

Treaties and Conventions for the Protection of Industrial Designs and the Protection System in Major Countries

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I. Forward

In Japan, industrial designs (hereafter referred to as “designs”) are protected primarily under the Design Law but also depending on their type, partly under the Copyright Law, the Unfair Competition Prevention Law and the Trademark Law. Because the principle of examination and registration is employed for designs, the Design Law, in fact, serves a greater role in their protection.

As in the United States, the Japanese Design Law stipulates design protection as based on a patent-oriented approach. However, in European countries, Design Laws are copyright-oriented while EU rules for designs have been drafted based on a design-oriented approach.

This means that the protection of designs varies widely both in form and type, in a way incomparable with Patent or Trademark Law. This results in many difficulties in advancing towards uniform protection.

Here, “industrial designs” means designs in an article that can be industrially utilized as far as Japanese Design Law is concerned, and works of graphic design, such as posters and advertisements, are not included in industrial designs, in principle. After all, such works can be basically protected by Copyright Law.

In addition, when we think about the protection of designs in terms of practical business affairs, we should not forget the relation between Design Law and other laws surrounding it, i.e., Copyright Law, Unfair Competition Prevention Law, Trademark

Law, Utility Model Law, Patent Law, Act Concerning the Circuit Layout of a Semiconductor Integrated Circuit and so on. The more we understand the relation between Design and other laws, the more we will be able to understand that Design Law is the one closest to other intellectual property laws. As the designs are a unique field surrounded by and mixed with many other laws, we have difficulty in understanding the realities of the designs and finding an appropriate method to protect them.

Here, in this paper, we are going to explain international treaties and conventions as well as legal protection systems in major countries established for the protection of industrial designs.

II. International Treaties and Conventions for the Protection of Designs

1. Paris Convention (Paris Convention for the Protection of Industrial Property, 1883)

Article 1 (2) of the Paris Convention (Stockholm Act of 1967) stipulates that “the protection of industrial property has as its object patents, utility models, industrial designs, trade marks, service marks, trade names, indication of source or appellations or origin, and the repression of unfair competition”.

In Article 5quinquies, the Convention confirmingly provides that “industrial designs shall be protected in all the countries of the Union”. However, the Paris Convention, not clearly providing a definition of industrial designs, leaves it to each individual country of the Union to decide how to protect them under domestic law.

Article 5B of the Convention provides that “the protection of industrial designs shall not, under any circumstances, be subject to any forfeiture, either by reason of failure to work or by reason of the importation of articles corresponding to those which are protected”. Thus, the Convention prohibits countries of the Union from imposing sanctions which forfeit protection of an industrial design under domestic laws due to a failure to work or the importation of an article incorporating the industrial design which should be otherwise protected.

2. Hague Agreement (The Hague Agreement Concerning the International Deposit of Industrial Designs, 1925)

Based on the provision of Article 19 of the Paris Convention, some of the countries of the Union gathered in The Hague in 1925 to make a special arrangement for the protection of industrial designs. This is “The Hague Agreement Concerning the International Deposit of Industrial Designs”.

In 1934, the Hague Agreement was revised in London with Article 1 reading: “Nationals of any of the contracting countries, as well as persons who, upon the territory of the restricted Union, have satisfied the conditions of Article 3 of the General Convention, may, in all the other contracting countries, secure protection for their industrial designs by means of an international deposit made at the International Bureau of Industrial Property at Berne”. This Article 1 was later revised in The Hague in 1960 to read: “(1) The contracting States constitute a Special Union for the international deposit of industrial designs” and “(2) Only States members of the International Union for the Protection of Industrial Property may become party to this Agreement”.

The Hague Agreement was an arrangement made in 1925 mainly by European countries from the contracting States of the Paris Convention, who adopted a non-examination system for the protection of industrial designs. They did not requiring the substantive examination of applications for their registration in regard to items such as novelty. With respect to the Hague Agreement, the London Act of 1934 became effective, and the Hague Act of 1960 became

effective for some of the countries by means of the Geneva Protocol of 1975.

As a result, the relations between contracting countries can be divided into the following three groups according to each Act effectuated by the Hague Agreement.

Group I: Countries for which only the London Act is effective

Group II: Countries for which only the Hague Act is effective

Group III: Countries for which both the London Act and Hague Act are effective

(a) London Act, 1934 (effective)

The London Act is an arrangement mainly based on the principle of “a copyright-oriented approach” for the protection of industrial designs.

1934 Act of the Hague Agreement is characterized by the fact that the right becomes effective in the designated country immediately after the design is deposited at the International Bureau. In other words, the international deposit of an industrial design means a unilateral declaration of its ownership by its creator. No individual examination is conducted in each designated country.

(b) Hague Act, 1960 (effective)

The Hague Act was revised by coordinating each country’s wishes while trying to provide contracting countries, including those conducting novelty examinations with an opportunity to obtain more effective protection through

an international deposit. This Act came into effect on August 1, 1984.

The key point of the Hague Act is that, while the deposit at the International Bureau has the same effect as completing all the application procedures in each designated country, designated countries with domestic laws that can refuse protection according to examination or opposition are obligated to notify the International Bureau of their refusal within six months from the receipt of the periodical bulletin from the Bureau. In other words, countries having domestic laws that require a substantive examination for novelty are allowed to have a right to refuse the protection.

(c) Geneva Act, 1999 (not effective)

(1) WIPO concluded the Geneva Act for the purposes of geographically expanding the effects of the Hague Agreement by incorporating contracting states such as Japan, the United States, South Korea and Britain where a strict substantive examinations covering novelty and creativity (unobviousness) are required on the basis of a “patent-oriented approach”.

Applications are filed with the International Bureau of WIPO, and international applications may be filed through a domestic office by designating a contracting state.

Designs are registered by the International Bureau and are collectively managed by the International Register.

Internationally registered designs are publicized in the international design gazette, which is sent to the Patent Office of each contracting state, but countries where an examination is conducted must finish a trial examination within a prescribed period and decide whether designs should be registered or refused.

