

## **THE COMPARATIVE ANALYSIS OF DESIGN RIGHT AND COPYRIGHT**

**ABSTRACT:** A large variety of market relations are regulated by intellectual property rights, which represent legitimate monopolies correcting certain inefficiencies of a profit distribution on the market. In the following paper, the author examines the relations between design right and copyright using the comparative method. Firstly the author will analyze both resemblances and differences between these two intellectual property rights. The resemblance in protection object in particular makes available the cumulation of protected rights, in other words, the possibility of protecting industrial design by copyright, which will also be analyzed in the paper. Such work aims to comprehend the hybrid nature of design right as a right usually bypassed in a legal theory, and which is, in the author's opinion, especially interesting.

**Keywords:** *design right, copyright, comparison, cumulation of protection, intellectual property law*

### **1. Introduction**

In continental legal tradition, it is customary to make a distinction between copyright and industrial property rights. The common feature of both copyright and industrial property rights is that they represent legitimate monopolies that are approved by the state in order to promote research and development of art and applied science, which are essential for economic development

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(Ognjanović & Cvetković, 2007). On the other hand, there are certain differences between them. The main difference is the simple fact that copyright is regulating relations concerning literature and art, while industrial property rights perform protection of industrial and technical creations (Raičević, Spasić & Glomazić, 2010). However, it is possible to make an examination on the relation between copyright and each of industrial property rights. In particular copyright and design right are in closer relation than the other rights.

Industrial design has immense importance in the market since it has been empirically proven that the good design of a product makes product more marketable. Industrial design as a specific market phenomenon, includes both esthetics and functionality, performs a great variety of roles on the market, and brings together market, art, and technique. Design right, by which industrial design is protected, therefore includes the elements of patent, copyright, and trademark. If we are going to explain the nature of this right in detail, we will have to analyze its relation to copyright. After such analysis, we will be able to examine the potential cumulation of protection of industrial design by design law, and copyright law, as well as conditions for such cumulation.

## **2. The resemblances and differences between Design Right and Copyright**

### ***2.1. The resemblances***

Design right because of the multifunctionality of its protection object, as we mentioned earlier, includes elements of other intellectual property rights, primarily patent and copyright. Therefore, when we analyze resemblances between copyright and design right, it is more appropriate to say that we are in fact analyzing elements of copyright that are contained in design right.

The elementary resemblance of these two rights is in their protection object. The industrial design of a product in European Union, Frech (Laygo, 2018), and Serbian law is considered to be a work of authorship. However, in this regard industrial design is specific work of authorship of a useful product that is placed on the market. In order to make such product more successful, it is necessary to make it prettier, more esthetically attractive. Therefore the creator of a design, for which the legal term according to the article 5 paragraph 2 Serbian Law on the legal protection of industrial design (Law on the legal protection of industrial designs, 2009) is also author, uses his creative abilities to insert certain esthetical quality to the useful product so it becomes more marketable.

As we can see, esthetical creations that are protected by design right and copyright are very similar in their nature. Their resemblances are implied by the lack of functionality that is characteristic for both of them. However, the complete lack of functionality is primarily characteristic of work of authorship, and yet the industrial design has to be functional to some degree. The industrial design represents a symbiosis of esthetics and functionality of the product, especially when we consider modern industrial designs, in which functionality of the product is particularly emphasized. Hence the lack of functionality in industrial design has to be accepted with reserve, but design cannot be entirely determined by product function (Law on the legal protection of industrial design, 2009). Since industrial design always includes some degree of functionality, it was not possible in the earlier USA law to protect industrial design with copyright (Denicola, 1983).

A certain similarity between copyright and design right is also expressed in protection prerequisites. Namely, the main condition for copyright protection is the originality of the work of authorship (Krstinić & Vasiljković, 2019). Originality means that a work of authorship has to be unique, peculiar, and it has to represent the expression of the author's personality (Popesku, 2016). Since the personality of the author is unique, his work of authorship, which is an expression of his personality, also has to be unique (Miladinovic, 2009). On the other hand, the main condition for design protection is that design has individual character, which means that the overall impression that design produces on the informed user differs from the overall impression produced on such a user by any other known design.<sup>1</sup> Hence the main condition for the protection of both industrial design and work of authorship is that these protection objects differ from the other designs and works of authorship. However, it is not required that these protection objects reach any particular level of originality or individual character, respectively.<sup>2</sup> In that manner, it is avoided that lawyers evaluate artistic and other values of the protection object (Laygo, 2018), which usually depends on personal opinion, and it changes over time and place.

