

The Requirements for Industrial Designs Protection The International Overview and National Application

by

Dr. Mohamed Fouad Elhariry

Legal Adviser for the Ministry of Finance, Kingdom of Bahrain

Vice-president of at the Egyptian 'Conseil D'Etat'

Table of Contents

INTRODUCTION

- A- The concept of industrial design
- B- The importance of the legal protection
- C- The distinction between industrial and artistic designs

PART ONE:

International overview on the requirements for protection of Industrial Designs

Section one:

The protection of Industrial Designs under the Paris Convention

Section two:

The protection of Industrial Designs under the Berne Convention

Section three:

The protection of Industrial Designs under the TRIPs Agreement

PART TWO:

The national application of the

requirements for protection of Industrial Designs

Section one:

The requirements for protection of Industrial Designs under the E.C. Design Directive

A- Protectable subject matters

A.1. Definition of design

A.2. Definition of product

B- Excluded subject matters

C- Protection requirements

C.1. Novelty

C.2. Individual character

C.3. Visibility

Section two:

The requirements for protection of Industrial Designs under the Egyptian Law

A- Definition of industrial design and model

B- Excluded subject matters

C- Protection requirements

C.1. Special appearance of novelty

C.2. Industrial applicability

CONCLUSION

BIBLIOGRAPHY

INTRODUCTION

This part of the paper will focus on the definition of industrial design, the importance of industrial design legal protection and the distinction between industrial and artistic designs.

A. The concept of industrial design:

There are many definitions of industrial design. One of these definitions is that an industrial design is an applied art whereby the aesthetics and usability of mass-produced products may be improved for marketability and production. Also, it is defined as the process of taking something from its existing state and moving it to a preferred state 1.

In addition, according to the International Council of Societies of Industrial Designs (ICSID) an industrial design is a creative activity whose aim is to establish the multi-faceted qualities of objects, processes, services and their systems in whole life cycles. Therefore, design is considered the central factor of innovative humanization of technologies and the crucial factor of cultural and economic exchange 2.

In my view industrial design may also be defined as an external appearance of an article produced by industry or handicraft. So, a hidden feature of a product can not be protected as industrial design. Moreover, it is a concrete intellectual creation which can be perceived by visual sense. This creation is the subject of design protection.

The design may consist of two-dimensional features or three-dimensional features. A two-dimensional design means an arrangement of lines or colors laid on a flat surface in order to produce a visual effect, whereas a three-dimensional design means forms which stand out from a flat surface. A two-dimensional design can be distinguished from a three-dimensional design in that the former implies a flat surface, whereas the latter occupies space. In fact, this practical distinction has no legal significance 1.

-
1. http://en.wikipedia.org/wiki/Industrial_design#Definition_of_industrial_design.
 2. The International Council of Societies of Industrial Designs (ICSID) is a global organization promotes better design around the world. It includes over 150 members in more than 50 countries, representing an estimated 150,000 designers. Its members are professional associations, promotional societies, educational institutions, government bodies, corporations and institutions, which aim to contribute to the development of the profession of industrial design.
 3. D. COHEN, *The International Protection of Designs*, Kluwer Law International, London, 2000, p.1.

It should be noted that the industrial design is related only to the shape of an article. It must not serve the function of that article. In other words, designs which are dictated solely by the function which the article is to perform shall be excluded from protection 2.

However, there is an inherent relationship between the industrial design and the function. On the one hand, design possibilities are limited by function. At a certain stages, extravagance or fantasy in design can impede function. On the other hand, a design can facilitate function. For example, certain designs of automobiles take advantage of aerodynamic and decrease air resistance to increase speed 3.

The international conventions which govern the intellectual property rights do not provide a specific definition for what is meant by the concept of industrial design. However, national legal systems provide definitions of industrial design.

The Directive 98/71/EC of the European Parliament and of the Council on the legal protection of designs defines design as 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 4.

According to the Egyptian IP law, a design is any composition of lines or any three-dimensional form whether or not associated with colors provided that such composition or form gives a special appearance of novelty and is industrially applicable 5.

B. The importance of the legal protection:

The legal protection of industrial design is very important to the owner of design, the consumers, and the economic development.

