of the Commission, III/F/5131/91-EN, pp 138.

¹² Moffat, V., 2004, "Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection", In *Berkeley Technology Law Journal*, 19, pp 1502-1505, retrieved from <https://ssrn.com/abstract=972358>.

between intellectual property with other fundamental rights¹³. It goes without saying that such problems are only magnified when the overlap occurs between more than two IPRs.

In addition to overprotection and regime clashes, according to Silva, there is another problem that may rise with the cumulation between at least two bodies of law, that of split ownership. The phenomenon occurs when different sets of rights for a single subject matter are owned by different persons (this can be considered also as a subjective overlap). A great example can be the interface of copyright and neighbouring rights where there are different rights for the performer, the author-composer and also the producer protecting the exact same work. In this case of fragmentation, the solution comes in the form of Collective Management Organizations (CMO) and compulsory licensing¹⁴. Split ownership in the other cases of overlapping IPRs, where CMO are not used, can pose a great threat to the balance of the market as it may lead to “a tragedy of the anticommons”, a state in which a product becomes practically useless due to fragmentation of exclusive right to different owners¹⁵.

In the following chapters, as we analyze the interfaces of copyright with design law and trademarks, we will examine in much more detail the complications that the overlap is causing to balance of the IP system.

¹³ Beckerman-Rodau, A., 2010, “The Problem with Intellectual Property Rights: Subject Matter Expansion”, in *Yale Journal of Law & Technology*, 13 (35), pp.88-89, retrieved from <https://ssrn.com/abstract=1754781>.

¹⁴ de Araújo Sousa e Silva, N., 2014, The Ownership Problems of Overlaps in European Intellectual Property, pp 29, retrieved from <http://www.jstor.org/stable/j.ctv941rmt>.

¹⁵ Heller, M. A., 1998, "The Tragedy of the Anticommons: Property in the Transition from Marx to Markets." in *Harv. L. Rev.*, 111 (3), pp 687-688.

2. Overlap between Trademark and Copyright Protection

In the following chapter we will examine in depth the interface between Trademark and Copyright law. It is considered one of the most problematic overlaps along with copyright and patent overlap. At first, in order to identify the reasons that give birth to this phenomenon we will analyze the differences between the two bodies of law, as well as the expansion of subject matter. Furthermore, we will investigate the problems that this overlap may pose when both IP segments are applied concurrently. And lastly, we will conclude with a study of the sequential protection and its threats to the public domain.

2.1. Differences between Copyright and Trademark

In terms of their designated purposes, Copyright and Trademark law are aiming to achieve different goals despite the fact that both can be explained under economic terms. Firstly, Copyright law is trying to create a safe environment for creativity to bloom providing economic incentives to the creators. As Professor Koumantos stated in the explanatory report for the Greek Copyright and related rights law 2121/93, Intellectual Property “is the absolute and most effective protection for intellectual creators. This is because the protection of intellectual property is the protection of creativity and creation, a reward of the spiritual toil and an incentive for the contribution to the development of our cultural level and our cultural heritage”¹⁶. In this respect, Copyright law and the set of rights it provides to the authors are necessary for the growth and continuation of the creativity process due to the economic benefits of the lawful exploitation of their works.

Granted that a work meets the level of originality needed, the rightsholder enjoys for a fixed period exclusive rights on the work controlling the reproduction, adaptation, distribution, translation, public performance and generally any type of exploitation of the work. Any attempt of infringement of those rights signifies an effort of appropriation of the economic benefits and by consequences it is a threat to the investment and monopoly of the author¹⁷. In addition to the

¹⁶ Koumantos, G., 1992, Explanatory report on the draft law 2121/93 for “Copyright, Related Rights and Cultural Matters”, p. 1.

¹⁷ Kallinikou, D., 20018, “Copyright promoting arts and economy” , in *Revue Hellenique de droit International*, 1, p.230.

exclusive set of rights, copyright law provides a list of exceptions and limitations in order to better balance the conflicting interests of the public and the author. In other words, there are cases that the use of the work is free meaning that no prior consent from the author nor compensation is needed. Such cases of limitations and exceptions can be categorized into five groups: 1. exceptions pro the freedom of speech by quoting excerpts, 2. exceptions in favor of the dissemination of knowledge with the provisions regarding archiving, education and accessibility for individuals with a disability, 3. exceptions in favor of informing the public about the actuality, 4. exceptions in favor of citizen's right to enjoy art even passively in the cases of public performances and presentation and on special occasions, and lastly 5. exceptions for judicial or administrative purposes¹⁸. As a result, it is clear that Copyright is aiming at the monetization of the creator's intellectual labor by offering for a given period of time a strong and exclusive set of rights to control the use of the work.

In a contrasting way, Trademark law is not designed to promote creativity nor to provide economic incentives to trademark holders to create as no specific level of creativity is required in the making of a trademark. In fact, Trademark law's purpose is solely to individualize the goods of a given enterprise and distinguishes them from the goods of its competitors by informing the customers about the origin (the manufacturer, the trader or even the geographical origin of the product)¹⁹. In strict economic terms, trademarks have two major benefits, it reduces customer search cost and improves product quality because a mark assures the characteristics of the product by communicating the quality standard to the consumer. To put it simple, if there is no mark to distinguish on product or service from the another, companies would not have any reason to invest in quality and consumers would have a limited range of products to choose from with no significant variation whatsoever²⁰. Therefore, Trademark law is serving the public interest in the aspect of protecting consumers from deceptions in the marketplace and developing a reputation system closely linked to the quality of the product²¹.

¹⁸ Christodoulou, K., Δίκαιο Πνευματικής Ιδιοκτησίας, 2018 pp. 149-151.

¹⁹ World Intellectual Property Organization, 1993, Introduction to trademark law and practice : the basic concepts : a WIPO training manual, pp. 9-10.

²⁰ Bone, R. G., 2004, "Enforcement Costs and Trademark Puzzles", in *Virginia Law Review*, 90 (8), pp. 2105-2108, retrieved from <https://ssrn.com/abstract=560462>.

²¹ Heymann, L., 2016, "The Trademark/Copyright Divide", in *SMU Law Review*, 60 (55), p. 65, retrieved from <https://scholar.smu.edu/smulr/vol60/iss1/3>.

As the protection of both regimes differs quite substantially and they are aiming to achieve different objectives, it is a logical conclusion that there would be no danger in enforcing them both concomitantly and any case of overlap between Copyright and Trademark would not cause severe problems in the functioning of the IP system. Yet, there are cases in which both artists and companies misuse both regimes intentionally in order to accomplish a stronger protection for their goods and works. Perfect example of such cases is Banksy who attempted multiple times (without success in EU so far²²) to register several of his works as trademarks claiming that “copyright is for losers”. Another example from the field of entertainment companies is Disney which in the risk of losing copyright protection and letting works enter the public domain has gone forth to register most of the popular characters as trademarks with mickey mouse having already registered 19 different word marks plus multiple trademarks for his animated and live-action appearance²³.

