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International Regulation of Industrial Designs: The TRIPS Agreement in the Light of European Union Law

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INTERNATIONAL REGULATION OF INDUSTRIAL DESIGNS: THE TRIPS AGREEMENT IN THE LIGHT OF EUROPEAN UNION LAW

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ABSTRACT

This paper analyzes the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) on industrial designs, and the manner in which the narrow aspects dealt with by the Agreement have been addressed by European Union (EU) legislation. The paper highlights the absence of a definition of protectable subject matter, and the considerable flexibility left to the member countries of the World Trade Organization to determine the framework of protection, notably on the basis of copyright. The paper also notes certain areas in which European legislation is more elaborate, and others which could be considered incompatible with the TRIPS Agreement.

En este documento se analizan las disposiciones del Acuerdo sobre los Aspectos de los Derechos de Propiedad Intelectual relacionados con el Comercio (Acuerdo sobre los ADPIC) relativas a los modelos y diseños industriales y el modo en que la legislación de la Unión Europea (UE) ha abordado los limitados aspectos tratados por el Acuerdo. Señala la ausencia de una definición de materia protegible y la considerable flexibilidad que se deja a los países miembros de la Organización Mundial del Comercio para determinar el marco de protección, especialmente sobre la base de los derechos de autor. El documento señala también algunos aspectos en los que la legislación europea es más elaborada y otros en los que podría haber incompatibilidad con el Acuerdo sobre los ADPIC.

Ce document analyse les dispositions de l'Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce (l'Accord sur les ADPIC) sur les dessins et modèles industriels et la manière dont les aspects limités traités par l'Accord ont été abordés par la législation de l'Union Européenne (l'UE). Il note l'absence d'une définition de la matière susceptible de protection et une considérable flexibilité laissée aux pays membres de l'Organisation Mondiale du Commerce pour déterminer le cadre de protection, notamment sur la base du droit d'auteur. Le document note aussi certains aspects dans lesquels la législation européenne est plus élaborée et d'autres dans lesquels on pourrait observer une incompatibilité avec l'Accord sur les ADPIC.

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INTRODUCTION

"Design is everywhere".¹ Indeed, since consumer choices are very often made on the basis of a product's shape rather than its technical qualities, "sales appeal" plays a major role in the commercial success of companies.² This is more so now in certain countries where markets are saturated and demand is no longer driven by the need to satisfy basic needs, or where the products on offer are interchangeable in their functional aspects.³ In addition, competition is so fierce as a result of globalization and the digitization of the market that "the need to stand out is stronger than ever".⁴ Furthermore, legal protection can be just as important for craft creations as for traditional designs.

However, the fact is that the protection of designs is not unanimous throughout the world. That said, not all countries are turning their backs on designs. In 2022, China alone accounted for more than half of all design applications filed.⁵ It was followed by the European Union (EU) which also pays very close attention to the sector, and for which it represents a major economic asset.⁶

Given the advantages that designs and models can bring to certain industries, such as the textile industry or handicrafts, which are key sectors in developing countries, it is therefore surprising to observe a lack of interest in the subject. One of the reasons for this is the cost of registering a design.⁷ Although they are considered relatively inexpensive, multiple design registrations represent a considerable cost for companies or craftsmen who cannot afford such an investment.⁸ The cost and duration of litigation concerning designs and their frequently limited commercial life may also contribute to this lack of interest. This is particularly true of small and medium-sized enterprises (SMEs), which suffer most from counterfeiting.⁹

Moreover, this lack of interest in designs also stems from the inadequacy of the legal framework established by the various laws.¹⁰ To get an idea, one need only look at the limited content of the provisions on designs in the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), and then compare it with the sections devoted to other branches of intellectual property. Similarly, there are much fewer studies on the subject than studies on trademarks or patents, which does not make it any easier for legislators or market players more generally to understand the subject.

¹ F. Chaudon, P. Massot, "Manifesto for better design protection in Europe", *Prop. intell*, April 2021, No. 79, p.40.

² M.-A. Perot-Morel, *Les principes de protection des dessins et modèles dans les pays du Marché Commun*, De Gruyter Mouton, (Vol. 1) 1968, p.15.

³ A. Kur, M. Levin, J. Schovsbo, *The EU Design Approach - A Global Appraisal*, EE Elgar 2018, p.7.

⁴ F. Chaudon, P. Massot, "Manifesto for better design protection in Europe", *Prop. intell*, April 2021, No. 79, p.40.

⁵ All figures taken from : WIPO, *Intellectual Property: WIPO Facts and Figures 2022* - <https://www.wipo.int/edocs/pubdocs/fr/wipo-pub-943-2022-fr-wipo-ip-facts-and-figures-2022.pdf> - accessed on 10 October 2024.

⁶ F. Chaudon, P. Massot, "Manifesto for better design protection in Europe", *Prop. intell*, April 2021, No. 79, p. 40.

⁷ *Ibid.*, p.46.

⁸ *Ibid.*

⁹ P. Faure, Press release - Key figures INPI 2022, INPI, 8 March 2023.

¹⁰ M. Buydens et al, "L'originalité des œuvres des arts appliqués en Europe: vers une harmonisation?", *Propr. Intell*, April 2017, No. 63, p.9.