The other resemblances between design right and copyright are implied by their common nature. Both of these rights are subjective, exclusive rights, that are limited by time and country that recognizes them, and they

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<sup>1</sup> According to article 1 paragraph 3 of Law on the legal protection of industrial designs, an informed user is a person who regularly encounters products that an industrial design is applied to.

<sup>2</sup> At this point USA law differs from the law of European states since it is required for industrial design, similar to the patent law, to have some degree of ingenuity – non-obviousness.

both represent legitimate temporary monopolies that allow the person who invested in the new creations to acquire the biggest profit from those creations (Markovic, 2014). However, other than these common attributes of all intellectual property rights, almost everything else is considered to be difference.

## 2.2. *The differences*

The differences between design right and copyright occur mostly because of industrial design special attributes that differentiate it from the work of authorship, as we have mentioned earlier. Those special attributes derive from the fact that the author of the design is always limited by the function of the designed object, unlike the author of the work of authorship. Hence it is not possible that two authors create the same work of authorship because it is expression of the author's personality which is unique. As two identical persons do not exist, there are no two identical works of authorship, although the subjects may be the same. However, since the author of the design is limited by many factors (product size, function, etc.), it is not impossible that two design authors working separately create two identical industrial designs. This is especially the case with simpler objects.

This situation has many similarities with the situation of the inventors in patent law. Therefore it was necessary to combine copyright elements of design right with certain elements of patent, mainly in priority of protection aspect. And just like that design right became hybrid right with both copyright and patent elements. The priority of protection has almost no significance for copyright, since, as we said before, there cannot be two identical works of authorship created by two separated authors. This difference implies other differences as well. One of the preconditions for protecting a design with design right is novelty, which is characteristic of patent law since it is necessary to protect only the right of the design author, who filed the application first (Miladinovic, 2009). Furthermore introducing novelty as a condition for design right protection made differences in the right's creation. The copyright protection is recognized at the very moment of its creation without registration procedure. For design right to be recognized, however, it is necessary to enter and conduct the registration proceeding.<sup>3</sup> Design right is recognized to the author who filed the application first. Moreover, the original holder of the

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<sup>3</sup> It is worth mentioning that in EU law and laws of certain countries in Western Europe, there is a so-called "unregistered design right" with protection limited up to 3 years from the creation of the design.

copyright can only be an individual person – the author of the work. Original design holder can be either a corporate or an individual person, since the author of the design can transfer the right to file the application to any person. This is another feature of design right that is similar to the patent.

Certain differences also occur in the second design right conditions for protection – individual character. Namely originality as a condition for copyright protection only requires that work of authorship represents expression of author's personality, and therefore to be different from any other work in an objective manner, without any standards. Differently individual character is evaluated using the informed consumer standard. In other words design right protection depends on informed consumer attention standard. One more time we can see the hybrid nature of design right since dependence on standards in providing the conditions for protection is a feature of trademark law.

There are also differences in rights that are conferred to the copyright holder and design right holder. Copyright in continental law comprises many personal and property rights (Markovic, 2020), which are necessary in order to provide adequate protection for many different works of authorship -books, sculptures, movies, etc. (Jović, 2019). Contrastingly design right confers one personal right – the right of the author to be cited in application and register as the author of the design, and one property right – the right to use the protected design which includes in particular, 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 (Law on the legal protection of industrial design, 2009), as well as right to stand up to anyone who performs these right without his permission. Moreover copyright includes in itself both exclusive and relative rights. In contrast, both rights that design right confers are exclusive in their character.

The most important difference between design right and copyright concerns the scope of protection. Both of these rights include protection from so-called “slavish copying” – complete copying of protection object in all of its elements. This is not disputed. However, differences occur when we examine the furthermost boundaries of the protection scope. Copyright is usually considered to have a protection scope that is more limited than industrial property rights (Markovic, 2014). The reason for this is the fact that work of authorship represents the qualified form of communication, and communication must not be monopolized in a broader scope. Unlike copyright, for the industrial property rights, especially patent, but also the design right which is similar to the patent in this aspect, it is necessary that their protection object transfers as soon as possible to the public domain, so economic development can be

preserved. Therefore in order to make their protection effective, these rights have a broader scope of protection, but in shorter-term (Markovic, 2014).