All in all, Copyright and Trademark Law overlap is quite problematic taking into consideration the different terms of protection and the neighboring nature of the subject matters that both bodies of law are aiming to protect.

2.2. Concurrent Protection

2.2.1. Old and New Meeting Points: The Subject Matter Expansion

The overlap between trademark and copyright have extended far and wide as more and more types of subject matters are eligible for protection under both regimes. However, it must be highlighted that this overlap is not something new nor does it derive exclusively from the current developments in copyright and trademark law.

Actually, the openness of the copyright system even in the earliest stages of the Berne Convention (providing protection to every production in the literary, scientific, and artistic domain, whatever may be the mode or form of its expression) in combination with the flexible originality

²² EUIPO Decision on Cancellation No 39 843 C for the “Flower Thrower” and EUIPO Decision on Cancellation No 39 873 C for the “Monkey Sign”. Although, Banksy succeeded in registering as trademarks two other works of his (“Love is in the Air” and “Girl with Balloon”) in Australia.

²³ Carlisle, S., 2014, Mickey’s Headed to the Public Domain! But Will He Go Quietly?, retrieved from <http://copyright.nova.edu/mickey-public-domain/>.

criterion of 'author's own intellectual creation', created an inviting environment for trademarks which in most cases are able to meet the prerequisites for copyright protection²⁴. As a result, simple marks and uninspired logos become works of art and literary works asking for a more enlarged set of rights granted by copyright.

Another factor that needs to be taken into account is the judgment of CJEU in the Infopaq case regarding the copyright protection of “words”. Particularly, the court in paragraph 48 explains that even 11 consecutive words can be regarded as a work eligible for protection if it is an expression of its author's own intellectual creation. The number of words provided by the judgment relates to the facts of the case and it is argued that even shorter phrases can be protected by copyright as choice, sequence and combination of those words is what matters²⁵. This approach creates turbulence as it allows slogans and titles (and in general word marks) to attract copyright protection together with trademarks. On the other side of the ocean, the US regulated this case of overlap by refusing copyright protection for “short phrases, such as names, titles, and slogans, are uncopyrightable because they contain an insufficient amount of authorship ... even if the word or short phrase is novel, distinctive, or lends itself to a play on words”²⁶.

In addition, the developments in the field of trademarks should be considered as factors to this expansion as well. The criterion of distinctiveness, according to Calboli, has become “looser”, from referring to the ability of the sign to identify good and services to the marketplace, now distinctiveness simply means no more that “recognizable by the human senses”²⁷. Examining distinctiveness in this point of view leads to include product designs, functional parts of a product or even the products as such under the umbrella of signs and marks. The flexibility of those requirements is what blurs the lines between the two bodies of law allowing overlaps to happen more often.

²⁴ Senftleben, M., 2020, *The Copyright/Trademark Interface: How the Expansion of Trademark Protection Is Stifling Cultural Creativity*, pp. 26-29,

²⁵ Connor Moran, 2011, “How Much Is Too Much? Copyright Protection of Short Portions of Text in the United States and European Union after Infopaq International A/S v. Danske Dagblades”, in *Wash. J. L. Tech. & Arts*, 247 (6), pp. 254-256, retrieved from <https://digitalcommons.law.uw.edu/wjlta/vol6/iss3/6>.

²⁶ US Copyright Office, Circular 33: Works Not Protected by Copyright, revised: 03/2021.

²⁷ Calboli, I., & Senftleben, M., 2018, *The Protection of Non-Traditional Trademarks: Critical Perspectives*, p. 294, retrieved from <https://books.google.gr/books?id=yGGLDwAAQBAJ>.

The extension of trademark subject matter is also ignited by art. 15(1) of the TRIPS Agreement and art. 3 of the Trademark Directive. Both articles agree that any signs including words, names, designs, letters, numbers, colours, combinations of colours, sounds, the shape of goods or of the packaging, or even combination of all the aforementioned components can be considered as trademarks given that they are distinctive. Also, CJEU in the Apple case²⁸ accepted that the layout of a retail store (represented by a design) is also capable of distinguishing the products or services of one undertaking from those of other undertakings, and thus, it can be registered as a trademark. More recently, the Italian Supreme Court (Corte Suprema di Cassazione) in a dispute between Wycon and Kiko²⁹, two major cosmetic companies, has granted copyright protection in a store layout (by applying CJEU's case law – more specifically the Cofemel decision) besides the fact that trademark protection was denied by EUIPO, opening the way for new meeting points in the copyright/trademark interface³⁰.

Hence, objective overlap between copyright and trademark covers two-dimensional objects such as logos, software interfaces, computer displays etc (multimedia marks and motion marks), three-dimensional objects (shape marks), musical works (in the form of small melodies – sound marks), titles and slogans, and lastly, architectural works (store layouts)³¹. Lastly, given that both criteria of originality and distinctiveness are met, the overlap is possible to expand to even more types of subject matters like works of plastic arts or audiovisual works.

2.2.2. *Who Overrides Who?*

Provided that there is no provision whatsoever regulating the overlap of Trademark with Copyright except the subjective value rule, which will be analyzed in detail in the following chapter, the question is how the problems arising from the overlap are handled?

²⁸ Case C-421/13, Apple Inc. v Deutsches Patent- und Markenamt, 2014, ECLI:EU:C:2014:2070, at para. 20.

²⁹ Italian Supreme Court (Corte Suprema di Cassazione), Wycon SpA v Kiko SpA, decision 780/2020.

³⁰ Rosati, E., 2020, "Italian Supreme Court applies CJEU Cofemel decision to make up store layout", in *Journal of Intellectual Property Law & Practice*, 15 (7), pp. 501–502, retrieved from <https://academic.oup.com/jiplp/article-abstract/15/7/501/5861707?redirectedFrom=fulltext>.

³¹ Ibid. Derclaye, E., 2018, pp.632-633.

With the previously mentioned differences in the ways of protection and in the goals, as well as, with the expansion of subject matters covered by both bodies of law it is noted that the overlap between them can cause three main types of problems. Firstly, there are problems related to the use of copyright in order to expand trademark rights, example when Copyright law is overriding Trademark law in the field of reproduction right because copyright owners have the right to stop the copying of their works and any derivative work, adaptation, or substantially similar work, while trademark owners can stop only the use of identical marks that can mislead customers in the marketplace. Secondly, split ownership problems may arise from the fact that copyright owners can be only the authors of the work or their employers, but trademarks can be owned solely by those who intend to use it in the marketplace and register them first. Lastly, Trademark law can override Copyright in the basis of the term of protection meaning that copyright provides protection for limited period of time and after that works enter the public domain whereas the protection of a mark under Trademark law can last for an indefinite period of time as long as it is renewed every 10 years³². Yet many other problems are caused by this problematic overlap with both regimes overriding each other constantly.