The protection period for international registration is fifteen years from the registration date (filing date), and the renewal registration fee must be paid every five years.

This Geneva Act will not come into effect until and unless at least three countries that have more than 3,000 applications annually under domestic laws join the Act, and as of January 2003 the Act has not become effective, though some countries have ratified it.

(2) In, 2002, Estonia, Slovenia, Switzerland and Ukraine (4) adhered to the Geneva Act of the Hague Agreement.

The total number of contracting states on December 31, 2002, was 7.

The act will enter into force three months after six states have deposited their instruments of ratification or accession provided that, according to the most recent annual statistics collected by WIPO, at least three of those states fulfill at least one of the following conditions: (i) at least 3,000 applications for the protection of industrial designs have been filed in or for the state

concerned, or (ii) at least, 1,000 applications for the protection of industrial designs have been filed in or for the state concerned by residents of states other than that state.

- (3) The Working Group on the Establishment of New Regulations under the Hague Agreement (hereinafter “the Working Group”) met in Geneva from June 24 to 26, 2003¹.

The Working Group was convened by the Director General of WIPO with a view to discussing a proposal of the International Bureau for the establishment of Common Regulations under the 1999 Act, the 1960 Act and the 1934 Act of the Hague Agreement.

The following member States of the Working Group were represented at the session: Estonia, France, Germany, Greece, Hungary, Italy, Netherlands, Republic of Moldova, Romania, Slovenia, Spain, Switzerland, the former Yugoslav Republic of Macedonia and Ukraine (14).

The following States were represented by observers: Croatia, Ireland, Japan, Latvia, Mexico, Norway, Portugal, Republic of Korea, Sri Lanka, Sweden and the United States of America (11).

The following intergovernmental organizations were represented by

¹ Member States of the Working Group comprise member States of the Hague Union and any States having ratified or acceded to the 1999 Act of the Hague Agreement.

observers: Benelux Designs Office (BBDM), Commission of the European Communities (CEC) and Office for Harmonization in the Internal Market (OHIM) (3).

The following international non-governmental organizations were represented by observers: American Intellectual Property Law Association (AIPLA), Center for International Industrial Property Studies (CEIPI), Japan Patent Attorneys Association (JPAA), International Chamber of Commerce (ICC), International Council of Societies of Industrial Design (ICSID), International Federation of Industrial Property Attorneys (FICPI) and Union of European Practitioners in Industrial Property (UEPIP) (7).

- (4) The Working Group discussed the draft Common Regulations proposed by the International Bureau, as contained in documents H/WG2/2 and H/WG/2 Add. It also considered the notes concerning the proposal for Common Regulations, as contained in document H/WG/3.

The Working Group agreed to propose to the Assembly of the Hague Union that it approve the inferred consequences related to the recording of changes in ownership in the International Register, as set out in Notes 21.04 and 21.05 of document H/WG/3.

The Working Group agreed that the draft Common Regulations should be submitted to the Assembly of the Hague Union for adoption at its next session.

The Working Group agreed that the Assembly of the Hague Union should be invited to decide that the Common Regulations should enter into force on April 1, 2004, or on the first day of the month following the date of entry into force of the 1999 Act, whichever is the later.

The Working Group agreed that the Assembly of the Hague Union should be invited to decide that, as from the date of entry into force of the Common Regulations, the latter should replace both the Regulations under the 1999 Act and the Regulations under the 1960 Act and the 1934 Act.

3. Locarno Agreement (Locarno Agreement Establishing an International Classification for Industrial Designs, 1968)

Revised in 1979 in Stockholm, this agreement sets forth an international classification for articles representing designs. It is composed of ① main classes and sub classes, and ② an alphabetical list of articles.

This classification does not bind the scope of protection granted by the domestic design laws of the contracting states.

Japan has not joined the Locarno Agreement.

4. TRIPS Agreement under the World Trade Organization Agreement (WTOA)

As a result of negotiations based on the GATT Uruguay Round talks, the “World Trade Organization Agreement (WTOA)” was concluded on December 25,

1993 in Geneva. In connection with this, a separate agreement regarding protection of intellectual property called the “TRIPS Agreement” was concluded. This Agreement obligated its contracting states to provide a high level of protection and enforcement over a wide variety of areas of intellectual property such as (1) copyright and related rights, (2) trademarks, (3) geographical indications, (4) industrial designs, (5) patents, (6) layout-designs of integrated circuits, (7) protection of undisclosed information, and (8) control of anti-competitive practices in contractual licenses.

In Section 4 of part II, the TRIPS Agreement sets forth regulations concerning “industrial designs”.

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.

- (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.

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.

(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.

(3) The duration of protection available shall amount to at least ten years.

5. Berne Convention (Berne Convention for the Protection of Literary and Artistic Works, 1886)

Article 2 (1) of the Berne Convention (Paris Act 1971) stipulates that “the expression ‘literary and artistic works’ shall include every protection in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are

assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science”.

Article 2 (7) of the Berne Convention stipulates that “subject to the provisions of Article 7 (4) of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union only to such special protection as is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works”.

According to the provisions of Article 2 (7) of the Berne Convention, it is considered a principle to protect applied works and industrial designs equally. While leaving it to each member country to regulate detailed conditions for the protection, “this term shall last at least until the end of a period of twenty-five years from the making of such work” (Article 7 (4)).

The term of protection for general works granted by this Convention shall be the life of the author and fifty years after the author’s death (Article 7 (1)).

6. Universal Copyright Convention, 1952

This convention was concluded at a UNESCO meeting held in 1952 in Geneva to coordinate the Berne Convention with the Pan-American Convention. The Paris Act was concluded in 1971.

The conclusion of this convention was intended to harmonize the two conflicting copyright conventions. At the same time, however, it was designed to prevent affecting the already existing conventions. Therefore, it does not cause any conflict between the two conventions.