When an industrial design is protected, the right holder can exclude and prevent any unauthorized copying or imitation of his protected design by

-
1. WIPO Intellectual Property Handbook, Industrial Design and Integrated Circuits, WIPO Publication, 2004, p.114.
 2. F.MABBOTT-TH. COTTIER-F. GURRY, International Intellectual Property in an Integrated World Economy, Aspen Publishers, Wolters Kluwer, New York, 2007, p. 559.
 3. The Directive 98/71/EC of the European Parliament and of the Council of 13th October, 1998, on the legal protection of designs, which came into force on 24th December, 1998.
 4. The Egyptian Law on the Protection of Intellectual Property Rights No. 82 of 2002, 2nd June, 2002, which came into force on 3rd June, 2002.

third parties. This assists to ensure a fair return on investment.

Consumers often take the visual appeal of a product into consideration when choosing between different products. This is especially true when the market offers variety of products with the same function and price. In these cases, the aesthetic appeal of a product is a decisive factor in determining the consumer's choice since design makes a product attractive and adds to its commercial value.

In fact, the importance of the legal protection of industrial design comes from the crucial role of designs in increasing product marketability and enhancing fair competition within a market-based economy.

The legal protection of design provides incentive for creativity in this field, and promotes the honest trade practices in the market which, of course, benefit consumers and enhance the welfare of the society at large.

Protecting industrial designs spurs economic development by encouraging creativity in the industrial and manufacturing sectors. Also, it contributes to increasing commercial activities and export of national products in both developed and developing countries.

C. The distinction between industrial and artistic designs:

The basis of the distinction between industrial and artistic designs is the functionality of the design. The purpose for which the design is made identifies the nature of design. Therefore, an industrial design is a creation intended for industrial use or exploitation, i.e. which is to be used for practical purposes such as clothing and furniture. So, industrial designs must be intended for mass production.

An artistic design is a creation has only a decorative purpose without any industrial aim. This design has no end other than to be looked at and admired such as painting and sculpture.

The distinction between industrial and artistic designs plays an important role in countries which protect designs by one legal method only, either by specific legislation or copyright law, because this distinction defines the type of protection regime which can apply to designs. Where a design is considered to be industrial, it will be protected by a specific legislation under which registration formalities are required. Whereas if a design is deemed as artistic, it will be protected only by copyright law under which the protection is granted automatically.

However, the distinction between industrial and artistic designs is not important in countries which adopt the principle of unity of art. Under this principle, a design can be protected at the option of creator, alternatively or cumulatively, through copyright law and/or specific design law regardless of the purpose of the design 1.

Additionally, there are countries protect industrial design by copyright law, beside protection by specific design law, if the artistic features of this design prevail over its functionality.

PART ONE

International overview on the requirements for protection of Industrial Designs

This part of the paper will be devoted to explain how the international conventions of the intellectual property rights, namely, the Paris Convention for the Protection of Industrial Property 2, the Berne Convention for the Protection of Literary and Artistic Works 3 and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) 4 , regulate the protection of industrial designs and what are the requirements for such protection.

Section one

The protection of Industrial Designs under the Paris Convention

Industrial designs are included in the scope of industrial property covered by Article 1(2) of the Paris Convention.

Article 5B of the Paris Convention provides that «*The protection of industrial designs shall not, under any circumstances, be subject to any forfeiture, either by*

-
1. D. COHEN, The International Protection of Designs, supra at note 3, pp. 2-4.
 2. Paris Convention for the Protection of Industrial Property, Paris, 20th March, 1883, which came into force on 7th July, 1884, WIPO lists 173 contracting countries as of November, 2008.
 3. Berne Convention for the Protection of Literary and Artistic Works, Berne, 9th September, 1886, which came into force on 5th December, 1887; WIPO lists 164 contracting countries as of November, 2008.
 4. Agreement on Trade-Related Aspects of Intellectual Property Rights, 15th April, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C.

reason of failure to work or by reason of importation of Articles corresponding to those which are protected.»

Article 5D of the Paris Convention provides that «No indication or mention of the patent, of the utility model, of the registration of the trademark, or of the deposit of the industrial design, shall be required upon the goods as a condition of recognition of the right to protection.»

Article 5quinquies of the Paris Convention stipulates that «Industrial designs shall be protected in all the countries of the Union.»

According to Article 5B of the Paris Convention, the legal protection of right holder can not be subject to any forfeiture, either by reason of failure to work or by reason of import of products corresponding to those which are protected.

This provision prohibits that rights conferred by industrial designs be declared forfeited as a result of either failure to work or importation of corresponding products. In contrast, such a possibility exists in relation to utility models and patents in accordance with Article 5A of the Paris Convention 1.

The expression «forfeiture» must be understood to include any measure which would terminate the protection of a design on the ground referred to. These measures may be repeal or revocation or annulment or cancellation.