More specifically, it is observed that the overlap can also create tension in relation to the use of copyright for blocking the resale of a product that is also protected by trademark. Such a situation was handled by CJEU in the Dior v Evora case³³ where the court accepted that copyright protection cannot block a reseller from advertising and further commercializing a product that is attached to a trademark if no infringement of the trademark occurred (in this case trademark protection was exhausted) because it would constitute an obstacle to the free movement of goods³⁴. Thus, copyright is outweighed by freedom of movement of goods and services, a principle of trademark protection which can be countered only when the reputation of the trademark is at stake³⁵.

Another point of concern lies in the sphere of exceptions and limitation under trademark law given that the list is closed concerning solely honest business practices leaving outside

³² Mende, C., & Isaac, B., 2012, "When copyright and trademark rights overlap", in *Overlapping intellectual property rights*, ed. Wilkof, N., & Basheer, S., p.144.

³³ Case C-337/95 *Parfums Christian Dior SA and Parfums Christian Dior BV v Evora BV*, 1997, EU:C:1997:517.

³⁴ *Ibid* at para. 50 &54

³⁵ *Ibid* at para. 49 and. Hegg, D. R., 1999, "Parfums Christian Dior Sa & (and) Anor v. Evora BV", in *Denver Journal of International Law & Policy*, 27 (27), pp 682-683, retrieved from <https://digitalcommons.du.edu/djilp>.

exception on freedom of speech such as parodies and criticism³⁶. In that matter, a trademark will eventually rule out copyright when an exception is provided by copyright. Such are the cases of Bibi Fricotin and ESSO in which the French courts found that parodies cannot be prohibited in copyright, but they are not permitted under trademark law due to the dangers they pose to the reputation of mark³⁷. So, it seems that there can be problems left unregulated in regard to limitations and more specifically concerning the clash between the freedom of speech and the free movement of good principles.

Lastly, about the ownership problems that may arise from this overlap priority in time seems to be the best option to resolve it. If there is fragmentation of ownership, then copyright must prevail over trademark as the creation of a work always comes first and the registration as a trademark latter³⁸. Yet it is clear that thing become more complicated when more than two parties are involved as seen the *Griggs v Evans* case³⁹ where an advertising agency (Evans) was commissioned to create a logo for a client (Griggs) and afterwards transferred the copyright of the work to a competitor (Raden). The court to resolve the issue decided to grant them equitable ownership of the copyright to Griggs and Raden.

So, it is apparent that through the differences between the scopes of protection a variety of problems may arise. The result of this challenging overlap is the tipping of the scale either in favor of copyright or as it is more likely in favor of trademark. Thus far, no uniform solution to this concurrent overlap can be found with CJEU attempts focusing mainly in resolving a greater threat to the balance between Copyright and Trademark that of sequential overlap.

³⁶ For a critique in the reform see: Kur, A., 2015, “The EU Trademark Reform Package—(Too) Bold a Step Ahead or Back to Status Quo?”, in *Marq. Intellectual Property L. Rev.*, 15 (19), pp. 32-33, retrieved from <http://scholarship.law.marquette.edu/iplr/vol19/iss1/3>.

³⁷ Derclaye, E., & Leistner, M., 2011, *Intellectual Property Overlaps: A European Perspective*, pp. 135-136.

³⁸ *Ibid*, de Araújo Sousa e Silva, N., 2014, pp. 46-50.

³⁹ *R. Griggs Group Ltd & Ors v Evans & Ors*, 2003, EWHC 2914 (Ch), retrieved from <https://www.casemine.com/judgement/uk/5a8ff7c460d03e7f57eb1f36>.

2.3.Sequential Protection and The Public Domain

2.3.1. Trademarking the Public Domain

First and foremost, it should be noted that subsequent overlap between those two regimes comes both ways. It is possible if trademark protection expires (two possible cases: it is not renewed, or it has not been in use for more than five years) copyright law will still protect the mark for the remaining period. Still the reversed situation is more common. It has become a trend among copyright owners to aim for the eternal protection of a trademark to avoid the expiration date of copyright and therefore deny their works the entrance to the public domain.

The notion of public domain was developed together with copyright itself as it refers to a free use space where the lack of copyright protection allows an open and shared use of intellectual works. There is no positive definition of public domain so it can be seen only in contrast to the protection copyright provides. Therefore, the only works that can enter the public domain are those whose protection has elapsed or if it is still in force they fall into exceptions or limitations⁴⁰. The purpose of such institution as it is convincingly explained by Litman is to return “the raw material of authorship” (meaning the works) back to public in order to be used again for the creation of new works saving in such a manner the dead-end concept of originality⁴¹.

The misuse of trademark law from companies and businesses aiming to expand the protection of their creative works undoubtedly leads to a violation of copyright’s balance by shrinking the public domain. Calboli rings the bell of concern underlining that sequential overlap by forbidding work to become public property is controlling the access of the public to works of cultural importance and consequently poses a threat to the balancing of interest that inherently exists in the Copyright system⁴². As more and more copyrighted works are about to enter the public

⁴⁰ Dusollier, S., 2011, Scoping Study on Copyright and Related Rights and the Public Domain, World Intellectual Property Organisation Publication, 2011, pp. 6-7 &15-17 retrieved from <https://ssrn.com/abstract=2135208>.

⁴¹ Litman, J. D., 1990, "The Public Domain.", in *Emory L. J.*, 39, p.1023, retrieved from <https://repository.law.umich.edu/articles/222/>.

⁴² Calboli, I., 2013, “Trademarking Creative Works: Trends and Negative Effects on the Copyright Equilibrium”, in *EVOLUTION AND EQUILIBRIUM: COPYRIGHT THIS CENTURY*, ed. by Frankel, S., & Gervais, D., 2014, pp. 17-19, retrieved from: <https://ssrn.com/abstract=2329569>.

domain it is envisaged that trademark litigation concerning the overlap is about to escalate yet with no provision to regulate it properly it is left to dissection of the courts to address it⁴³

For reasons of general principle, a work that has fallen into the public domain is free to use for everyone, meaning that it can be registered as a trademark despite the opposition of the former copyright owner. The only limitation to a total “resurrection” of a work lies in the very nature of trademarks that is the registration of a certain graphic representation of the work and not the work as such. However, it is a common practice among trademark proprietors to register multiple marks related to the work, such as in the case of Mickey Mouse, and in that manner creating a strong monopoly by limiting the use of similar signs if there is a risk of confusing the customers⁴⁴.