A standard by which we determine the protection scope of copyright is the originality of the work of authorship. Namely, the protection scope of copyright comprehends all works of authorship that include the original elements of the copyrighted work if they could be recognized. Therefore derivative works – adaptations depend on the work of authorship from which they acquire original elements. The limit of the protection scope in case of derivative works in USA law is set at “reuse that alters the fundamental message of primary work” (Laygo, 2018, p. 1340). On the other hand, laws of the European countries provide “the dependency principle”, developed from the natural law theory of credit (Markovic, 2014). According to this, the authors of subsequent works can create works inspired by prior works, and use for creative purposes the original elements of prior works, but they cannot use them economically or publish them, without the consent of the author of prior work (Laygo, 2018). Contrary to this, design right protection scope provides that any person other than the author of the design must not use the protected industrial design as well as its imitation – design similar to the protected design (Laygo, 2018). This protection scope corresponds to the patent protection scope. The test of similarity in the USA, as well as former German law was conducted using so-called “mosaic examination”, which is usually performed in patent law. This test consists of the examination of similarities of two designs in detail, analyzing all elements of the design separately (Vlaskovic, 2012), especially those that are considered to be novel from the point of view of an average consumer (Laygo, 2018). However, present-day European Union law and laws of its member states provide that similarity between two designs is determined by the difference between them in the overall impression that they produce on informed consumer (Regulation no. 6/2002). In such test of similarity, the degree of freedom that the author had in developing his design will be taken into consideration (Regulation no. 6/2002), which means that even the slightest differences would count, if the degree of freedom of creation was lower (Vlaskovic, 2012). The author of the derivative design, unlike the author of the adaptation, is not dependent on prior design author consent if compared designs are different enough considering the standards that we have mentioned. In design law the dependency principle is not used (Laygo, 2018).

At this point, we would only mention that the copyright protection term is significantly longer (during the lifetime of the author and 70 years after his death) than design right protection term (maximum length of 25 years from the day application is filed, but right has to be extended every five years), as

well as there is a greater number of limitations for copyright than design right. This is determined by the social and economical function of these rights protection objects, and as well by the difference in the scope of protection, which we have already explained.

### **3. The conditions for cumulation of Design Right and Copyright Protection**

We have mentioned earlier that the only condition for copyright protection of esthetic creation is the originality of that creation. Since industrial design represents esthetical creation that can be original, it can be protected by both design right and copyright. This is what we call cumulation of design right and copyright protection (Miladinovic, 2009). If we conduct a comparative analysis, laws of different countries provide different conditions for cumulation of design right and copyright protection.

On the one side of the table, we have USA law, which firstly completely denied the possibility of copyright protection for industrial design.<sup>4</sup> However, after the Supreme Court judgment *Mazer v. Stein* in 1954, there is an overturn in this matter. The Supreme Court has allowed copyright protection for the design of the lamp which was shaped like a sculpture. The Court's reasoning was that there is no reason to deny copyright protection for sculpture, which is a work of authorship *par excellence*, only because it is applied to a lamp. Trying to fit into the Supreme Court's reasoning, the US Congress passed new Copyright Act of 1976 in which the protection of design of useful articles by copyright was allowed if it "incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article" (Setliff, 2006, p. 55). This was the introduction of so-called separability doctrine in American law, which meaning is unclear in both legal theory and practice. Although word design was explicitly used in the Copyright Act, not all the theorists have the opinion that copyright protection was allowed for industrial design, but for works of applied art. The argument for this opinion is that industrial design in its nature

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<sup>4</sup> In the USA there is no *sui genris* industrial design protection with design right. Industrial design is protected by patent law as a specific *design patent*. The main consequence of such protection is the fact that conditions for patent protection are applied to industrial design, and that is unfit for industrial design. This is especially the case with the *non-obviousness* condition which most of the designs cannot meet, so it represents a major obstacle for the protection of a large number of industrial designs. Since industrial design was considered as an invention, the possibility of protecting it with copyright was denied at first.