In other words, this convention was concluded by each contracting state “Moved by the desire to ensure in all countries copyright protection of literary, scientific and artistic works: Convinced that a system of copyright protection appropriate to all nations of the world and expressed in a universal convention, additional to, and without impairing international systems already in force, will ensure respect for the rights of the individual and encourage the development of literature, the science and the arts: Persuaded that such a universal copyright system will facilitate a wider dissemination of works of the human mind and increase international understanding (preamble)”.

(1) Published works of nationals of any Contracting State and works first published in that State, or unpublished works shall enjoy in each Contracting State the same protection as that State accords to the works of its nationals first published in its own territory or unpublished works of its own nationals (Article II (1) and (2)).

(2) The term of protection for works protected under this Convention shall not be less than the life of the author and twenty-five years after death. However, this does not apply to works of applied art, which shall not be less than ten years (Article IV (2) and (3)).

(3) Any Contracting State of the Berne Convention shall regard these requirements as satisfied with respect to all works protected in accordance with this Convention if the author bears the symbol © accompanied by the name of the copyright proprietor and the year of the first publication at the time of obtaining copyright protection in the United States and other countries adopting the registration system (Article III (1)).

7. EU Design Directive

As to the design protection system in the EU, Directive 98/71 EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs became effective on November 17, 1999, and Contracting States had to provide for their own design system based on this Directive by October 28, 2001. Italy, France, Denmark and Britain had finished revising the laws, however, Germany had not.

EU Member States have to provide for the design protection system in accordance with this Directive, and EU Design Law is established pursuant to this directive.

(1) “Design” means the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colors, shape, texture and/or materials of the product itself and/or its ornamentation.

“Product” means any industrial or handicraft item, including inter alia parts intended to be assembled into a complex product, packaging, get-up, graphic symbols and typographic typefaces, but excluding computer programs.

What is important is that a design does not require attributes of articles, but introduces a wider concept. Product includes an item not having the attributes of articles, such as graphic symbols.

(2) Protection requirement

Member States shall protect designs by registration, and shall confer exclusive rights upon their holders in accordance with the provisions of this Directive.

A design shall be protected by a design right to the extent that it is new and has individual character.

A design applied to or incorporated in a product which constitutes a component part of a complex product shall only be considered to be new and to have individual character: if the component part, once it has been incorporated into the complex product, remains visible during normal use of the latter; and to the extent that those visible features of the component part fulfill in themselves

the requirements as to novelty and individual character.

(3) Novelty

A design shall be considered new if no identical design has been made available to the public before the date of filing of the application for registration or, if priority is claimed, the date of priority. Designs shall be deemed to be identical if their features differ only in immaterial details.

A public domain on a worldwide basis without geographical restriction is adopted when regarding novelty.

(4) Individual character

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 before the date of filing of the application for registration or, if priority is claimed, the date of priority. In assessing individual character, the degree of freedom of the designer in developing the design shall be taken into consideration.

(5) Designs dictated by their technical function and designs of interconnections

A design right shall not subsist in features of appearance of a product which are solely dictated by its technical function.

Design right shall not subsist in features of appearance of a product which it

is applied to be mechanically connected against another product so that either product may perform its function. This provision intends to exclude “must fit.”

Notwithstanding, a design right shall subsist in a design serving the purpose of allowing multiple assembly or connection of mutually interchangeable products within a modular system.

(6) Scope of the protection

The scope of the protection conferred by a design right shall include any design which does not produce on the informed user a different overall impression.

In assessing the scope of protection, the degree of freedom of the designer in developing the design shall be taken into consideration.

(7) Term of protection

The right holder may have the term of protection renewed for one or more periods of five years each, up to a total term of 25 years from the date of filing.

In the Dane Design Law, which was revised in accordance with this Directive, the term regarding an ordinary design is as per the Directive, but the term regarding spare parts lasts fifteen years at maximum from the filing date. This is because Article 14 of the Directive leaves the protection of spare parts to each domestic law.

(8) Right conferred by the design right

The registration of a design shall confer on its holder the exclusive right to use it and to prevent any third party not having the holder's consent from using it.

The "use" shall cover 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.

(9) Limitation of the rights conferred by the design right

The rights conferred by a design right upon registration shall not be exercised in respect of:

- a) acts done privately and for non-commercial purposes;
- b) acts done for experimental purposes;
- c) acts of reproduction for the purposes of making citations or of teaching;
- d) the equipment on ships and aircraft registered in another country when these temporarily enter the territory of the Member States concerned;
- e) the importation in the Member State concerned of spare parts and accessories for the purpose of repairing such craft;
- f) the execution of repairs on such craft.

(10) Transitional provision

Member States shall maintain in force their existing legal protections relating to the use of the design of a component part (for example, design of an

automobile door) used for the purpose of the repair of a complex product (for example, an automobile) so as to restore its original appearance.

As to the protection of spare parts for restoring the appearance of automobiles, there was once dispute between automobile and parts manufacturers and insurance companies. As a compromise, provisions of spare parts were not incorporated in the Directive and were left to each country's domestic law. However, the EU Committee needs to prepare a report on spare parts three years after the Directive became effective, and to make a proposal for possible revision of the Directive to the EU Parliament and Council one year thereafter.

(11) Relationship to other forms of protection

The provisions of this Directive shall be without prejudice to any provisions of Community law or of the law of the Member State concerned relating to unregistered design rights, trademarks or other distinctive signs, patents and utility models, typefaces, civil liability or unfair competition.

(12) Relationship with copyright

A design protected by a design right shall also be eligible for protection under the law of copyright of that State. However, the conditions of the protection shall be determined by each Member State.

III. Design Protection Laws in Major Countries

1. United Kingdom

Britain has built up a lot of experiences and researches and steadily connected to legislation with respect to the protection of an artistic work by Copyright Law and Design Law.