The use of designs by businesses, in particular SMEs, and craftsmen will only be possible if national laws are better protected within the framework of the minimum rules of protection adopted at international level.

The General Agreement on Tariffs and Trade (GATT) ventured into this area by drafting the TRIPS Agreement. As this text was adopted thirty years ago in 1994, it is worth looking at it in order to determine the extent of the obligations in the light of more recent developments. To this end, the two articles making up the section of the TRIPS Agreement concerning industrial designs will be reviewed and analyzed in detail in the light of European Union law.

I. TITLE OF THE SECTION: "INDUSTRIAL DESIGNS AND MODELS"

The TRIPS Agreement decided to include the term "industrial" in the title of its fourth section to designate designs and models. It should be noted that this qualification has not been adopted everywhere and by everyone. This is the case in particular in EU law, and in French law, which has opted for the more concise title "designs and models". Furthermore, the French Intellectual Property Code states that designs and models correspond to the appearance of "any industrial or craft object".¹¹ However, as "*artisanal*" is considered to be the antonym of "*industriel*"¹² it is easy to understand why French law has not chosen the title "dessins et modèles industriels" for the section devoted to this subject. "Artisanal" is the French word for hand-crafted or craft object.

The non-university nature of this qualification suggests that we should consider its relevance. What is the point of such a qualification? Is it really necessary to qualify designs?

Presumably, this is a way of automatically associating design law with industrial property.¹³ However, it will be seen that designs are not an object specific to this right; copyright also plays a significant role in their protection. As a result, designs and models are part of both industrial property and literary and artistic property. There would therefore be no justification for any exclusivity for these designs under industrial property law.

Secondly, some authors argue that "the specificity of these creations is essentially due to their industrial nature, i.e. the possibility of mechanical reproduction".¹⁴ This may well be the case for certain types of design, such as in the automotive and fashion sectors. However, in today's digitalized world this vision of designs seems a little narrow. The TRIPS Agreement no longer seems in line with the multiple uses of design.

¹¹ Art. L. 511-1 of the Intellectual Property Code: "The appearance of a product (...) may be protected as a design or model.

A product is considered to be any industrial or craft object (...)".

¹² Definition and synonyms for "*artisanal*" - <https://www.larousse.fr/dictionnaires/francais/artisanal/5580> - accessed on 16 October 2024.

¹³ Art. 1^{er} of the Paris Convention: "(2) The protection of industrial property concerns patents, utility models, industrial designs, trademarks, service marks, trade names and indications of source or appellations of origin, as well as the repression of unfair competition.

¹⁴ M.-A. Perot-Morel, *Les principes de protection des dessins et modèles dans les pays du Marché Commun*, De Gruyter Mouton, (Vol. 1) 1968, p.16.

II. ARTICLE 25: ELIGIBILITY FOR PROTECTION

Before delving into a detailed analysis of this article, we can already identify a number of points on initial reading.

What is most striking is the absence of a definition of designs. Finding a common definition in a field that encompasses extremely varied forms was no easy task for the negotiators of the TRIPS Agreement. This lack of a definition leaves a certain amount of freedom to the Members and consequently leads to disparities at international level that reflect different national approaches, which can hinder the legibility and understanding of the system by designers and businesses, particularly SMEs.

EU law – on a smaller scale, of course – has given a relatively clear definition of what designs refer to. Article 3a) of the Regulation states that a design is "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".¹⁵ It also specifies that a product is "any industrial or handicraft article, including inter alia parts designed to be assembled into a complex product, packaging, presentation, graphic symbols and typographical characters, but excluding computer programs".¹⁶ Thus, EU law gives a fairly clear idea of the object of protection.

As will be seen in more detail below, designs are also protected by copyright. Therefore, to get a brief idea of what these designs and models refer to, it is possible to refer to the section devoted to this branch of law, since designs and models can respond to the snippets of definition left on the subject of copyright protection. It is therefore agreed that designs meet the requirement of "expression" and cannot meet the notions of "ideas, procedures, methods of operation or mathematical concepts as such",¹⁷ which is in line with the "appearance" dictated by EU law.

Another point to note is the total absence in the TRIPS Agreement of any specification of the procedure to follow in order to obtain protection. The text does not indicate whether, apart from any copyright protection, the granting of protection is subject to registration, like trademarks or patents, or whether, like intellectual works, it is acquired automatically. This is another example of the great diversity that exists in national legislation in this area.

We now need to take a closer look at Article 25 of the TRIPS Agreement and EU law.

Article 25.1: "Members shall provide for the protection of independently created industrial designs that are new or original. Members may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features. Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations."

¹⁵ Art. 3a) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.

¹⁶ *Ibid.*

¹⁷ Article 9.2 TRIPS: "Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such".

To make it easier to analyze this article, let's take the elements one by one.

First of all, in the first sentence, the use of the indicative tense signifies that an obligation is imposed on Members. They must provide protection for designs on the twofold condition that they have been created independently and that they are new or original.