The expression «failure to work» is understood as meaning the failure to manufacture the products representing or incorporating the design 2. However, the contracting countries have discretion to define what they understand by that expression.

Article 5D of the Paris Convention states that the recognition of the right to protection does not require that there is an indication to the deposit of the industrial designs on the product. This rule was introduced in 1925 and extended in 1934 to other industrial property rights which are patents, utility models and trademarks .

I think that the Paris Convention opened the door, by that Article, to the contracting countries to adopt the rule whereby the deposit of design

-
1. A. KUR, TRIPs and Design Protection in (F.K. Beier & G. Schricker eds.), From GATT to TRIPs: The Agreement on Trade Related Aspects of Intellectual property Rights, Studies in Intellectual Property and Copyright Law, 1996, 141 ff., at 145.
 2. G. H. C. BODENHAUSEN, Guide to the application of the Paris Convention for the Protection of Industrial Property, BIRPI, WIPO publication, 2004, p. 74.

application is sufficient to grant protection. Indeed, the deposit system is criticized because it does not require national IP offices to examine the novelty of a design before granting protection. This way of protection does not encourage the creativity in the field of the industrial designs since the applicant knows that the novelty of the claimed design will not be examined. In practice, this system creates a lot of problems among the competitors in the market.

Article 5quinquies of the Paris Convention states that the protection of industrial designs must be provided in all the countries of the Union. However, it does not explain how protection is to be granted.

This provision should not be interpreted so as to mean that the contracting countries have to protect industrial designs by sui generis legislation, rather it is allowed to every country of the Union to protect industrial designs under copyright legislation or as protection against unfair competition.

In addition, it was said that Article 5quinquies may be considered self-executing in countries which accept this concept; consequently, the interested parties can directly invoke that provision in court .

According to the previous articles, it could be stated that the Paris Convention obliges all contracting countries to protect industrial designs. However, it does not specify a special legal system for protecting them, so each contracting country has freedom to adopt any legal protection regime in its domestic legislation in order to implement its international obligation set out by the Paris Convention.

Section two

The protection of Industrial Designs under the Berne Convention

Article 2(7) of the Berne Convention provides 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.»

The purpose of the Berne Convention regarding industrial designs is to regulate their protection on the basis of copyright. This issue was topic of

heated discussions during the various revisions of the Berne Convention. The paragraph (7) of Article 2 of the Berne Convention governs this question. This paragraph sets out two essential principles in this area.

First, the choice of the method of protection applicable to industrial designs is a matter of discretion of the contracting countries. Therefore, the national legislature of the contracting states can determine firstly the requirements for protection of industrial designs, and secondly the scope of application of that protection ¹.

The Berne Convention does not oblige the contracting countries to protect industrial designs under copyright. They can protect them exclusively by a legislation specific to industrial designs, or cumulatively, and without any restriction, by a copyright law and specific legislation, or cumulatively, but with certain reservations, by a copyright law and specific legislation.

The second principle of Article 2(7) of the Berne Convention states that if a work of art applied to industry is protected only by a specific legislation to industrial designs in its country of origin, a national of another contracting country can not claim the protection of copyright for this design in other countries of the Union.

On the other side, if a work of art applied to industry is protected by copyright in its country of origin, a designer can claim this protection in other countries of the Union if they accept the copyright protection. In other words, a work which is not protected by copyright in its country of origin can not benefit from such protection in another country of the Union ².

The importance of this principle appears in practical applications to grant copyright protection for industrial designs. In these situations, courts must firstly determine whether its national system allows for protection of industrial designs by copyright if so, secondly, it must determine whether this way of protection is also available in the country of origin.

Denis Cohen thinks that the principle of reciprocity contained in Article 2(7) of the Berne Convention must be viewed as an exception to the general principle of national treatment set out in the Convention. Consequently, the principle of reciprocity should be strictly interpreted ¹.

It is worthy to note that Article 7(4) of the Berne Convention provides that the determination of the term of protection of the works of applied art, where they are protected under copyright, is a matter for the national

-
1. A. KUR, TRIPs and Design Protection in (F.K. Beier & G. Schricker eds.), From GATT to TRIPs: The Agreement on Trade Related Aspects of Intellectual property Rights, supra at note 12, p.145, Footnote No. 24.
 2. G. H. C. BODENHAUSEN, Guide to the application of the Paris Convention for the Protection of Industrial Property, supra at note 13, p. 86.

legislations of the contracting countries; however this Article states that the minimum term of protection shall be twenty-five years from the making of such works.