The case of Mickey Mouse is a perfect example for this type of situation. Despite the fact that Disney is constantly asking for extensions to the copyright protection (an option available in US) it is indisputable that the company is trying to retain its rights on the beloved character through trademark law. Disney attempts to secure its assets do not stop with Mickey, but they extended to multiple other character (like Tarzan, Mulan, Aladdin etc.), all the same, they should be considered as extensions of trademark into fields mostly related to the copyright regime⁴⁵. Mickey's journey to the public domain is not yet a finished story but the last chapter, without any doubt, will have great implications to the sequential interface of trademark and copyright.

To counter the issues of sequential overlap the use of Article 7(1)(f)⁴⁶ of EUTMR is suggested. Senftleben argues that this provision of public order and morality can be enough to stop the registration of public domain artworks. Despite the fact that several national courts and OHIM⁴⁷ as well are in support of a more traditional approach focusing on the offensive character of a sign or the offensiveness of the use of a particular sign, Senftleben’s read of this provision is

⁴³ Calboli, I., 2014, “Overlapping Trademark and Copyright Protection: A Call for Concern and Action”, in *University of Illinois Law Review Slip Opinions*, 25, p. 34. retrieved from <http://www.illinoislawreview.org/wp-content/uploads/2014/10/Calboli.pdf>

⁴⁴ Ibid Dusollier, 2011, pp. 47-51.

⁴⁵ Hennessey, K., 2020, “INTELLECTUAL PROPERTY—MICKEY MOUSE’S INTELLECTUAL PROPERTY ADVENTURE: WHAT DISNEY’S WAR ON COPYRIGHTS HAS TO DO WITH TRADEMARKS AND PATENTS”, in *W. New Eng. L. Rev.*, 25 (42), pp. 34-35, retrieved from <https://digitalcommons.law.wne.edu/lawreview/vol42/iss1/2>.

⁴⁶ And Art. 4(1)(f) of the Trade Mark Directive: “1. The following shall not be registered if registered, shall be liable to be declared invalid: ... (f) trade marks which are contrary to public policy or to accepted principles of morality”

⁴⁷ See *Mona Lisa* case German Federal Patent Court, 25 November 1997, Case 24 W & *Nachtwacht* case Chiever v Benelux-Organisatie voor de Intellectuele Eigendom ECLI:NL:GHDHA:2017:2446

backed by a ruling of the European Free Trade Association Court on an attempt to register work of Gustav Vigeland. So, it believed that a broader understanding of morality and public order that will include fundamental societal values related to the cultural heritage and therefore the public domain, can serve as grounds of refusal for cases of appropriation of a public domain artwork⁴⁸.

However, as we wait to see if such approach will find fertile soil, EUIPO in two recent cases⁴⁹ regarding the registration of Banksy's artworks used article Article 59(1)(b)⁵⁰ of EUTMR as a way to counter the misuse of trademark and the creation of "mutant copyright". Traditionally, CJEU suggests that the bad faith provision should be applied in cases of intentional registration of third-party signs, yet in a series of recent case the court attempts to broaden the field of application including cases with no commercial logic⁵¹ and cases intention to undermine the interests of third parties by "obtaining trademark protection for purposes other than those falling within the functions of a trademark"⁵². Therefore, the use of bad faith provision in order to stop the registration of works that should be protected by copyright such as the artworks of Banksy seems to be a promising strategy to control the sequential overlap between those regimes. In these cases, Banksy's obsession to maintain anonymity along with the lack of intention to use the marks as he never marketed products under the trademarks were deemed enough to fall under the bad faith provision.

Besides the recent advancement regarding those two provisions on morality/public order and bad faith the weight of monitoring and controlling this sequential overlap (and concurrent as well) rests mainly to the substantial value rule.

⁴⁸ Senftleben, M., 2022, "No Trademark Protection for Artworks in the Public Domain – A Practical Guide to the Application of Public Order and Morality as Grounds for Refusal", in GRUR International, 71 (1), pp. 4-5 & 16-17, retrieved from <https://doi.org/10.1093/grurint/ikab107>.

⁴⁹ EUIPO Decision on Cancellation No 39 843 C for the "Flower Thrower", EUIPO Decision on Cancellation No 39 873 C for the "Monkey Sign".

⁵⁰ The Article states: "1. An EU trade mark shall be declared invalid on application to the Office or on the basis of a counterclaim in infringement proceedings: ... (b) where the applicant was acting in bad faith when he filed the application for the trade mark."

⁵¹ Case C-104/18 P, Koton Mağazacılık Tekstil Sanayi ve Ticaret v EUIPO, 2019, ECLI:EU:C:2019:724, at para 61 & 62.

⁵² Case C-371/18, Sky and Others, 2020, ECLI:EU:C:2020:45, at para 51.

2.3.2. *The Substantial Value Rule*

The only legislative attempt to regulate the overlap in EU level can be found in the Art. 7 (1) (e) of the EU Trademark Regulation and Art. 4 (1) (e) of the EU Trademark Directive which both prohibits the registration of a sign that consists exclusively of “shape, or another characteristic, which gives substantial value to the goods” even if it is distinctive. This exclusion with the criterion of substantial value together with the two other provisions (Art. 7 (1) (e) & (ii) of the TMR and Art. 4 (1) (e) (i) & (ii) of the TMD, respectively⁵³) were put in the legal texts in order to control the interface of trademark not only with copyright but with patent law and design law as well.

The opportunity to explain further the notion of substantial value had the CJEU in the *Bang & Olufsen* case⁵⁴. In 2003, Bang & Olufsen A/S filed an application for a Community Trademark to OHIM for a three-dimensional sign, a loudspeaker, but, in 2005, OHIM rejected the application for lack of distinctiveness. As the case brought in the General Court trademark protection was also denied but this time in ground of Art.7(1) (e) (iii) of the TMR with the court explain in paragraph 74 that “a very specific design ... increases the appeal of the product at issue, that is to say, its value” meaning that the aesthetic characteristics of a shape should be considered in order to determine where lies the substantial value of a product. This approach was developed further by CJEU in the *Hauck* case⁵⁵ where in a dispute regarding another three-dimensional sign, this time a children’s chair called ‘Tripp Trapp’, the court held that the concept of substantial value is not limited to artistic or ornamental value of the shape but it should be a general assessment of different criteria such as “the nature of the category of goods concerned its dissimilarity from other shapes in common use on the market concerned, a substantial price difference in relation to similar products, and the development of a promotion strategy which focuses on accentuating the aesthetic characteristics of the product in question”⁵⁶. In this manner, CJEU tries to regulate concurrent and,

⁵³ Both articles states that: “1. The following shall not be registered or, if registered, shall be liable to be declared invalid: ... (e) signs which consist exclusively of: (i) the shape, or another characteristic, which results from the nature of the goods themselves; (ii) the shape, or another characteristic, of goods which is necessary to obtain a technical result; (iii) the shape, or another characteristic, which gives substantial value to the goods.”