It is worth noting the vagueness surrounding the concept of "independence". What is an independently created design? According to the Larousse dictionary, independence can be defined as being "in no way linked to anything else, unrelated to anything else".¹⁸ Does this mean that the design is independent of prior art, i.e. previously disclosed designs? In other words, must the design be dissociated from prior art so that it is independent of it? Or should it be independent of the other people around the designer? In other words, must the designer have created freely, without conforming to the directions of others?

From the point of view of EU law, this condition of self-employment is undoubtedly related to the second condition set out in this first sentence, namely the need to have a new or original design.

On the one hand, novelty is a condition for the validity of a design under EU law. Regulation 6/2002 governing Community designs states that "a design shall be deemed to be new if no identical design has been made available to the public".¹⁹ A design that is identical to an earlier design is therefore not protectable, which often implies that it was not conceived independently. This notion of independent creation is also found in another article of the Regulation. More specifically, Article 19.2 §2 states that, for unregistered Community designs, "the contested use shall not be considered to result from a copy of the protected design if it results from an independent creative work carried out by a designer who may reasonably be expected not to have been familiar with the design disclosed by the holder".²⁰ This article suggests that the term "independent creation" means that the designer has worked without relying on the work of others, in the same way as the definition of novelty suggests.

On the other hand, originality, which is the subject of more debate due to its nebulous nature,²¹ presupposes independent work in principle. The Court of Justice of the European Union (CJEU) has given a definition to compensate for the gap left by the texts: originality is "an intellectual creation unique to its author",²² characterized in that "the author has been able to express his creative abilities in the making of the work by making free and creative choices".²³ Thus, originality is established if the work emanates from the author's personality, which reflects subjective independence, since the CJEU makes no reference to previously created works.

As a result, to date, the lack of precision regarding independence has been linked to both the condition of novelty and the condition of originality.

¹⁸ Definition and synonyms for "independence" -

<https://www.larousse.fr/dictionnaires/francais/ind%C3%A9pendant/42535> - accessed on 18 October 2024.

¹⁹ Art. 5.1 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.

²⁰ Art. 19.2 §2 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.

²¹ A. SICOT "L'appréciation de la créativité des conditions de nouveauté, de caractère individuel et d'originalité à l'aune de la créativité", edited by P. MASSOT, July 2024 - part 1, chapter 2, section 1.

²² ECJ, 16 July 2009, Case C-5/08, *Infopaq International*, point 37.

²³ CJEU, 11 Dec. 2011, Case C-145/10, *Eva-Maria Painer*, paragraph 89.

Secondly, as has been briefly noted, the end of the first sentence of Article 25.1 of the TRIPS Agreement indicates that Member States have the choice of introducing either the condition of novelty or the condition of originality. This is therefore an alternative and not a combination. From the point of view of European Union law, this option between these two conditions may appear surprising for several reasons.

First of all, it should be noted that novelty and originality are not specific to designs. Indeed, novelty is also used as one of the conditions to be met in patent law. Secondly, originality—at least in EU law—is automatically linked to copyright. Thus, as design law is a separate branch of intellectual property law, with its own regime, it is objectionable that it is not given one or more conditions specific to its own regime.

Moreover, not only do they not have the same definitions, as we have seen, but above all, they do not call for the same level of creativity. On the one hand, if we take the definition of novelty in EU law, it is characterized by the fact that no identical design has been disclosed to the public. For greater clarity, the Regulation specifies that "designs shall be considered identical where their features differ only in insignificant details".²⁴ On this point, the EU General Court concluded that insignificant details were "those which are not immediately perceptible and which do not produce even slight differences between the designs".²⁵ Thus, the condition of novelty is satisfied if the design under examination differs, even slightly, from its predecessors. Consequently, novelty requires very little creativity.²⁶

On the other hand, it is worth recalling that the Court of Justice ruled that an original work is an intellectual creation specific to its author, provided that the author was able to express his or her creative abilities during the creation of the work, by making free and creative choices. Needless to say, this definition does not provide a clear-cut and unambiguous condition, which has forced judges to find ways of putting this condition into practice. Some jurisdictions have used novelty to assess the originality of a work, without making two conditions identical. For example, in France, the Court of Appeal, in applying the condition laid down by the CJEU, stated that "originality [had] to be assessed in relation to works already known in order to determine whether the creation claimed [was] sufficiently clear and significant".²⁷ Thus, the presence of one or more relevant pre-existing works rules out any trace of originality. In other words, if a work is not novel, it cannot be original. This is why it can be concluded that novelty acts as a filter, since a work devoid of any novelty rules out any possible copyright protection.

However, the Court of Appeal goes further than this. To be original, the work must stand out *clearly* and *significantly* from prior works. This means that originality calls for a much higher threshold of creativity than that of novelty, insofar as the mere difference between the work and prior works – meeting the requirement of novelty – is not enough, since it must be *clear* and *significant*.

²⁴ Art. 5.2 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.

²⁵ Tribunal de l'Union européenne (3rd Ch.), 6 June 2019, Case T-210/18Dr. Ing. H.v. F. Porsche AG v. EUIPO and Autec AG, para. 86.

²⁶ For a more detailed discussion of this issue, see : A. SICOT "L'appréciation de la créativité des conditions de nouveauté, de caractère individuel et d'originalité à l'aune de la créativité", edited by P. MASSOT, July 2024.