is completely different from the art since it exists only to camouflage the ugliness of industrial product and by that attract consumer to buy it. From this point of view, separability doctrine is an instrument for dividing applied art, for which copyright protection is allowed, from industrial design which must not be protected with copyright (Denicola, 1983). Another opinion on this subject is completely different from the previous. In this opinion, in *Mazer*, the Supreme Court allowed protection for industrial designs. The purpose of providing the separability doctrine was to create an additional condition for industrial design, so it could be protected by copyright. It is considered that there is no reason for strictly dividing industrial design from applied art since there are no clear limits between these works of authorship and at that point, previous opinion is criticized (Setliff, 2006). Separability doctrine creates immense trouble in practice, considering the fact that it still hasn't got clear shape. Firstly, there is a problem of whether separability means physical or conceptual separability. Is it necessary that part of the article that design is applied to can be physically separated from the functional part of the article, or it is enough that we can use design separately from the article that it is applied to? Also, there is an opinion that design is separable if it can be used economically apart from the functional part of the useful article, but it is considered that economic factor is not customary for the distinction of art. Finally, there is an opinion that separability doctrine should be subject to alternative design test, which means that design could be protected if there are other designs that can be used by competition (Setliff, 2006). Whatever the case may be, the unclear nature of the separability doctrine implies legal uncertainty, since there is no unanimous court reasoning on this matter. It is not unusual that courts measure the artistic value of industrial design in order to perform a separability test, which goes against the very nature of copyright protection and *ratio legis* of the Copyright Act of 1976 (Setliff, 2006).

Such a solution in the USA law system is dictated by long-standing legislation policy that denies any form of protection for industrial design. Design patent protection is inadequate because of non-obviousness condition, and as we can see separability doctrine almost completely precludes copyright protection for industrial design. Also, there is no *sui generis* design right in this system, and for trademark protection (more specifically trade dress protection) industrial design has to acquire secondary meaning, which is not usual. Therefore USA law persistently refuses to give any effective form of protection for industrial design (Fryer, 1988). The reason such poor protection level for the industrial design comes from the US economy. Namely, the USA does not have a strong fashion or automobile industry like strong European

economies, but it has a strong car spare part industry, which would be dependent on European producers if stronger industrial design protection is provided. In that way, American Congress protects its automobile spare part industry at the expense of American design industry (Saidman & Esquerra, 2008).

On the other side, European countries are divided on the premissability of cumulation of design right and copyright protection for industrial design. French theorists, legislation, and practice have developed the theory of “The unity of art” (fr. *l’unité de l’art*), under which cumulation of protection is unconditionally allowed. At this point of view, every industrial design is a work of authorship – applied art, and therefore there is no reason to deny copyright protection for industrial design or to provide additional conditions for it, with the exception of functionality test which is also mandatory for industrial design. This protection is classified as full cumulative protection (Laygo, 2018). On the other hand, Italian law forbids cumulation in principle unless the industrial design has an artistic value that is independent of the useful article that is applied on. This concept is very similar to the American separability doctrine, and it led to courts measuring artistic value of the work, casuistry, and legal insecurity, which was also the case in the USA. This system is evaluated as non-cummulative protection (Laygo, 2018). German law is also on this side of the reasoning since in this country cumulation is allowed only if design manifests exceptional creativity. There is a difference between pure art, applied art in industry, and utilitarian works which represent routine work of the craftsman. Theory classifies this system as partially cumulative protection (Laygo, 2018).

The law of the European Union in general allows cumulation of protection. It even made cumulation mandatory since under the Directive 98/71/EC on the legal protection of industrial design the member states have obligation to provide it in their laws. However, harmonization is not complete, because the Directive in article 17 does not provide conditions under which cumulation will be allowed, leaving that question to the member states’ national laws. It is provided that member states will allow the cumulative protection of industrial design by copyright from the day application for design was filed, but eventual conditions for cumulation will be provided by the member states (Directive no. 98/71/EC). The same solution was adopted in article 96 paragraph 2 of Regulation 6/2002 on community design (Regulation no. 6/2002). As we can see, European Union could not overcome the differences between member states in the matter of cumulation, but made cumulation mandatory in order to ensure strong protection for industrial design which has a key role in fashion and automobile industries, that are essential for the European

economy. However, we have to point out that this solution is not completely logical for community design. Community design is a specific supranational design right that is registered by EU institutions, and it is effective on the unitary EU market. Although it is protected by courts of each member state, it is unnatural to let each member state shape the protection of this right differently using different conditions for cumulation. We can say that this solution was more political than legal, but it severely damaged the protection of industrial design and it will almost certainly lead to different court decisions and legal insecurity. The provision of mentioned EU Directive and Regulation is also adopted in article 46 of Serbian Law on the legal protection of industrial design, and since there are no additional conditions for copyright protection for industrial design (Law on the legal protection of industrial design, 2009) we believe that Serbian law adopts the full cumulation system similar to the French model.