⁵⁴ Case T-508/08, *Bang & Olufsen A/S v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, 2011, EU:T:2011:575.

⁵⁵ Case C-205/13, *Hauck GmbH & Co KG v Stokke A/S and Others*, 2014, EU:C:2014:322.

⁵⁶ *Ibid* para. 35.

most importantly, subsequent overlap by not allowing the exclusive and permanent right that derives from a trademark to extend the lifespan of more limited rights such as copyright.

In a more recent case, that of Louboutin's red outer sole, the Grand Chamber did not use the substantial value exclusion and therefore ruled in favor of Christian Louboutin and the registration of this nontraditional trademark. In the interpretation of the notion of substantial value the court argued that the colour of the sole cannot be regarded as consisting "exclusively" of a shape, within the meaning of Article 3(1)(e)(iii) as it does not relate to any specific shape but it should be regarded as a specific part of a product⁵⁷. Another thing that should be underlined from that case is the approach of Advocate General Szpunar in his additional Opinion in which he states that reputation of the mark or of his proprietor is not something that should be taken into account during the assessment of the substantial value of a shape nor it is an indication of attractiveness but it a core element of the competition system that trademark is aiming to maintain⁵⁸.

The substantial value exclusion and this approach of CJEU was heavily criticized and suggested to be abolished as it is deemed arbitrary and hard to apply with a sole purpose to limit the granting of trademark rights in works that other rights are providing protection for a limited period of time⁵⁹. Moreover, according to Kur, this exclusion is considered as bad law making and CJEU's interpretations and focus on incidental characteristics need to be revisited as the assessment of substantial value emphasizes mostly on the aesthetic aspect leaving other more important elements outside such as the performance of the product in the marketplace or the competitive potential of the form at stake⁶⁰. Although, Rosati successfully argues that in absence of a legislative provision to regulate the cumulation nothing else can control the functioning of the trademark

⁵⁷ Case C-163/16, Christian Louboutin and Christian Louboutin Sas v van Haren Schoenen BV, 2017, EU:C:2017:495 at para. 25-27.

⁵⁸ Opinion of Advocate General Szpunar in Case C-163/16, Christian Louboutin and Christian Louboutin Sas v van Haren Schoenen BV, EU:C:2018:64 at para. 72.

⁵⁹ Gielen, C., 2014, "Substantial Value Rule : How it Came into Being and Why it Should be Abolished", in *European Intellectual Property Review*, 36 (3), p.169, retrieved from https://charlesgielen.com/media/1016/substantial_value_eipr.pdf.

⁶⁰ Kur, A., 2011, "Too Pretty to Protect ? Trade Mark Law and the Enigma of Aesthetic Functionality", In *Max Planck Institute for Intellectual Property & Competition Law Research Paper*, 11 (16), pp.21-22, retrieved from <https://ssrn.com/abstract=1935289>.

registration system and the dangers of interference with other IPRs, except of the substantial value rule⁶¹.

In conclusion, with this study of the interface between trademark and copyright it became obvious that the concerns raised to the surface are extremely complicated creating further problems to the balance of the IP system in general. The nature of the originality criterion alongside with the dominant perception of distinctiveness permits and expands the overlap provided that there is no legal text to control it. The problem gets even bigger when the convergence is sequential as trademark's eternal protection creates the so-called "mutant copyright" by limiting public access to works whose protection expired. CJEU with few weapons in its armory can safeguard the public domain using the substantial value rule, yet we strongly believe that it would not be enough, and a more immediate action will be needed in the form of a legislative intervention.

⁶¹ Rosati E. 2020, "The absolute ground for refusal or invalidity in Article 7(1)(e)(iii) EUTMR/4(1)(e)(iii) EUTMD: in search of the exclusion's own substantial value", in *Journal of Intellectual Property Law & Practice*, 15 (2), pp.19-20, retrieved from <https://academic.oup.com/jiplp/article/15/2/103/5650358>.

3. Overlap between Industrial Design and Copyright protection

In the present chapter, the focus of the analysis will be in the interface between Copyright and Design law by firstly examining the key differences between the two regimes and the few legislative attempts to regulate it. At the end, we will emphasize mostly in the CJEU case law as it is forming the status quo not only of their relationship, but of their relationship with patent protection as well.

3.1. Copyright and design interface

3.1.1. The Protection of Designs: a quick outline

As design products occupy a dominant place in the economy the legal protection of such goods has become an issue of critical importance. In fact, the aesthetics and the overall appearance of a product (even if it is a car, a computer or a vase) are a key component for its survival and success in the specific industrial sector. Even though, it is considered that design law in its nature is included under the umbrella of industrial property arguably the entire philosophy of this protection is closely related to the essence of copyright and intellectual property⁶². This exact relationship is what will be discussed in detail in the following chapters.

First and foremost, a design is defined as “the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation”⁶³. It is easily derived by this definition and endless possible combinations of the above-noted features that the field of designs is characterized by a unique diversity. For systematic purposes, the designs can be trisected into structural, pictorial, and decorative designs. The first type, structural designs, refers to the designs which serve mostly functional purposes e.g. tools and machines. The second type includes designs that are neighboring with fine arts, and lastly, decorative designs comprise designs which serve to

⁶² Jougleux, P., 2020, Ευρωπαϊκό Δίκαιο Διανοητικής Ιδιοκτησίας, p. 337.

⁶³ See Art. 3 (1) of the Council Regulation (EC) No 6/2002 on Community designs.

beautify industrial goods for daily use. Although this tripartite division of designs helps to identify the best protection regime (i.e., patents for structural designs, copyright for pictorial, and industrial design law for decorative) these three main types are hard to be distinguished as the lines between them are obscure in practice⁶⁴.

With all that being said, the design of a product in order to be protected by industrial design law needs to be subject to an ex ante control of its characteristics. To be eligible for protection, as stated in articles 4 and 5 of the Design Directive, the design needs to be novel and have individual character. In this framework, “novelty” means that no identical design is already disclosed⁶⁵, and the “individual character” signifies that “the overall impression it (the design) produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public”⁶⁶. Together with those two requirements there is one more typical prerequisite, that of registration to the EUIPO Office. After filling the application, the owners are granted with exclusive rights for five years that can be renewed up to four times (maximum 25 years of protection). Besides the registered designs, unregistered designs are protected as well (under the articles of the Design regulation) for the limited period of three years from the moment of their disclosure to the public and only from infringements enacted in bad faith.

However, due to the very nature of designs, meaning the hybridic combination of utility and beauty, their protection solely via industrial design law seems inadequate in most cases. Legal systems both at national and international level are struggling to find a sufficient solution as single protection may be proven underprotective and the accumulation of two or more can result in overprotection. The overlap between copyright and design law is one of the oldest as it exists in many products ascribable to the fact that there are millions of shades between a work of pure art and a clearly industrial object.