In Britain, then existing Copy right Law (1956) and Registered Design Law (1949) were substantially revised by Copyright, Designs and Patents Act 1988 (hereafter referred to as CDPA1988) that became effective on August 1, 1989.

CDPA1988, which became a general law on intellectual works, introduced a new protection system for “design rights” as a method for protecting designs, in addition to existing copyright and registered design rights. “Design rights” means “unregistered design rights”, which is the right to protect an original design for a short term without registration.

Protection of a design is classified into the following three schemes in CDPA1988.

- ① Protection by means of a copyright (Sections 51 to 53)
- ② Protection by means of the design right (Sections 213 to 264)
- ③ Protection by means of the registered design (Sections 265 to 273)

In addition to the above new design protection methods, “typeface” was

protected by copyright (Articles 54 and 55). Protection term lasts twenty-five years.

1.1 Protection by means of copyright

A. Limits on copyrights for drawings (Section 51)

(1) It is not an infringement of any copyright in a design document or model recording or embodying a design for anything other than an artistic work or a typeface to make an article to the design or to copy an article made to the design.

→ Production of industrial articles out of drawings does not mean reproduction of drawings (the existing precedent was recognized as unsuitable).

(2) Nor is it an infringement of the copyright to issue to the public, or include in a film, broadcast or cable program service, anything the making of which was, by virtue of above subsection, not an infringement of that copyright.

(3) In this section, “design” means the design of any aspect of the shape or configuration (whether internal or external) of the whole or part of an article, other than surface decoration (surface decoration itself is copyright work).

B. Protection of works of applied art (Section 52)

(1) This section applies where an artistic work has been exploited, by or with the license of the copyright owner, by -

(a) making by an industrial process articles falling to be treated for the purposes of this Part as copies of the work, and

(b) marketing such articles, in the United Kingdom or elsewhere.

(2) After the end of the period of 25 years from the end of the calendar year in which such articles are first marketed, the work may be copied by making articles of any description, or doing anything for the purpose of making articles of any description, and anything may be done in relation to articles so made, without infringing copyright in the work.

(3) Where only part of an artistic work is exploited as mentioned in subsection (1), subsection (2) applies only in relation to that part.

(4) The Secretary of State may by order make provision -

(a) as to the circumstances in which an article, or any description of article, is to be regarded for the purposes of this section as made by an industrial process;

(b) excluding from the operation of this section such articles of a primarily literary or artistic character as he thinks fit.

→United Kingdom came to be able to ratify the Paris Act of the Berne Convention pursuant to this provision.

→ This provision is important especially when “the right to commercialization” is considered.

C. Non-infringing act of works of applied art (Section 53)

(1) The copyright in an artistic work is not infringed by anything done -

(a) in pursuance of an assignment or license made or granted by a person registered under the Registered Designs Act 1949 as the proprietor of a corresponding design, and

(b) in good faith in reliance on the registration and without notice of any proceedings for the cancellation of the registration or for rectifying the relevant entry in the register of designs.

(2) In subsection (1) a ‘corresponding design’, in relation to an artistic work, means a design within the meaning of the 1949 Act which if applied to an article would produce something which would be treated for the purposes of the Part as a copy of the artistic work.

1.2 Protection by means of the Design Right

A. Protection of original design (Section 213)

(1) Design right is a property right which subsists in accordance with this Part in an original design.

(2) In this Part “design” means the design of any aspect of the shape or configuration (whether internal or external) of the whole or part of an article.

(3) Design right does not subsist in -

(a) a method or principle of construction,

(b) features of shape or configuration of an article which -

i) enable the article to be connected to, or placed in, around or against, another article so that either article may perform its function, or

ii) are dependent upon the appearance of another article of which the article is intended by the designer to form an integral part, or

iii) surface decoration.

(4) A design is not ‘original’ for the purposes of this Part if it is commonplace in the design field in question at the time of its creation.

(5) Design right subsists in a design only if the design qualifies for design

right protection by reference to -

(a) the designer or the person by whom the design was commissioned or the designer employed, or

(b) the person by whom and country in which articles made to the design were first marketed, or in accordance with any Order under section 221 (power to make further provision with respect to qualification).

(6) Design right does not subsist unless and until the design has been recorded in a design document or an article has been made to the design.

→As aforementioned, the “design right” is an unregistered design right and a proprietary right that subsists without being registered.

B. Duration of design right (Section 216)

(1) Design right expires -

(a) fifteen years from the end of the calendar year in which the design was first recorded in a design document or an article was first made to the design, whichever first occurred, or

(b) if articles made to the design are made available for sale or hire within five years from the end of that calendar year, ten years from the end of the calendar year in which that first occurred.

- (2) The reference in subsection (1)(b) to articles being made available for sale or hire is to their being made so available anywhere in the world by or with the license of the design right owner.

C. Qualifying individuals and qualifying persons (Section 217)

- (1) In this Part –

‘qualifying individual’ means a citizen or subject of, or an individual habitually resident in, a qualifying country; and

‘qualifying person’ means a qualifying individual or a body corporate or other body having legal personality which –

- (a) is formed under the law of a part of the United Kingdom or another qualifying country, and

- (b) has in any qualifying country a place of business at which substantial business activity is carried on.

- (2) References in this Part to a qualifying person include the Crown and the government of any other qualifying country.

- (3) In this section ‘qualifying country’ means -

- (a) the United Kingdom,

- (b) a country to which this Part extends by virtue of an Order under section 255,
- (c) another member State of the European Economic Community, or
- (d) to the extent that an Order under section 256 so provides, a country designated under that section as enjoying reciprocal protection.