Whether or not cumulation is adopted and under which conditions, however, it is necessary to examine whether or not is adequate to protect industrial design with copyright. Without evaluating the possible artistic merit of the design, which is always subjective and relative, as a common conclusion, we can say that lifecycle of industrial design is rather a short one. Designs created in the fashion industry and for consumer goods are often used only for one or two seasons. Designs for automobiles are usually changed in five to ten years period. Therefore there are opinions in theory that even 25-year protection term is rather too long and does not match the requirements for most industrial designs, since, as we can see, they are not used for the full period of protection (Barre're & Delabruye're, 2011). Therefore copyright protection that lasts even longer would not be particularly effective. On the contrary, extensive design protection term could slow down design development, since designs are usually derived from the earlier works, which are used as inspiration. Consequently, copyright protection for industrial design would almost certainly become a simple economically unjustified monopoly of the right holder (Laygo, 2018). The design protection, in that case, would fail the very cause it was provided for in the first place. On the other hand, there are almost no strong logical or theoretical reasons to deny copyright protection for industrial design. The industrial design is, as we saw, a work of authorship without doubt. The arguments against this are rather weak. Therefore, although copyright protection for industrial design is somewhat problematic, at the present situation we cannot deny that industrial design can meet all conditions required for the copyright protection.

#### 4. Conclusion

Copyright and design right are similar intellectual property rights, bearing in mind that industrial design as a protection object in its nature represents specific work of authorship. Also, originality as a condition for copyright protection essentially matches the individual character of design, which is a condition for design right protection. Both of these conditions require that the protection object is different than any existing. In contrast with the work of authorship, liberty of artistic expression for industrial design is much more limited by the function of the object to which design is applied. Because of this, it is possible that two design authors working separately create the identical design. In order to regulate possible conflict of their rights, the priority of protection and novelty condition are introduced into design right, much like the patent. There are certain differences in originality and individual character condition, since originality is not determined by any standard, it is only necessary that work of authorship is the expression of the author's personality, and yet the individual character is dependent on informed consumer standard. The main difference between these two rights is in their scope of protection. Copyright is considered to have a more limited scope of protection, but its term of protection is significantly longer. Industrial design scope of protection is wider, yet for a limited period of time, similar to the patent.

The consequence of prevailing similarities (though not in number) in protection object makes possible to protect industrial design by copyright, what is called the cumulation of protection. Most of the developed countries at present allow cumulation of industrial design protection, although providing different conditions which are required for cumulation to be allowed. European Union had limited success in the harmonization on this matter, and therefore in its acts provides only that cumulation is mandatory, and leaves to the member states to regulate conditions for cumulation. In the same manner, it regulates supranational community design right, which leaves the space for different court interpretation, forum shopping and legal insecurity. Pointing out this problem, *de lege ferenda* we recommend that in the future, European Union should fill this blank space and determine cumulation concept for community design that would apply in all member states in the same way.

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## **UPOREDNA ANALIZA PRAVA NA INDUSTRIJSKI DIZAJN I AUTORSKOG PRAVA**

**REZIME:** Pravima intelektualne svojine se regulišu različiti odnosi na tržištu putem pravno dozvoljenih monopola kojima se ispravljaju neefikasnosti tržišta u raspodeli društvene dobiti. U radu koji sledi autor nastoji da primenom komparativne metode ispita odnos prava na industrijski dizajn prema autorskom pravu. U analizi će najpre biti prezentovane sličnosti, a zatim i razlike ovih subjektivnih prava intelektualne svojine. Sličnost u pogledu predmeta zaštite dovode do mogućnosti kumulacije, odnosno zaštite industrijskog dizajna i u okvirima autorskog prava, što će takođe biti predmet analize. Cilj ovog rada jeste da se spozna hibridna priroda prava na industrijski dizajn, često zaobilazena u teoriji, a koja je po mišljenju autora posebno intersetantna.

***Ključne reči:*** *pravo na industrijski dizajn, autorsko pravo, komparacija, kumulacija zaštite, pravo intelektualne svojine*

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