⁶⁴ Weston, C., 1972, “The legal protection of. Industrial designs”, in *Western Australian Law Review*, 10(65), p. 65, retrieved from <http://classic.austlii.edu.au/au/journals/UWALawRw/1971/5.pdf>

⁶⁵ The term of novelty is closely linked with that of specialized circles. In the H. Gautzsch Großhandel GmbH & Co. KG v. Münchener Boulevard Möbel Joseph Duna GmbH case of CJEU was suggested that a specialized circle can include not only creators but also traders, retailers and wholesalers that are involved in the specific sector.

⁶⁶ The evaluation of the individual character criterion is heavily influenced by the notion of the informed user which is not defined in the Directive. According to the CJEU, in the Pepsi Co case, and in paragraphs 53 and 59, it was explained that an informed user is a particularly observant individual with personal experience or knowledge of the sector in question, being someone between an average consumer and a specialist.

To conclude, it needs to be stretched out that in contrast with the sui generis protection of designs, copyright law provides protection to original creations of the mind (including works of applied Arts) automatically without registration. Therefore, the crucial and sole precondition for copyright protection is originality. CJEU's case law dived into this notion multiple time concluding that in order for a work to be original and consequently protected by copyright it should be his authors own intellectual creation i.e., the author should be free to make creative choices and should stamp the work with his personal touch⁶⁷. At first, originality of this level had to do only with photographs, databases, and computer programs⁶⁸ but with the *Infopaq* case the originality criterion was homogenized across EU and extended to all works regardless of form and type⁶⁹. Also, the protection of works under copyright last for the whole lifetime of the author plus 70 years post mortem auctoris⁷⁰, a term of protection significantly larger than the one under design law. So, it is comprehensible that the overlap between those two bodies of law is quite challenging as systems that allow the interface are consequently allowing the override of design law by copyright.

3.1.2. *The legal framework of the Interface and the “Unité de l’art” Theory*

The objective overlap between copyright and design law is without a doubt allowed in the vast majority of different IP systems. At an international level there is no provision that prevents cases of overprotection or regime conflict between those two IP segments. The first ever attempt to regulate the situation of overlap protection for works of applied arts was made in the art. 2 para.7 of the Berne Convention (with the Paris revision of 1971). According to this article the countries of the union have the possibility to choose whether this type of work will be protected by design law, copyright law, or both. The exact same philosophy can be seen in the art 25 and 26 of the TRIPS Agreement which state that industrial designs need to be protected without prescribing a

⁶⁷ For more about the originality criterion see: Stamatoudi, E., 2016, “Η Πρωτοτυπία στο Δίκαιο Πνευματικής Ιδιοκτησίας της Ευρωπαϊκής Ένωσης”, in *ΔΙΜΕΕ*, 1/2016.

⁶⁸ Art. 6 of the 2006/116/EC Directive of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights – Art. 3 (1) of the 96/9/EC Directive of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases – Art. 1 (3) of the 91/250/EEC Council Directive of 14 May 1991 on the legal protection of computer programs.

⁶⁹ Case C-5/08, *Infopaq International A/S v. Danske Dagblades Forening*, 2009, ECLI:EU:C:2009:465, at para. 34 – 37.

⁷⁰ Art. 1 (1) of the Council Directive 93/98/EEC on harmonizing the term of protection of copyright and certain related rights.

specific right. Therefore, the cumulation of those two bodies of law is not regulated in a harmonious manner across the globe. Actually, according to Derclaye, the interface can be categorized into four archetypes: (1) *total cumulation*, when there is an assimilation of the terms of protection between the IP segments (such is the case of France), (2) *full cumulation*, when copyright and design law co-exist without any legislation to prevent regime clashes, (3) *partial cumulation*, when there are some provision in the national law that deal with the interface (classic exemplar the UK), and (4) *demarcation*, when no cumulation is allowed signifying that designs need to be protected only by design law or only by copyright⁷¹.

Looking at the European Union, the interface, in spite of the fact that it is not handled in a homogeneous way either, is definitely allowed. In accordance with Art. 17 of the Design Directive and Art. 96 par. 2 of the Design Regulation⁷² industrial designs (and community designs) are also “eligible for protection under the law of copyright of Member States”. By consequence, it is left to the discretion of each member state to further regulate the overlap in order to stay faithful to its traditions.

This position that is followed at an international level of allowing the intersection of design law and copyright is heavily influenced by the “Unité de l’art” theory. This theory was developed and established in France at the beginning of 20th century and step by step managed to secure the dominant position across Europe. According to the theory, copyright law should provide protection to all works which are products of creativity irrespective of the shape and form. As creation is always considered as Art, there is no place for distinction between Pure Art and Industrial Art so all works need to be protected by the same law. The very essence of the rule of the unity of art lies in view of the fact that the exclusive right of the author originates first and foremost from his own creation and not from a subsequent administrative provision or action⁷³. However, the theory is

⁷¹ Derclaye, E., 2018, The Copyright/Design Interface, Past, Present and Future, pp 5-6, retrieved from https://books.google.gr/books/about/The_Copyright_Design_Interface.html?id=A9tPDwAAQBAJ&printsec=frontcover&source=kp_read_button&hl=en&redir_esc=y#v=onepage&q&f=false

⁷² Both read as follows: “A design protected by a design right registered in or in respect of a Member State in accordance with this Directive shall also be eligible for protection under the law of copyright of that State as from the date on which the design was created or fixed in any form. The extent to which, and the conditions under which, such a protection is conferred, including the level of originality required, shall be determined by each Member State.”

⁷³ Mott, K. M., 1964, "An Analysis of the Unity of Art Concept in European Legal Systems", in *Bulletin of the Copyright Society of the U.S.A.*, 11 (4), pp. 246-250, retrieved from <https://heinonline.org/HOL/P?h=hein.journals/jocosol1&i=266>.

heavily criticized as in its purest form would lead industrial property law to fall into disuse due to the superior terms of protection of copyright. It is hardly necessary to say that in this highly competitive market (traditional and digital) providing protection for more than 70 years to structural designs and products like refrigerators or cars seems to be a risky solution. There are other approaches that try to resolve the same issue such as the theory of "duality of art" or the principle of "the aesthetic impression", but none of them found fertile grounds especially in EU⁷⁴.