Section three

The protection of Industrial Designs under the TRIPs Agreement

Article 25 of the TRIPs Agreement provides that «Requirements for Protection.

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 25(1) of the TRIPs Agreement is devoted to define the requirements for protection of industrial designs in the WTO Member States. It reflects the mixed nature of industrial designs as works of applied art which are subject to copyright protection, and as external aesthetic shape of industrial products which is subject to industrial property.

This provision obliges the Member States to require that designs must be independently created to deserve protection regardless of whether they adopt a copyright protection or an industrial property registration system. In addition, they are obliged to require that designs must be new or original; yet, this Article does not permit the accumulation of requirements 1.

Article 25(1) uses expression «independently created» as well as words «new» and «original».

Industrial design must be independently created since it is a fundamental condition for protection. An industrial design is considered independently created when a designer, without knowing about the work of another designer, produces a similar or identical design 2.

There is no specific definition in the TRIPs Agreement for the words

1. D. COHEN, The International Protection of Designs, supra at note 3, pp. 113-114.

«new» and «original». However, the use of these words is crucial in the field of protection of industrial designs because word «new» has connotations of novelty which are well understood within the context of patent law, while «original» is a word which is rooted in copyright.³

Novelty is a concept of industrial property and is always measured in connection with a specific date. It is an essential objective condition for the protection of industrial property. Although the TRIPs Agreement does not specify the kind of novelty required to protect industrial designs, most national legislations require worldwide novelty to grant protection.

Generally, the notion of originality means that a work must express personal intellectual creation of an author. In other words, there must be a personal link between the work and the creator, so it is intertwined with independent creation. It is deemed as an essential subjective condition for the protection of copyright.

So, I can state that the TRIPs Agreement considers that independence of creation is a mandatory requirement for protection of industrial designs; additionally, Member States may choose between novelty and originality as a second requirement for such protection.

It should be noted that although industrial designs are intended for industrial use, the TRIPs Agreement does not require that designs must be industrially applicable as a requirement for protection.

Moreover, the TRIPs Agreement does not prevent Member States from adopting additional substantive requirements for protection, so all national legislations require that designs must not be contrary to public order and morality.

According to the second sentence of the text of Article 25(1), Member States may decide that an industrial design is not protectable where it does not significantly differ from known designs or combinations of known design features since; in this case, industrial design lacks novelty or originality.

The third sentence of Article 25(1) allows Member States to exclude the technical or functional designs from scope of protection of industrial designs. The rationale of this is that if a design for an article is dictated purely by the function which the article is intended to perform, protection for that design would have the effect of excluding all other manufacturers from producing items intended to perform the same function.¹

-
1. N. PIRES DE CARVALHO, *The TRIPs Regime of Trademarks and Designs*, Kluwer Law International, London, 2006, p. 402, para 25.8.
 2. *Id.*, p. 396, para 25.3.
 3. C. M. CORREA-A. A. YUSUF, *Intellectual Property and International Trade: the TRIPs Agreement*, Kluwer Law International B V, The Netherlands, 2008, p. 223.

Article 25(2) of the TRIPs Agreement provides requirement for securing protection for textile designs, in particular in regard to any costs, examination or publication, do not unreasonably impair the opportunity to seek and obtain such protection.

This provision can be implemented by industrial design law or copyright. It applies only to textile designs. No such provision is found in articles of trademarks or patent protection even though the expense of the latter has long been a source of complaint 2.

PART TWO

The national application of the requirements for protection of Industrial Designs

Part two of this paper will shed the light on what the national legislature requires to protect industrial designs in Europe and Egypt.

This part is subdivided into two sections; the first will explain the protectable subject matters, the excluded subject matters from design protection and the protection requirements under the Directive 98/71/EC of the European Parliament and of the Council on the legal protection of designs (the Design Directive). The second section will preview how the Egyptian Law on the Protection of Intellectual Property Rights No. 82 of 2002 regulates the above mentioned elements.

Section one

The requirements for protection of Industrial Designs under the E.C. Design Directive

The main aim of the Design Directive is to harmonize registered protection for industrial design across European Union Member States. So, it establishes the basic structure of European Union members' design registration systems 3.