²⁷ CA Paris, 24 Sept. 2019, RG n°18/00814.

This is where originality effectively stands apart from novelty. More concretely, while the only requirement for novelty is that the designs be non-identical, a mere difference is not enough to characterize originality. This implies that novelty is only the first – albeit insufficient – step towards originality. Consequently, the threshold of creativity required is higher for originality than for novelty.²⁸

As a result, from the point of view of EU law, leaving WTO Members the choice between novelty and originality seems odd insofar as not only do they not require the same threshold of creativity, but they are also not specific to design law.

In addition to the novelty described above, EU law has opted for a condition specific to designs: individual character. This is introduced by Regulation 6/2002, which states that "A design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public",²⁹ while specifying in recital 14 that "The assessment as to whether a design has individual character should be based on whether the overall impression produced on an informed user viewing the design *clearly* differs from that produced on him by the existing design corpus".³⁰ Thus, as with novelty, this condition is based on a comparison with prior art. It is therefore an objective condition. However, unlike novelty, individual character calls for greater creativity. It is no longer a matter of differentiating the design through insignificant details; what counts here is the overall impression, i.e., its synthetic perception.³¹ Consequently, barely perceptible details will not suffice to satisfy this condition. What's more, the difference must be *clear*. In other words, it must be easier to distinguish because it must be more significant than in the case of novelty. This is why the EU General Court has ruled that a design with individual character is necessarily new, whereas a new design does not necessarily meet the individual character test.³² Thus, individual character requires more creativity than novelty.

However, this threshold of creativity required by individual character needs to be put into perspective. To understand this, we need to look at what EU law calls the "informed observer" or "informed user". The latter is responsible for assessing individual character. To define him, the CJEU has stated that he must be understood as "a user endowed not with average attention but with particular vigilance, whether by reason of his personal experience or his extensive knowledge of the sector in question".³³ In addition, "without being a designer or technical expert, the user is familiar with various designs existing in the sector concerned, has a certain degree of knowledge as to the elements which these designs normally contain, and because of his interest in the products concerned, demonstrates a relatively high degree of attention when using them".³⁴ This familiarity with the product distinguishes the informed user from the average consumer –the person referred to in trade mark law– who is only "normally informed and reasonably attentive".³⁵ This knowledge and awareness enable them to discern differences to which the average

²⁸ J. Cabay, N. Berthold, S. Starc, "Cumulat du droit d'auteur et des dessins et modèles: une comparaison systématique au secours des principes" *D.A.O.R* 2022/1, n°141, p.57.

²⁹ Art. 6 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.

³⁰ Council Regulation (EC) No 6/2002 of 12 December 2001, recital 14.

³¹ P. Greffe, "L'observateur averti en droit des dessins et modèles", *LEGICOM*, 2014/2 (No. 53), p. 121

³² Tribunal de l'Union européenne, 6 June 2013, T 68/11, *LEPI* sept. 2013, n°109, obs. C. Bernault.

³³ CJEU, 20 October 2011, Case C281/10, *PepsiCo Inc*, paragraph 53.

³⁴ CJEU, 20 October 2011, Case C281/10, *PepsiCo Inc*, paragraph 59.

³⁵ CJEU, 22 April 2019, Case C-342/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV*, paragraph 26.

consumer would not pay attention. In this way, a difference that is the result of non-excessive creativity can still attract the attention of the informed user, thus validating the condition of individual character. This is why the threshold for creativity in EU law is not very high.

Finally, to refine its presentation, it can be added that individual character does not require as high a level as originality. To explain this, we need to look at the *Cofemel* decision of the CJEU.³⁶ In compliance with Directive 98/71 on the legal protection of designs,³⁷ the Court confirmed that designs can be protected under both design law and copyright law. However, "such cumulation can only be envisaged in certain situations".³⁸ This is why the CJEU has recognized that such cumulation is only partial.³⁹ This means that not all designs are necessarily protected by copyright if they are protected by design law. In other words, the originality of a design is not automatically accepted once its individual character has been established. This is why it can be argued that originality requires a higher level of creativity than that attached to individual character.⁴⁰

Thus, individual character, which is a specific condition of EU design law, lies between novelty and originality as proposed by the TRIPS Agreement.

Let us now examine the second sentence of Article 25.1. This sentence suggests, in a non-binding way, a threshold of creativity that designs may reach in order to be protected. More specifically, it states that designs are not new or original if they do not differ *significantly* from other designs. As the term "significantly" is used synonymously with "considerably" or "appreciably",⁴¹ this means that designs must be *clearly* distinguishable from other designs in order to be protected. In other words, the distance between designs must be relatively easy to perceive, as the difference must be *notable*. This reflects a relatively high level of creativity. In fact, the gap between two designs that can be protected is such that designers are obliged to show enough creativity to distinguish themselves sufficiently from prior designs. This objective comparison will determine whether the design is the result of a sufficiently high level of creativity.