1.3 Protection by means of the Registered Design

A. Design covered by the registration (Section 265)→Section 1 of RDA

(A)

“In this Act ‘design’ means features of shape, configuration, pattern or ornament applied to an article by any industrial process, being features which in the finished article appeal to and are judged by the eye, but does not include –

- (a) a method or principle of construction, or
- (b) features of shape or configuration of an article which -
 - i) are dictated solely by the function which the article has to perform,
→ “must fit”
 - ii) are dependent upon the appearance of another article of which the article is intended by the author of the design to form an integral part.
→ “must much”

Section 1(1)(b)(ii) of RDA (A) is the provision that is called “must match” exclusion. If a design of that part wholly consists of the features dependent upon the appearance of the finished product including that part, such a design is not registered as the one used for that part (it is registered as one aspect of the design used for the finished product). The main policy existent behind the exclusion is to prevent a monopoly in the supply of spare parts by means of the design registration of parts.

The effects of this exclusion were considered by the court handling the aforementioned Ford Motor Co’s Design Appns. The House of Peers was inclined to conclude that the part being applied for registration was not an article “that was separately manufactured and sold”. However, Queen’s Bench Divisional Court thought that the designs of automobile parts such as panels, doors, covers for the bonnet, cover of the trunk and window screens were included in the “must match” exclusion. These parts form and contribute to parts of the shape and appearance of automobile as a whole.

Secondly, as to “new”, the following cases are not deemed as “new”.

- (a) If the design is identical to the design that is registered for an identical article or another article earlier filed

- (b) If the design is identical to the design for an identical article or another article published in United Kingdom prior to the filing date

Or if the design is different from the above design only with respect to an unimportant part or if the design is different as usually used in trade.

B. The right of Registered Design (Section 268)→Section 7 of RDA (A)

(1) The registration of a design under this Act gives the registered proprietor the exclusive right -

(a) to make or import –

(i) for sale or hire, or

(ii) for use the purposes of a trade or business, or

(b) to sell, hire or offer or expose for sale or hire,

an article in respect of which the design is registered and to which that design or a design not substantially different from it has been applied.

(2) Acts of nonexclusive right of the owner pursuant to the above (1) without such registered owner's approval constitute infringement of the registered design right.

C. Duration of right in registered design (Article 269)→Article 8 of RDA

(A)

(1) Registered design was defined as “copyright in a Registered Design” in

1949 Act but was changed as “The Right in a Registered Design” in the 1988 Act. The right remains to be a right with exclusive effects, but characteristics of the right changed from those copyright-oriented to those patent-oriented both in name and in content.

- (2) The right in a registered design subsists in the first instance for a period of five years from the date of the registration of the design. Furthermore, the period for which the right subsists may be extended for a second, third, fourth and fifth period of five years, by applying to the registrar for an extension and paying the prescribed renewal fee.

The duration of the registered design set at a maximum of twenty-five years relates to the protection of works of applied art (Article 52) provided for by the revised copyright law. This provision provides that the duration of protection for works of applied art, using a copyrighted work as the design for an article lasts twenty-five years from the end of the year in which the article was first put on sale. The duration of the registered design is equal to the duration of copyright protection regarding works of applied art (see Article 7, paragraph 4 of the Berne Convention).

Here we can clearly understand that mass produced works of applied art have the same basis as industrial designs.

Benefits of design registration before the Patent Office are as follows (from HP issued by the UK Patent Office).

A registered design:

- provides the exclusive right to make, import, export, use or stock any product to which the design has been applied or is incorporated, or to let others use the design under terms agreed with the owner;
- gives the right to take legal action against others who might be infringing the design and to claim damages;
- is a financial asset whose value could increase;
- is a recognized intellectual property right which protects the design from being copied by competitors for up to 25 years;
- may be synonymous with branding of the company's products and images.
- Registration is relatively quick, cheap and simple.

2. Germany

2.1 Protection by means of the Copyright Law

The existing Copyright Law (Urheberrechtsgesetz) was established in 1965 and revised in 1990.

Article 2, paragraph 1-(4) provides that the works protected by the Copyright Law “include, as works of fine arts (Werke der bildenden Kuenste), works of

architecture and applied art and drawings thereof”. In addition, there is no difference in the term of protection between works of applied art and other works.

The term of a copyright lasts seventy years after the author dies (Article 64, paragraph 1).

Article 2, paragraph 11 subparagraph 4 of the existing German Copyright Law provides for “works of fine arts” as works protected by the Law, and clearly provides that “works of applied art” are included in such works. However, the Law does not provide for the concept behind works of applied art, and the Law leaves it to judicial precedent and theory. According to theory, works of applied art are defined as “daily necessities or domestic articles with artistic form”. Works of applied art are the concept against a narrow sense of works of fine arts, such as sculpture, drawings, sketches and print art, and they are distinguished according to whether they are practical or not.

In order that works of applied art may be protected by Copyright Law, they must be, like all the other works, “personal intellectual creations (Persoenliche geistige Schoepfung)”. In deciding whether certain works of applied art satisfy this requirement, such works of applied art must be marked by the artist’s “individual character” (Individuarit) and have “highly-achieved creativity” (Gestaltungshe).

“Highly-achieved creativity” means the minimum necessary level to obtain

protection from the Copyright Law, which is different from each individual's opinion. According to the dominant theory, works of applied art require more highly-achieved creativity than other works. Protection of works of applied art by copyright includes design protection beneath it, and the protection of less individualistic artistic works is left to the latter. Copyright protection and design protection are distinguished according to how highly creativity is achieved. In other words, less individualistic works are covered by design protection, and highly and clearly individualistic works are covered by copyright protection. Copyrighted works must possess artistic and highly-achieved creativity. The difference between copyright protection and design protection arises from the purposes of laws, differentiating protection of artistic works lasting seventy years, even after the author's death, from the protection of a design expiring after a rather short period, i.e., twenty years.

2.2 Protection by means of the Design Law

This Law provides that the subject of protection is any "draft or model, which is novel and original only". The subject of protection by this Law is "draft or model" (Muster oder Modell). Draft is two dimensional (plane) and model is three dimensional. The term "design" (Geschmacksmuster) is used as higher concept of draft or model.

The Design Law (Geschmacksmustergesetz) was established in 1876 and partially revised in 1953, and on July 1, 1988 the wholly revised Law came into effect.