A- Protectable subject matters:

To identify the protectable subject matters, it is appropriate to analyze the definitions of the key terms used in the Design Directive which are «design» and «product». Everything that satisfies these concepts is considered

-
1. WIPO Intellectual Property Handbook, Industrial Design and Integrated Circuits, supra at note 4, p. 115.
 2. C. M. CORREA-A. A. YUSUF, Intellectual Property and International Trade: the TRIPs Agreement, supra at note 21, p.224.
 3. <http://www.fryer.com/eudedrp1.htm>

protectable subject matter.

A.1. Definition of design:

Article 1(a) of the Design Directive defines a «design» as the appearance of the whole or a part of a product results from features of, in particular, the lines, contours, colors, shape, texture and/or materials of the product itself and/or its ornamentation. This definition covers two-dimensional designs which are called «designs», and three-dimensional designs which are called «models»¹.

The expression «appearance of the whole or a part of a product» refers to any element which can be perceived by the human senses. It seems to me that ideas and concepts are not covered by that definition since it focuses on the external aspects of a product.

There is constancy in the jurisprudence on that the word «appearance» covers all visual and tactile features of a product since Recital (11) of the Design Directive indicates that protection is conferred by registration for those design features of a product which are shown visibly in an application, and Recital (13) of the same Directive says that assessment of individual character relies on viewing of an informed user to the design. Furthermore, it is clear that the European legislature intends to exclude sound, taste and smell features from the definition of a «design».

In addition, it is not required that a design must be attractive or have aesthetic quality to be qualified for protection because Recital (14) of the Design Directive provides that «... whereas it is understood that this does not entail that a design must have an aesthetic quality...»

The use of expression «in particular» let me state that the current definition is very broad since it encompasses non-exhaustive list of features whereby the appearance may be assessed. Every design which meets that definition can be protected.

A.2. Definition of product:

Article 1(b) of the Design Directive defines a «product» as any industrial or handicraft item including, inter alia, component parts, packaging, get-up, graphic symbols, and typographic typefaces, but excluding computer programs.

1. D. MUSKER, *Community Design Law—Principles and Practice*, Sweet & Maxwell, London, 2002, p. 12, para 1-012.

This definition is broad enough to include all items which can be produced by industry or handicraft except computer programs. It covers all kinds of two-dimensional and three-dimensional products. However, it was not intended to go so far as to cover living spaces, e.g. landscape design. The protection for these is to be left to copyright 1.

The Design Directive provides for some examples for protected products. Component parts are deemed protectable where they are intended to be assembled into a complex product. The Design Directive defines a complex product as a product which is composed of multiple components which can be replaced permitting disassembly and reassembly of the product. Graphic symbol is something which is neither letter nor number, e.g. «@» which is used in Internet domain names. Typographic typefaces mean way of letter or number designs which are used in writing on computer, e.g. Times New Roman and Arial.

It is important to know that the Design Directive does not require that a design exhibits industrial application or some quality of repeatability. It is said that the European stance is appropriate as there is no justifiable reason to single out any one mode of manufacture for protection above all other means of manufacture 2.

As the Design Directive does not deal with matters concerning application and registration formalities, it is evident that what is protected is a design for any product; in other words, a design does not necessitate being associated with a specific product. This principle affects the assessment of novelty and individual character requirements as we will discuss below.

It should be noted that the protection is conferred on the design and not the product. Thus a registered design is not tied to a specific industrial product but remains protected regardless of the product to which it is applied 3.

B- Excluded subject matters:

Excluded subject matters are exceptions to registrability. According to Articles 1(b), 7 and 8 of the Design Directive, four main types of subject matters are excluded from design protection, namely, computer programs,

-
1. Id, p. 16, para 1-019.
 2. U. Suthersanen, Design Law in Europe, Sweet & Maxwell, London, 2000, p. 30, para 6-010.
 3. K.A. LEVIN-M.B. RICHMAN, A Survey of Industrial Design Protection in the EU and the US, in 25 EIPR 2003, 111 ff., at 111.

designs solely dictated by technical function, designs of interconnections and designs contrary to public order or morality.

First, Article 1(b) of the Design Directive excludes expressly computer programs from the definition of a product; accordingly they are not protected under design protection. The reason of this exclusion is that computer programs are decided to be protected by copyright in accordance with the provisions of the Directive 91/250/EEC on the legal protection of computer programs¹. However, specific graphic designs, such as computer icons, will qualify as products.

Second, Article 7(1) of the Design Directive stipulates that «1. A design right shall not subsist in features of appearance of a product which are solely dictated by its technical function...»