3.2.CJEU's Approach to the Interface

3.2.1. The first steps towards Industrial Copyright

In the fall of 2006, Flos SpA , an Italian company manufacturing lighting designs, brought proceedings before the Milan district court against a furniture producer and retailer, Semeraro Casa e Famiglia SpA, claiming copyright infringement of the "Acro" lamp, a statement piece created by Achille and Pier Giacomo Castiglioni for Flos⁷⁵, on the grounds that Semeraro had imported from China and marketed in Italy a lamp with aesthetically similar features called "Fluida". At that time, the Arco lamp had already entered the public domain as it was created in 1962, and it was never registered as a design.

The Tribunale di Milano decided to stay the proceedings and to refer to the CJEU for a preliminary ruling regarding the interpretation of Article 17 of Directive on the legal protection of designs. According to CJEU copyright protection cannot be denied to designs that had been registered and then fallen to the public domain before the date of entry in force of the Directive if the designs meet all the requirements for copyright protection, but unregistered designs, that had fallen to the public domain before the date of entry in force of the Directive (such as the Arco lamp), do not fall within the scope of Art. 17. In the case of unregistered designs CJEU underlined

⁷⁴ Finniss, G., 1964, "The Theory of Unity of Art and the Protection of Designs and Models in French Law", in *Journal of the Patent Office Society*, 46 (9), pp. 624-641, retrieved from <https://heinonline.org/HOL/P?h=hein.journals/jpatos46&i=>.

⁷⁵ More information about the specific work: Italian ways, 2017, THE CASTIGLIONI BROTHERS' ARCO LAMP, A NEW CONCEPT OF LIGHT, available at <https://www.italianways.com/the-castiglioni-brothers-arco-lamp-a-new-concept-of-light/>.

in paragraph 34 that the way for copyright protection is open under the InfoSoc Directive⁷⁶. CJEU's judgment was in complete accordance with General Advocate's, Yves Bot, opinion as he argued that the aim of the Directive is to "eliminate disparities" between member states in the field of copyright and design overlap⁷⁷.

At last, in September 2012, the Court of Milan came to the decision that all industrial designs can be protected as copyrighted works regardless of whether they have been previously registered as industrial designs and ruled in favor of Flos granting copyright protection to the Acro lamp⁷⁸.

CJEU's judgment in Flos was heavily criticized due to a great number of flaws in its reasoning. According to Bently, the Court's attention was mainly on harmonization as a means to an end, misinterpreting core parts of legislation and supporting its reasoning in the travaux of the Directive. As a result, it comes to the conclusion that the freedom of each Member State to decide the prerequisites of copyright protection for designs, a freedom that derives from Art. 17 of the Design Directive, is clearly countered by the Information Society Directive and designs in order to be eligible for copyright protection needs to be their author's own intellectual creation⁷⁹.

Despite the concerns that were raised, in 2017, CJEU with the infamous Cofemel v G-Star Raw case seems to keep the same position as in Flos. In particular, in 2013 the fashion company G-Star accused another fashion label Cofemel of copyright infringement for multiple products (ARC and ROWDY jeans and t-shirt designs). As the court of first instance and court of appeal agreed that the products were original intellectual creations and therefore eligible for copyright protection, the Portuguese Supreme Court decided to make a referral to CJEU for a preliminary

⁷⁶ Case C-168/09, Flos SpA v Semeraro Casa e Famiglia SpA, 2011, ECLI:EU:C:2011:29, at para. 34: "...it is conceivable that copyright protection for works which may be unregistered designs could arise under other directives concerning copyright, in particular Directive 2001/29, if the conditions for that directive's application are met..."

⁷⁷ AG opinion para 50: "One of the main contributions of Directive 98/71 is to lay down the principle of the cumulation of specific registered design protection with copyright protection, in order to eliminate disparities in the laws of the Member States in this field. In its preparatory work, the Commission stated that the cumulative application of design protection is mandatory, and that consequently national legislation needs to be amended where it provides that copyright protection cannot, or can only under certain conditions, be cumulated with protection under specific design protection law."

⁷⁸ The judgment of this case (R.G. 74660/06) is available online here: http://www.corteappellomilano.it/ArchivioPubblico/B_241.pdf

⁷⁹ Bently, L. A. F., 2012, "The Return of Industrial Copyright?", in *European Intellectual Property Review*, 10, pp 15-17 & 25-31, retrieved from: <https://ssrn.com/abstract=2122379>.

ruling asking if the interpretation of Article 2(a) of Directive 2001/29 preclude national legislation providing copyright protection to designs based on any other criteria apart from originality.

The Court underlined that copyright protection for works of applied art must be evaluated solely in a manner conforming with the originality criterion as it is formed in *Infopaq*, *Football Dataco*, *Painer* cases⁸⁰. Additionally, there is no mention in the reasoning of the judgment of Art. 17 of the Design Directive and Art. 96 par. 2 of the Design Regulation and their relationship with the InfoSoc Directive. Although, Advocate General Szpunar in his opinion claimed that once harmonization on the field of originality has been achieved, the margin of discretion given to the Member States by both of these articles is limited by their obligation under InfoSoc Directive⁸¹.

So, after the *Cofemele* decision works of applied arts must be protected by copyright and strictly in accordance with the *Infopaq* criteria of originality creating a uniformed approach across EU for the overlap of copyright and design law only in relation to the specific kind of works (decorative and pictorial designs). As *Cofemele* opens the door for copyright protection to everyday products and fashion goods, the only viable option to limit the overlap is the reduction of copyright protection in the field of the harmonized criterion of originality⁸². Additionally, as suggested by Kur, in order to control the effects of the overlap between copyright and design law, at this point, the focus must be on the catalog of limitation of each body of law, meaning that designs made to be displayed permanently in public places or used for parody purposes should be protected only by design law as a consequence of the list of limitation and exception provided in Copyright⁸³.

It is certain that the interface of design law and copyright is encouraged by CJEU who in the process of harmonization is taking great steps towards a total cumulation between those two regimes. The only thing that was left to be demystified after the *Cofemele* decision was only the overlap in regard to structural designs.

⁸⁰ Case C-683/17, *Cofemel v G-Star Raw*, 2019, ECLI:EU:C:2019:721, at para. 29-31.

⁸¹ C-683/17, *Cofemel v G-Star*, Opinion of Advocate General Szpunar, ECLI:EU:C:2019:363, at para. 38.

⁸² Schovsbo, J., 2020, Copyright and Design Law: What Is Left after All and *Cofemel*? – Or: Design Law in a ‘Double Whammy’, p. 14, retrieved from <https://ssrn.com/abstract=3519156>.

⁸³ Kur, A., 2019, “Unité De L’Art Is Here to Stay - *Cofemel* and Its Consequences”, in *Max Planck Institute for Innovation & Competition Research Paper*, 19 (16), pp. 18-19 retrieved from <https://ssrn.com/abstract=3500845>.