In this respect, it is possible to ask whether the level of creativity suggested by the TRIPS Agreement might not be too high. To answer this question, we need to draw a parallel with trademark law. These two branches of industrial property law share a common communication function.⁴² In other words, the purpose of both a design and a trademark is to convey a message to the consumer. However, this message is not entirely the same. A trademark indicates the commercial origin of a good or service, while a design "is not intended to convey any message beyond its own appearance".⁴³ Its sole purpose is to "present itself as something special".⁴⁴ In other words, the only message it has to

³⁶ CJEU, 12 Sep 2019, Case C-683/17, *Cofemel*.

³⁷ Article 17 of Directive 98/71/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 October 1998 on the legal protection of designs: "Article 17: "a design (...) shall also enjoy the protection granted by copyright law from the date on which the design was created or fixed in any form".

³⁸ CJEU, 12 Sep 2019, Case C-683/17, *Cofemel*, paragraph 52.

³⁹ F. Chaudon, P. Massot, "Manifeste pour une meilleure protection du design en Europe", *Propr. Intell.*, April 2021, N°79, p.52.

⁴⁰ For a more detailed argument, see A. SICOT "L'appréciation de la créativité des conditions de nouveauté, de caractère individuel et d'originalité à l'aune de la créativité", edited by P. MASSOT, July 2024.

⁴¹ <https://www.larousse.fr/dictionnaires/francais/notablement/55043> - accessed on 10 October 2024.

⁴² A. Kur, M. Levin, J. Schovsbo, *The EU Design Approach - A Global Appraisal*, EE Elgar 2018, p.8.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, p.15.

communicate to consumers is that it stands out from other designs; it is not like other designs. Thus, the design's communication message is weaker than that of the trademark. In other words, it is easier to demonstrate its uniqueness in relation to other designs than to demonstrate that it belongs to a given commercial origin. Consequently, the level of creativity required should not be the same. More precisely, the function of the trademark would therefore call for more creativity than that of the design. For this reason, a rather low threshold of creativity should be introduced for design law – at least lower than that required by trademark law.

This is perhaps why the European Parliament's legislative resolution in preparation for a directive on the protection of designs proposes lowering the level of creativity required. Indeed, recital 18 describes that "the assessment of distinctiveness should be based on whether the overall impression produced on an informed user looking at the design differs from that produced on that user by any other design forming part of the existing corpus of designs (...)".⁴⁵ Here, the removal of the requirement for a *clear* difference set out in the Regulation in favor of the requirement for a simple difference reflects a desire to be genuinely lenient about the level of creativity required to obtain design protection. This would lower the threshold of creativity required to achieve individual character, perhaps more in line with the function assigned to designs.

Thus, if we take up the analysis of these first two sentences, from the point of view of EU law, the TRIPS Agreement sets a flexible framework between two very different thresholds of creativity – novelty requiring a low level of creativity and originality requiring a high level of creativity – by proposing a threshold of creativity that would lie between these two thresholds, perhaps equivalent to that attached to the individual character of EU law.

The third sentence of Article 25.1 of the TRIPS Agreement allows Members to choose whether or not to limit protection to designs that are not *essentially* based on technical or functional considerations.

This provision is rather vague. Indeed, the adverb *essentially* is not entirely clear. It should be noted that this is not synonymous with "totally" or "absolutely",⁴⁶ in which case the text would exclude from any protection designs that are 100 percent dictated by technical or functional considerations. Conversely, the text proposes more limited protection, with "essentially" being equated with "principally" or "fundamentally".⁴⁷ Consequently, designs do not necessarily have to be 100 percent dictated by technical or functional considerations in order to fall into the category introduced by the text and thus be excluded from any protection. However, two problems arise on this point.

Firstly, it is difficult to determine precisely when a design is *essentially* dictated by technical or functional considerations. In other words, it is unclear where the boundary lies between designs that are essentially dictated by technical or functional considerations and those

⁴⁵ The European Parliament, Legislative resolution of 14 March 2024 on the proposal for a directive of the European Parliament and of the Council on the legal protection of designs (COM (2022)0667 - C9-0395/2022 - 2022/0392(COD)). P9_TA (2024)0165: "The assessment as to whether a design has individual character should be based on whether the overall impression produced on an informed user viewing the design differs from that produced on that user by any other design that forms part of the existing design corpus, taking into consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs and the degree of freedom of the designer in developing the design".

⁴⁶ Definition and synonym of "essentiellement" - <https://www.cordial.fr/dictionnaire/definition/essentiellement.php> - accessed on 11 October.

⁴⁷ Ibid.

that are not. This makes it difficult for designers to anticipate whether their creations will actually be protected, which may limit their incentive to create new designs.

Secondly, this restricts the possible scope of protection for designers' creations. More concretely, as we have seen, a design that is *essentially* dictated by technical or functional considerations is not *absolutely* dictated by such considerations. As a result, there remains a certain amount of freedom, the freedom which separates a design which is *essentially* dictated by technical considerations from one which is *totally* dictated by technical considerations, for the expression of the designer's creativity. In this way, creativity, which is admittedly limited compared to that expressed through other designs which are not or are only slightly dictated by such considerations, cannot be protected even though it is effectively expressed.

Thus, the use of the term "essentially" restricts the protection of creativity.