- (1) In order to obtain design registration, not only foreigners but also German nationals must submit an application form to the German Patent and Trade Mark Office and at the same time deposit drawings or photographs representing the design. This deposit can be done either as one unsealed or sealed. Sealed deposits will be opened three years after the filing date.
- (2) In the case of a plane design, a sample can be deposited instead of drawings or photographs, but there must be less than fifty in one package weighing less than ten kilograms.
- (3) In order to obtain registration, the design must be novel and original, but substantive examination is not given.
- (4) One of the characteristics of the German Design Law is the non-substantive examination system, and another is variations deriving from one design may be filed in one application, but in the same class only. The scope of variation is not practically clear, and it is irrelevant to a similar design under the Japanese Design Law.
- (5) Design rights are derived from an application and the term initially lasts five years. However they may be renewed three times for a maximum of twenty years.

2.3 As to “typeface”, Germany started its registration on July 7, 1981 through a special law called “Schriftzeichengesetz”, which was formally incorporated

into the Design Law in 1988. Design rights for typefaces last twenty-five years at maximum (Article 9 (1) of the Vienna Convention provides for a maximum of fifteen years, but its protocol provides for one of twenty-five years.

3. United States

3.1 Protection by means of the Patent Law

- (a) The initial Patent Law established in 1970 did not include protection of industrial designs. This patent was usually called a “utility patent”.

The Patent Law revised in 1942 provided for protection of “design patents” for the first time, and the standards for utility patents basically applied to design patents.

- (b) Even now the United States does not have an independent design patent law. There are only three relevant provisions (Sections 171 to 173) in Chapter 16 of the 1953 Patent Law. Among such provisions, Section 172 provides for the deadline for filing a design patent application by claiming priority. Therefore, there are only two provisions that are substantially relevant to design.

section 171 provides the requirements for a design patent. Designs must be (1) an article of manufacture, (2) new, (3) original (unobviousness) and (4) ornamental. General provisions of the Patent Law apply to the procedures for design patents.

Section 173 provides for the term of design patent, which lasts fourteen years from the date of grant.

- (c) Designs protected in the United States must be “ornamental”. However, this term “ornamental” does not just cover patterns but also covers shapes, and is therefore recognized as “nonfunctional”. In order to decide whether a design is ornamental or not, whether some artistic endeavor has been made to the appearance of the product must be judged. In other words, a design is ornamental if another person can achieve the same practical effect with another appearance (*Lee v. Dayton-Hudson Corp.*, 5 USPQ 2d 1625, 2d Cir. 1988).

- (d) Standard of “novelty” is that a design is not identical to a prior design, like requirements for utility patents. Even if it is similar, it will be recognized as “novel” when it is different from a prior design. However, designs that are deemed to be substantially similar are not different.

- (e) As to standards for “unobviousness”, it has been disputed for a long time how to apply them to design patents. The dispute specifically concerns who decides it, ordinary person or designer. In *re Nalbandian* (661 F.2d 1214, 211 USPQ 782, 1981 CCPA), the second circuit court made the judgment that it was “an ordinary designer skilled in the particular design field” may decide unobviousness. Therefore, a witness having expertise was able to show the standard of unobviousness. The Court said that an ordinary person’s decision was the less-discerning eye and that the Court was easily

able to decide that a design patent was invalid.

However, when a designer is asked what is obvious or whether a variation is within the scope of the designer's technology or not, the answer often depends on that designer's personal opinion. Compared with technical inventions for utility patent, an analysis on unobviousness of the design is rather uncertain. After all, it is the judge who decides whether the design is unobvious or not even if there is assistance from a designer.

- (f) Two or more designs may be included in one application, but these designs must be substantially similar to each other. If an examiner does not approve of a substantial similarity, divisional application will be recommended. Therefore, it is limited to cases of similar design on identical articles.

3.2 Protection by means of the Trademark Law

- (a) The federal trademark law established in 1946, which is called the Lanham Act, provides for procedures for trademark registration and remedies for infringements on trademark rights. Major characteristics thereof are that there are two methods for trademark registration, i.e., the "Principal Register" and the "Supplemental Register".

Configurations of a product or modes of a container were initially registered in the Supplemental Register. Since a pinch bottle of Haig & Haig Ltd's whisky (118. USPQ 229, Comr. Pats 1958) was registered on the

Principal Register in 1958 for the first time, non-functional configurations of a product were registered in the Principal Register if it was proved that they held a “secondary meaning”. Famous examples of product designs (three dimensional trademarks) that are registered on the Principal Register are as follows.

-Reg. No. 670,723 (shape of Haig bottle)

-Reg. Nos. 696,147 and 1,057,884 (shape of a Coke bottle)

-Reg. No. 969,666 (red and yellow colors of Kodak box)

-Reg. No. 1,444,193 (blue color of Wedgewood)

However, almost all of the product designs are not effectively protected under Trademark Law. It is because it takes a long time to prove that the product design has acquired a secondary meaning. Otherwise, the product design is not recognized as having the capability to distinguish origin. Therefore, it is not wise to depend on design protection by Trademark Law. However, if the design is registered as a trademark in the Principal Register, it is protected as far as it is used, which is advantageous.

(b) In order for a design to be protected under Trademark Law, the following requirements must be satisfied.

① Non-functionality

In order for a product design to be protected under Trademark Law, the design must perform a function as a trademark.

In regard to a trademark consisting of color combinations used for a capsule, the Federal Supreme Court judged applying the Lanham Act that ordinary people used this color combination in order to distinguish the contents of capsules and not to confirm the manufacturer (Inwood Laboratories Inc. v. Ives Laboratories, Inc., 456 US 844, 214 USPQ 1, USSC 1982).

This judgment made it clear that the function of a design prevented protection under Trademark Law, and that, if the design trademark performed a non-trademark function, it could not be protected as a trademark.