3.2.2. *Designs, Patents, and Copyright: the Story of Structural Designs*

Concerning the protection of the third category of designs, that of structural designs, which mostly includes tools, part of machinery and generally highly functional products, it needs to be clarified how design law and patent law are linked together with copyright creating situations of triple overlap. In a series of cases CJEU is attempting to shed some light on extremely complex matters.

In 2018, the court in a case about centric pins made by a manufacturing company named Doceram⁸⁴ had the opportunity to demystify the exclusion of technical function provided by Article 8 (1) of the CDR⁸⁵ and more specifically to determine how a feature is “solely dictated by its technical function”. The *raison d'être* of this provision rests in the limitation of overlap between design and patent law yet the exact notion of this exclusion was not clarified nor harmonized across Member States⁸⁶. In the Doceram case, the court located the central criterion of the evaluation to the perception of the ‘objective observer’ further explaining that only objective circumstances should be considered such as the design itself, the reasons which dictated the choice of features of appearance or other existing designs which fulfill the same technical function⁸⁷. Much like the functionality provision in trademark law⁸⁸, CJEU is attempting to control the convergence between designs and patents by examining the features of design objectively leaving the intention of the designer out of the assessment⁸⁹.

More recently, in 2020, on the subject of a folding bicycle with the ability to have three different positions (the Brompton bicycle-), CJEU in its judgment accepted that objects, whose

⁸⁴ Case C-395/16, DOCERAM GmbH v. CeramTec GmbH, 2018, ECLI:EU:C:2018:172.

⁸⁵ According to the article: “A Community design shall not subsist in features of appearance of a product which are solely dictated by its technical function.”

⁸⁶ Ibid Derclaye, E., 2017 p.645

⁸⁷ Ibid Case C-395/16 at para. 31

⁸⁸ Art. 3(1)(e)(ii) of the Directive 2008/95 and Art.7(1)(e)(ii) of the Regulation No. 40/94 “1. The following shall not be registered or, if registered, shall be liable to be declared invalid: ... (e) signs which consist exclusively of: ... (ii) the shape of goods which is necessary to obtain a technical result.”

⁸⁹ Suthersanen, U. 2019, “Excluding Designs (and Shape Marks): Where Is the EU Court of Justice Going?”, in *International Review of Intellectual Property and Competition Law*, 50(2), p. 159, retrieved from <https://doi.org/10.1007/S40319-019-00785-1>

shape is partially determined by technical considerations, can be protected by copyright only if they satisfy the requirements of originality meaning that the author “expressed his creative ability in an original manner by making free and creative choices in such a way that that shape reflects his personality”⁹⁰. Even though, technical features can limit copyright protection if the shape of the work is solely dictated by them, it seems CJEU is viewing functionality under the prism of originality suggesting that a patent can be original and therefore qualified for copyright protection⁹¹.

By combining the outcomes of those Cases together with the decision on the Cofemele Case it is obvious that all designs, even if they are not decorative or pictorial, can always attract copyright protection given that they are original. The originality criterion does not differ from the one that is applied to all work. The fact that structural designs, despite their functional aspect on their shape can be original, is opening the way for the cumulation of design, patent, and copyright protection to the same subject matter without any concern whatsoever to the problems that may arise. In addition, the flexibility of the originality criterion makes it easier for patent proprietors and designers to expand their rights to a product that otherwise would have escaped their monopoly.

The whole attitude of CJEU in the interface is criticized immensely due to the way it treats design protection. It is stretched out that in order to achieve a better interface between design law and copyright a holistic approach is needed. CJEU not only promotes copyright with the position it follows, but it also allows it to completely override EU design system rendering it useless⁹². The domination of the originality criterion after Cofemele over higher levels of originality of some Member States is simply expanding the areas of overlap without even attempting to essentially regulate it⁹³.

⁹⁰ Case C-833/18, *Brompton Bicycle Ltd v Chedech/Get2Get*, 2020, ECLI:EU:C:2020:461, at para. 38

⁹¹ Ilanah, S., 2020, “The CJEU Decision in *Brompton Bicycle* (Case C-833/18): An Original Take on Technical Functionality?”, in *European Intellectual Property Review*, pp. 766-767, retrieved from <https://ssrn.com/abstract=3741645>.

⁹² Derclaye, E., 2018, “A Model Copyright/Design Interface: Not an Impossible and Undesirable Task?” In *The Copyright/Design Interface, Past, Present and Future*, ed. by Derclaye E., p.452.

⁹³ Derclaye, E., 2020, “Doceram, Cofemel and Brompton: How does the Current and Future CJEU Case Law Affect Digital Designs?”, in *Il design, l’innovazione tecnologica e digitale, Un dialogo interdisciplinare per un ripensamento delle tutele - Design, technological and digital innovation. Interdisciplinary proposals for reshaping legal protections*, ed. by B. Pasa, 2020, p. 17 retrieved from <https://ssrn.com/abstract=3507802>.

To conclude, throughout the analysis of the copyright/design interface it is clear that despite the differences in the scope and terms of protection the overlap is not only inevitable due to the nature of the subject matter but also it is openly allowed. CJEU's jurisprudence in the issue seems to adopt fully the "Unité de l'art" theory making moves in every chance to harmonize further the landscape. This insatiable need for harmonization we believe is the reason that CJEU is promoting the originality criterion making it easier for all types of work to attract copyright protection without hearing the concerns on the total cumulation of those two regimes.

Conclusions

It is difficult to draw concrete conclusions from the sketchy picture shown above, overlapping right is an extremely complex issue, especially if we take into account other IP regimes apart from those we already mentioned in this paper. Yet, we can conclude the analysis stating the following:

Firstly, regarding the interface between Trademark Law with Copyright we need to clarify that it should not be considered per se as bad since the two regimes serve completely different purposes. Although, with the subject matter expansion and the flexibility of originality the inherent balance of interests in the IP system is threatened, misusing trademark protection is leading to an unjust undermining of the public domain. This is the problem that needs more attention from the EU legislation as CJEU's options are limited and not as effective as the situation needs them to be.

Secondly, about the overlap of Copyright with Design Law it is safe to say that the "Unité de l'art" theory has the dominant position in the EU framework. From *Flos* to *Cofemele* to *Doceram* and *Brompton*, CJEU is slowly, but steadily, putting pieces to the puzzle of total cumulation of those two bodies of law by promoting copyright protection over the sui generis design rights. Basically, as more and more designs are eligible for copyright protection, the need of a separate right with significantly smaller term of protection is put into question.

Lastly, we can argue that the nature of overlapping rights in general should not be regarded solely as problematic because of the multiple intangible assets embodied in the same subject matter. The extent of the overlap, on the other hand, is what raises concerns about the stability of the IP structure. By leaving the interfaces completely unregulated situations of exploitation and misuse will only worsen, so a legislative attempt to control the extent of overlap and minimize the threat of overprotection seems to be the only viable way for a subject matter to attract multiple IPRs.

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