For its part, EU law has put in place a provision which, at first glance, seems more or less similar, but which is ultimately more protective of design. Specifically, Article 8.1 of the Regulation states that "A Community design shall not subsist in features of appearance of a product which are *solely* dictated by its technical function."⁴⁸

Firstly, EU law has opted for the more categorical adverb "solely", which leaves no room for doubt. In effect, only characteristics that are *totally* dictated by their technical function are excluded from protection. In other words, EU law excludes any protection where there is no possibility of any creative imprint. It is in this sense that it differs from the text of the TRIPS Agreement. In cases where technical considerations, without totally dictating the appearance of the product, outweigh the freedom left to the designer to express creativity, the TRIPS Agreement excludes all protection, whereas EU law nonetheless retains some.

EU law goes even further; in addition to guaranteeing protection for designs that do not require a great deal of creativity, such as those that are partially dictated by technical or functional considerations, it lowers the level of creativity required for such designs. The Regulation states that "in assessing the scope of protection, the degree of freedom of the designer in developing his design shall be taken into consideration".⁴⁹ In other words, the assessment of creativity depends on the designer's freedom to express his creativity. On this point, it is now accepted that "the more restricted the designer's freedom in developing the design, the more likely it is that minor differences between the designs in question will be sufficient to produce a different overall impression on the informed user".⁵⁰ This means that a lower level of creativity than that required for other designs with fewer technical or functional features is sufficient to meet the individual character requirement. In this way, it makes it easier to obtain protection for designs that do not leave much room for creativity.

This exclusion of the protection of functional characteristics is welcome. Indeed, if monopolies were granted on technical or functional elements which, by their very nature, should be taken over by competitors, this would damage the proper functioning of the market insofar as the holders of these rights, which would then become too broad, could abuse them and restrict access to the market.⁵¹ This is why it would have been appropriate

⁴⁸ Art. 8.1 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.

⁴⁹ Art. 10.2 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.

⁵⁰ F. Greffe, P. Greffe, *Traité des dessins et des modèles*, Lexis Nexis, 10^e éd. 2019, p.104.

⁵¹ N. Binctin, *Droit de la propriété intellectuelle*, 7th edition, LGDJ édition, 2022, p.933.

for the TRIPS Agreement to introduce an obligation here, and above all to opt for the absence of protection for designs and models that are *solely* and not *essentially* dictated by technical or functional considerations.

Article 25.2: Each Member shall ensure that requirements for securing protection for textile designs, in particular in regard to any cost, examination or publication, do not unreasonably impair the opportunity to seek and obtain such protection. Members shall be free to meet this obligation through industrial design law or through copyright law.

This provision introduces an obligation for Members to provide designers with accessible protection that will not hinder their desire to create and protect their textile-related creations. To this end, the text indicates *in particular*, the cost, examination, or publication criteria, without preventing Members from focusing on other criteria. The choice is left to Members between design law and copyright law, so as not to *unreasonably* compromise the application for, or grant of, protection.

From the point of view of EU law, the first sentence may seem surprising. The texts governing designs do not make any special mention of designs for textiles or any other sector. That said, the position of the WTO is not necessarily unwelcome – at least not after a first reading.

On the one hand, this focus on textiles is interesting. In fact, "design law emerged thanks to the textile industry",⁵² which was already offering a considerable number of designs at the time. Even today, this is one of the main sectors of activity in terms of the number of registrations.⁵³ It is therefore appropriate to require Members to facilitate their protection in order to ensure better protection and encourage creation. That said, it would have been preferable not to target only textile designs. Indeed, "most industrial design applications from fashion houses do not concern clothing, but accessories (...), such as watches, handbags and glasses".⁵⁴ Therefore, such protection would be truly relevant if it covered not just textiles, but everything that comprises fashion.

On the other hand, it can be deduced from a new reading of the text that this obligation is not really binding after all. Members are required not to *unreasonably* compromise the possibility of applying for and obtaining protection. However, given that the adverb "unreasonably" is synonymous with "abusively",⁵⁵ it is questionable whether this does not leave Members too much room for maneuver. In other words, the TRIPS Agreement is not very binding and may not be very effective.

Furthermore, this would imply the implementation of a different regime depending on whether or not a textile design is involved. In this case, it would be essential to be able to define precisely what is covered by textile designs and models in order to have a well-defined subject matter for the regime. Otherwise, legal certainty would be all the more affected, in addition to the introduction of two different regimes.

⁵² A. Kur, M. Levin, J. Schovsbo, *The EU Design Approach - A Global Appraisal*, EE Elgar 2018, p.3.

⁵³ WIPO, *Intellectual Property: WIPO Facts and Figures 2022* - <https://www.wipo.int/edocs/pubdocs/fr/wipo-pub-943-2022-fr-wipo-ip-facts-and-figures-2022.pdf> - accessed on 10 October 2024.

⁵⁴ F. Fischer, "Europe: design law in the fashion sector", *WIPO Magazine*, February 2008 - https://www.wipo.int/wipo_magazine/fr/2008/01/article_0006.html - accessed on 15 October 2024.

⁵⁵ <https://dictionnaire.lerobert.com/definition/indument> - accessed on 9 October 2024.