In order to decide whether the configuration of a product is functional or not, there are many standards to be considered. For example, where the production cost of a design is considered, if it is advantageous overall, it will be deemed to be functional.

In addition, alternative design is considered, and if there is no other design that can bring about desired practical effect, the design in question is deemed to be functional.

To the contrary, if there are a lot of alternative designs that bring about the same practical effect, the design is deemed not to be functional.

② Secondary meaning

The secondary meaning is attached to the product design itself, and not to the product name. In addition, in the case of a product design, what is protected is not the product itself but the configuration or characteristic of the product as a whole.

Several lower courts do not require verification of secondary meaning if the product design is “inherently distinctive”. However, in the case of trade dress mentioned below, the plaintiff should try to prove secondary meaning, and if a trade dress is the configuration of the product, secondary meaning is always required.

③ Possible misleading and confusion

Generally speaking, possible misleading and confusion are determined by the strength of the marks, the degree of similarity between two marks, the degree of similarity between two products, actual confusion, the defendant’s intention, the quality of the defendant’s product, and the degree of attention paid by consumers, among other things.

④ Trade dress

Trade dress functions similarly to letters, numbers, figures, sounds or scents, as used by the product supplier or service provider in a competitive and free market in order to inform consumers of the difference in origin from a competitor’s product, i.e., “overall visual image of the product and/or its package”. Therefore, it will consist of various and different

physical features.

The first judicial precedent in connection with trade dress is *Eastman Kodak Co. v. Royal-Pioneer Paper Box Mfg. Co.* (197 F. Supp. 132 (E.D.Pa), 1961). The plaintiff in this suit insisted that, in connection with another expression that is distinctive, when KODAK written in “red and/or black on yellow background” was used for photographs or services, packaging or advertisements, KODAK constituted a distinctive trade dress. The Court determined that the defendant breached Article 43 (a) of Trademark Law by selling a similar photo-film box.

In 1970’s, protection of a trade dress under Article 43 (a) extended to an illegal copy of a configuration of a product (*Truck Equipment Service Co. v. Fruehauf Corp.*, 536 F. 2d 1210, 8th Cir. 1976). The number of trade dress-related suits in connection with configuration of products rapidly increased in the 1980’s, and will be expected to increase further in the 1990’s.

Article 43 (a) of Trademark Law is as follows.

Any person who on or in connection with any goods or services, or any container for goods uses in commerce any word, term, name, symbol or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which --

- (a) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
- (b) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

If a trade dress is registered, Article 32 (1) of Trademark Law applies to prohibition of infringement on such trade dress.

In order that a trade dress be registered as a trademark, it must satisfy the aforementioned three requirements, but once it is registered, it will be presumed to be valid.

If a trade dress is not registered, Article 43 (a) of Trademark Law is applied. As this is contained in the federal unfair competition prevention law that covers the United States, it protects an owner of a legitimate but unregistered trademark from unfair competition. If this provision applies, the industry can rely on Article 43 (a) of Trademark Law, not on common law (state law), as seen in *Sears, Roebuck & Co. v. Stiffel Co.* (376 US 225, 376 US 973 1964) and *Compco Corp. v.*

Day-Brite Lighting, Inc. (376 US 234, 377 US 913, 1964), a famous judgments rendered by the Federal Supreme Court declaring that federal laws are superior to state laws.

3.3 Protection by means of Copyright Law

- (a) The United States Copyright Law prohibits other persons from making a substantially identical copy of the protected work. There are no procedural requirements for obtaining copyright protection, and protection starts at the time when a work is concretely created.

When that work is publicized, the copyright symbol must be attached to the work, otherwise the owner may lose the right to institute a suit.

Copyright protection starts at the same time when creation of the work is finished, but if the owner desires to insist on such protection before the court, the work must be registered at the Copyright Office. The Copyright Office examines the work to decide whether it is worth protection. If the Copyright Office refuses registration, the owner may appeal to a court.

The term of protection lasts seventy years after the designer dies.

Copyright protection is given to specific industrial designs, but all product designs will not obtain copyright protection. Copyright protection has been given to the designs of useful products artistic in nature, for example, jewels, candlesticks, salt and pepper cellars, goldfish bowls and ashtrays. As to the

designs of useful products, however, even now, it is unclear which standards are used for copyright registration.

By means of a judgment rendered by the Supreme Court allowing copyright protection in *Mazer v. Stein* (347 US 201, 221, 100 USPQ 325, 334, 1954 USSC) regarding a very charming sculpture of a woman used as a lamp stand, the protection standards became clearer to a certain degree. *Mazer's* sculpture is an artistic work that forms a part of the lamp, irrespective of useful purposes, and this fact does not constitute any reason to refuse copyright protection. Copyright protection was demanded for the sculpture alone.

- (b) The Copyright Law revised in 1976 defines designs protected by Law as only those that can be conceptually separable from the functional characteristics of the product. "Conceptually separable" means that the design of an article can exist conceptually independently.

The Copyright Office refused the copyright protection of the appearance of a mannequin for displaying clothes, in *re Barnard v. Economy Cover Corp.* (773 F. 2d 411, 228 USPQ 385, 2D Cir. 1985), then, the Second Circuit Court maintained the above refusal. As the mannequin was created for practical purposes, the design was deemed not to be conceptually separable from configuration of the useful product. Therefore, according to this interpretation, the Copyright Law applies to a very limited scope of industrial design protection.

Articles 101 and 102 (b) of the Copyright Law provide as follows.

17 U.S.C.A. Section 101 (Definition) “Pictorial, graphic, and sculptural works” include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design 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.

17 U.S.C.A. Section 102 (b) (Subject Matter of Copyright) “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work”.

4. EU Community Design Regulation

EU Member States are as follows.

Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and United Kingdom (this Regulation applies to other countries that are likely to join EU in the near future).

4.1 “Design” means the appearance of the whole or a part of a product.

Therefore, this Regulation does not protect the product itself, but protects the appearance of the product. If a specific appearance is protected as an EC design, the product presenting such as a whole is covered.