EU law has no such provision for textiles or fashion. Furthermore, the legislative resolution in preparation for a directive on the protection of designs presented by the European Parliament does not mention any new rules on this subject either. So even the European Union did not want to establish different regimes depending on the object of protection. Nevertheless, it has introduced a solution that meets the need to reduce obstacles that could discourage designers. European Union law offers protection to both registered and unregistered designs, one corresponding to long-term protection and the other to short-term protection.⁵⁶ Unlike registered designs, unregistered designs are protected as soon as they are disclosed to the public, provided they meet the criteria of novelty and individual character. In this case, protection is not subject to any examination by the Office or payment of fees. Naturally, this ease of obtaining protection for one's creation is accompanied by the other side of the coin: protection does not last for a minimum of five years, renewable four times, as is the case for registered designs, but lasts for only three non-renewable years.

This alternative offered by EU law has the merit of complying with WTO expectations in order to avoid any obstacles relating to cost, examination and publication. However, three years' protection may prove insufficient, as it is ineffective against copying.⁵⁷ In fact, in the fashion sector, it has been established that certain models are more successful than others. The latter are sold over several seasons, thus exceeding the three years during which they are protected against copying.⁵⁸ However, it is obviously the designs that are successful, that are sold over several years, (and therefore have no protection after three years if they are not registered) that are of interest to counterfeiters. Finally, these unregistered designs are only protected against copying.⁵⁹ Thus, the protection ensured by the individual character going beyond copying is not applicable to unregistered designs. Consequently, as they cannot predict which designs will be successful and cannot all afford to register all their designs,⁶⁰ companies can easily see their investments go unrewarded and, above all, used for the benefit of others.

The second part of this provision leaves it to the Members to choose whether to guarantee this protection by means of design law or by means of copyright law. Here again we find the idea of an alternative to copyright to ensure the protection of designs, as mentioned previously. The text seems to propose an alternative, i.e., it is one *or the other* and not a combination of protection by design *and* copyright law.

Copyright protection does not appear to be meaningless. On the contrary, as the TRIPS Agreement requires compliance with the principle of automatic protection by copyright, the latter fulfils the requirements set out in Article 25.2.

As discussed above, EU law also offers copyright protection for designs. However, it goes further than the TRIPS Agreement by providing not an alternative but a combination of these two systems of protection. However, this cumulation is only partial. It does not apply

⁵⁶ Recital 17 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.

⁵⁷ F. Chaudon, P. Massot, "Manifeste pour une meilleure protection du design en Europe", *Prop. intell*, April 2021, N°79, p.47.

⁵⁸ *Ibid.*

⁵⁹ Art. 19.2 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs: " An unregistered Community design shall, however, confer on its holder the right to prevent the acts referred to in paragraph 1 only if the contested use results from copying the protected design.

⁶⁰ F. Chaudon, P. Massot, "Manifeste pour une meilleure protection du design en Europe", *Prop. intell*, April 2021, N°79, p.47.

to all designs. As a reminder, copyright protection is only possible if the design or model meets the condition of originality, requiring a higher level of creativity than individual character. Nevertheless, this creativity will be rewarded with automatic protection for a much longer period than that offered by design law. It should also be emphasized that the dual protection afforded by EU law does not only apply to the textile and fashion sectors. Neither the text nor the case law has made any distinction between different sectors. As a result, copyright protection will not be easier to obtain for textile designs.

III. ARTICLE 26: PROTECTION

"Article 26.1: The owner of a protected industrial design shall have the right to prevent third parties not having the owner's consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes.."

This article is not a new provision insofar as it appears –in a more or less similar way– in the section on trademark law.⁶¹ More specifically, these two sections require Members to protect the owners of these rights against any infringement of their rights where the acts are carried out for commercial purposes. To this end, no true or substantial copy of a design may be manufactured, sold or imported.

There is one term that should be highlighted here: "*substantial* copying". The text specifies here that not only a true copy is prohibited, but also a design that is *substantially* similar to it. In other words, the scope of protection goes beyond that of the design itself, i.e., protection is not limited to the design as it is. In this way, designers can be reassured that their competitors will not be able to get too close to their creations. It should be noted at this stage that this obligation is not respected by all jurisdictions. This is the case in French case law, which restricts the protection of unregistered Community designs to slavish or quasi-slavish copying. This means that an unregistered Community design will only be protected against identical designs, which greatly limits the effectiveness of their protection.⁶²

This extended protection is not all that surprising. Article 25.1 suggests that designs should not be protected if they do not differ *substantially* from known designs. As a result, a design cannot be protected if it is too similar to another. It is precisely this necessary distance expressed by the adverb "significantly" that broadens the scope of protection for designs. Conversely, if this adverb had not been introduced into the definition, and therefore a design was not new or original if it did not differ from another –without this absence of difference necessarily being *substantial*– then the scope of protection would be limited to the protected design as it is and only a true copy would be prohibited.

This is why this article is the logical continuation of the previous provisions by establishing protection that goes beyond the design. Nevertheless, it is possible to note that Article 26.1 presents an obligation to Members through the use of the indicative whereas the definition given by Article 25.1 is only an option. Since these two provisions are part of the same piece –one being the consequence of the other– it would have been logical for them to have the same binding effect on the signatories.

Furthermore, as mentioned above, this obligation is found in both trademark law and design law. This is not surprising insofar as both are aimed at the consumer. Indeed, since

⁶¹ Art. 16.1 TRIPS Agreement: " The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. (...) "

⁶² F. Chaudon, P. Massot, "Manifeste pour une meilleure protection du design en Europe", *Prop. intell*, April 2021, N°79, p.47.

each sends a message to the consumer to enable them to make a choice as to the best purchase for them, any copy –whether *substantial* or not– would jeopardize the integrity of any communication. Put another way, a copy would compromise the proper communication conveyed by designs and trademarks, which would then no longer be able either to present themselves as a design not similar to another, or to present themselves as belonging to a certain commercial origin and not to another.

This is also the reason why these acts are reprehensible when they are carried out for commercial purposes, as it is in this precise context that they distort the market. Conversely, if they are committed for non-commercial purposes, no financial advantage can be gained by those making the copies. In this way, the investments made are not diverted to competitors and the incentive to create remains intact.

"Article 26.2: Members may provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties."

This provision does not call for much comment. It is simply an option and not an obligation. It is also classic in the sense that the sections devoted to trademarks and patents also contain such a provision relating to limited exceptions to protection. Certain points can nevertheless be made.

Firstly, we can highlight the uncertainty surrounding the expression "normal exploitation", which makes it impossible to establish a clear regime. To try to guess what this expression might refer to, a parallel can be drawn with the normal exploitation of a work, which would correspond to "potential, desirable or conceivable" exploitation.⁶³ However, as this provision is not an obligation, this vagueness is not really problematic insofar as Members are not obliged to comply with this article. That said, it is always preferable to have a clear text.

Secondly, although this provision is almost identical to that relating to patents,⁶⁴ it stands out more clearly from that relating to trademarks.⁶⁵ Unlike the latter, which neglects the interests of trademark owners, article 26.2 offers better protection for trademark owners, as their interests are taken into account in establishing exceptions to protection. This means that Members are advised to put in place exceptions that do not infringe on the interests of right holders. This is interesting insofar as it leads to a balance between the interests of rights holders and those of third parties, which is beneficial in terms of encouraging creativity, as designers or potential designers are then assured of effective protection of their rights.

⁶³ S. Dusollier, "L'encadrement des exceptions au droit d'auteur par le test des trois étapes", *I.R.D.I.*, 2005, p. 223.

⁶⁴ Art. 30 TRIPS Agreement: "Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties".

⁶⁵ Art. 17 TRIPS Agreement: "Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties".

Finally, there is no escaping the fact that this exception is particularly similar to the three-step test for copyright introduced by the Berne Convention. This test, which makes it possible to justify the introduction of an exception or limitation to copyright, is made up of three tests: "the exception must be provided for in certain special cases, it must not conflict with a normal exploitation of the work, and it must not unreasonably prejudice the legitimate interests of the right holder".⁶⁶ This brings us back to the notion of "normal exploitation" and protection against "unjustified prejudice to the legitimate interests of the right holder". Design law goes further in that it also takes into account the interests of third parties. Nevertheless, this quasi-identity once again establishes an indestructible link between design law and copyright.

Article 26.3: "The duration of protection available shall amount to at least 10 years".

The TRIPS Agreement requires Members to offer protection for a minimum of 10 years.

As discussed above, an appropriate level of protection is also justified by its duration. As we have seen, a three-year term of protection is not always adequate. However, a 10-year protection period should be able to address the issues raised by a three-year protection period.

Surprisingly, EU law does not respect this provision. In fact, it is an obligation. However, on the one hand, unregistered designs have a maximum duration of three years, and on the other, even though registered designs can be protected for up to 25 years, they still have a minimum duration of only five years. EU law is therefore not in line with the text of the TRIPS Agreement.

However, Article 26.3 does not specify the date from which this period begins to run. In other words, Members may choose to start the 10-year period from the date of creation, the date of disclosure, the date of application for registration, or even the date of publication in the case of registered designs. EU law, for example, has opted for two different regimes: the three-year period of protection for unregistered Community designs runs from the date on which the design was first made available to the public within the Community⁶⁷ whereas a registered Community design is protected from the date of filing of the application for registration.⁶⁸

⁶⁶ S. Dussolier, "L'encadrement des exceptions au droit d'auteur par le test des trois étapes", *I.R.D.I.*, 2005, p. 213-223.

⁶⁷ Art. 11 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.

⁶⁸ Art. 12 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.

CONCLUSIONS

After a detailed analysis of the short section devoted to designs in the TRIPS Agreement, it appears that the Agreement leaves a great deal of flexibility to Member countries to ensure the protection of designs, which is still too little known but which nevertheless proves to be significant for the economy of certain States that have adopted it. Indeed, the framework established, which lacks a definition of the object of protection, appears to be very flexible and, as such, insufficient to define a national design regime. That said, certain points are welcome, such as the protection of designs by copyright.

As negotiations approach on a new international treaty on the procedure for obtaining design protection, it is to be hoped that it will help to establish a regime that addresses the interests of countries with different levels of development, while ensuring that this branch is not always seen as the poor relative of intellectual property.

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