Artistic characteristics of a design are not necessary for obtaining protection from the Design Regulation.

4.2 “Product” means any industrial or handicraft item, including inter alia packaging, get-up, graphic symbols and typographic typefaces, but excluding computer program.

A “graphic symbol” may be expressed in the mode of a figure like a trademark. In this case a graphic symbol may be protected as a trademark.

Here a product does not have to be movable property. For example, the appearance of a subway station or a building may be the subject of protection.

“Complex product” means a product which is composed of multiple components which can be replaced permitting disassembly and re-assembly of the product. For example, the exchangeable fender of an automobile is one of the component parts of complex product.

4.3 Design shall be protected by a Community design to the extent that it is new and has individual character. These requirements of novelty and originality

equally apply to registered as well as unregistered Community designs. Industrial applicability is not a requirement for protection.

4.4 A Community design shall not subsist in features of appearance of a product which are solely dictated by its technical function.

As “form follows function”, it does not exclude protection of a technical product as a whole. Protection of a technical product, whose characteristics are inevitably determined only by the technical function of the product, is restricted. For example, a wheel can be a Community design, but the circular shape of that wheel is inevitably decided only by its technical function, which cannot be a Community design.

4.5 Unregistered Community design right (enforced on March 6, 2002)

(1) Unregistered design rights are rights that prohibit a third party from copying the protected design on any product, in connection with production of a design with an overall impression identical to that of the original.

(2) The term of protection for an unregistered design right lasts only three years from the time the design was exploited for the first time in EU territory. However, where the exploitation is not known to ordinary businesses in the industrial field of EEA territory, this does not apply.

4.6 Registered Community design right (enforced on April 1, 2003)

- (1) Registered design rights are rights in a unified design registration extending to EU Member States, like CTM, and the ordinance provides for almost the same procedures as those of CTM, except that there is no search and opposition period.
- (2) Registration is acquired swiftly, cheaply and simply, and the validity of the registration may be objected after it is registered.
- (3) The term of protection for a Registered design right lasts twenty-five years from the filing date (registration date), but the renewal registration fee must be paid every five years.

5. Japan

5.1 Requirements for a design to be established

The Design Law defines a “design” subject to protection as “a shape, pattern or color or any combination thereof in an article (including part of an article) which produces an aesthetic impression on the sense of sight (Article 2, paragraph 1).

First of all, a design relates to “an article”, and examples of articles are shown in the attached table of the ordinance of the Design Law. In addition, as only part of an article may be subject to protection, its configuration may be protected if it is specifically created.

Secondly, a design relates to “a shape, pattern or color or any combination thereof”. These are collectively called “configurations”.

A “shape” consists of an outline forming an article in a space, and any article has its shape as far as such article exists.

A “pattern” consists of lines and so on forming an article, by means other than the shape, and mainly decorates the said shape.

A “color” is a color painted on the aforementioned shape or pattern.

Thirdly, a design is seen “through the sense of sight”. This does not only mean sight by the naked eye, but also to understand the true character or nature. When deciding the similarity of designs, one must see and understand the features of the designs in question.

Fourthly, a design produces an aesthetic impression. Seeing the appearance of an article through the sense of sight gives people an aesthetic impression. However, an aesthetic impression is deemed to be vague.

The reason why Design Law requires an aesthetic impression as a requirement for a design is because Utility Model Law also covers “the shape of an article” as subject to protection. Therefore, a simply practical and functional shape is excluded from protection under the Design Law.

5.2 Requirements for registration of a design

Designs must be industrially utilized, and cannot be registered if they are neither novel and creative.

The following designs are not considered novel.

- i) Designs which were publicly known in Japan or elsewhere prior to the filing of the design application,
- ii) Designs which were described in a publication distributed or made available to the public through electric telecommunication lines in Japan or elsewhere prior to the filing of the design application,
- iii) Designs which are similar to those referred to in the two preceding paragraphs.

A “similar design” is a design basically identical in creativity to a design publicly known by means of fact or publication. This is because the purposes of Design Law will be accomplished by protecting the registered design against another design having identical creativity even if the configuration or article surrounding such registered design is different.

When talking about “similar designs”, two questions are always raised, i.e., similarity of an article and similarity of a configuration.

Determination of a “similar article” generally depends on whether articles in question have common uses and functions or not. Determination of “similar

configuration” depends on whether an overall aesthetic impression or aesthetic feature is common or not, but behind it is a question of creativity.

The following designs are not considered creative.

- i) By a person with ordinary knowledge in the art to which the design pertains (person skilled in the art),
- ii) on the basis of a shape, pattern or color or any combination thereof publicly known in Japan or overseas,
- iii) A design could easily have been created.

Even if novelty is lost, a design may be deemed to be novel if the application is filed within six months and if the fact of publication is proved.

In the case of competitive applications, priority is given to the application with an earlier filing date.

As to similar designs, several designs may be filed as related designs as far as they are filed on the same date.

5.3 Effect of the design right

Term of the design right lasts fifteen years after registration of the granted right. Term of the related design right is included in the term of the principal design.

The owner of the design right possesses the right to commercially exploit the registered design and any design similar thereto.

5.4 Relationship to Copyright Law

According to judicial precedent in Japan, if artistic works which are initially protected by Copyright Law are later commercialized, the effect of copyright extends to that product by interpreting them as reproductions or translations of such works.

Persons who acquire a design right by using another person's artistic works cannot exploit the design right without the copyright owner's approval.

The term of the copyright lasts fifty years after publication in the case of a corporation and fifty years after death in the case of an author.

IV. After-Word

As mentioned in the beginning, there are two ideas regarding the legal protection of industrial designs, i.e., a copyright-oriented approach and a patent-oriented approach. Therefore, each country's legislation is not necessary harmonious with each other. However, at least EU Member States have prepared unified domestic laws after the EU Design Directive became effective, and EU Design Regulation has been enforced.

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