Features of a design can not be registered if they are exclusively dictated by the function of a product. Recital (14) of the Design Directive makes clear that the reasoning of this exclusion is to avoid hampering technological innovation within the European market. In practice, the refusal to register a design on the ground of technical function will arise where such design includes new technology or functionality invented or designed by the designer.

The word «dictated» could be interpreted to mean that a feature of a design is dictated solely by function if it can not be made any other way to perform the function, in other words «dictated» has a mandatory meaning. Also, it could mean that if a designer thought only about the function, in other words, «dictated» has a causative meaning. In fact, there is no harmonization among Member States regarding these interpretations, that is, some national courts adopt the first interpretation whereas other national courts take the second one².

It seems to me that expression «technical function» should be interpreted to mean the principal function of the product, that is, the main function for performing which the product is manufactured, because this view agrees with the rationale behind the current exclusion which is to allow the competitors to enter the relevant market as well as to promote the competition in supply of functional specifications.

-
1. The Council Directive 91/250/EEC of 14th May, 1991, on the legal protection of computer programs, which came into force on 16th May, 1991.
 2. D. MUSKER, Community Design Law—Principles and Practice, *supra* at note 25, pp. 45-46, para 1-079.

In addition, it should be noted that the Design Directive follows to some extent the exclusion provided for by Article 25(1) of the TRIPs Agreement that allows Member States to exclude the technical or functional designs from protection of industrial designs.

Third, Article 7(2), (3) of the Design Directive provide that «2. A design right shall not subsist in features of appearance of a product which must necessarily be reproduced in their exact form and dimensions in order to permit the product in which the design is incorporated or to which it is applied to be mechanically connected to or placed in, around or against another product so that either product may perform its function.

3. Notwithstanding paragraph 2, a design right shall, under the conditions set out in Articles 4 and 5, subsist in a design serving the purpose of allowing multiple assembly or connection of mutually interchangeable products within a modular system.»

According to Article 7(2) of the Design Directive, interconnecting features of a design are excluded from design protection. An interconnecting feature is any feature of the designed product which enables that product to be mechanically connected to or placed in, around or against another product, so that either product may perform its function. This exclusion applies to features which permit a precise fit between two products as in plug and socket 1.

This provision is concerned primarily with the spare parts within motor vehicle sector. For example, features of an exhaust pipe connecting with the underside of the car will be subject to the current exclusion. Additionally, the wording «mechanically connected» makes evident that this provision is limited to mechanical interconnection.

The aim of the mechanical interface exception is to promote interoperability of products of different makes by not extending protection to the design of mechanical fittings. Thus an industrial design which must be reproduced in exact form and dimension in order to mechanically connect to another product is not registrable. However, this exception does not apply if a design allows multiple assembly or connection of mutually interchangeable products within a modular system for example, stacking chairs 2.

Article 7(3) of the Design Directive removes features within a modular system from the interconnection exclusion clause. So, this exclusion does

-
1. U. Suthersanen, Design Law in Europe, supra at note 27, p. 36, para 6-030.
 2. K.A. LEVIN-M.B. RICHMAN, A Survey of Industrial Design Protection in the EU and the US, supra at note 28, p. 113.

not apply to Lego toy and interconnecting elements of a toy car assembly kits and the like.

It is said that one way of rationalizing the exclusion of modular products is that the assembling together of such products is not just an ancillary to enable the products to fulfill their function since assembly is the primary function of such products ¹.

In fact, the current paragraph was drafted as a result of successful lobbying of the manufacturers of such products on the European legislature. This special drafting for benefit of certain businesses is criticized by Professor Marco Ricolfi who thinks that it affirms that industrial designs are over protected.

It must be noticed that although Article 7 of the Design Directive excludes design right from subsisting in certain features of a design, namely, solely functional and must-fit features, these features are still part of the design and are hence presumably taken into account in assessing the overall appearance of the design for scope of protection and for individual character ².

In order to avoid any potential misinterpretation of the above mentioned paragraphs of Article 7 of the Design Directive, David Musker said, correctly, that Article 7(1) is concerned with features which allows a product to perform its function, whereas Article 7(2) concerning with features which allow two products to be connected so that either product may perform its function, in other words, features on product A allowing product B to function ³.

Fourth, Article 8 of the Design Directive stipulates that «A design right shall not subsist in a design which is contrary to public policy or to accepted principles of morality.»

Accordingly, a design that is contrary to public order or to accepted principles of morality is excluded from protection. Indeed, the concept of public order and morality differs from country to country. Moreover, it differs within a given country from time to time in accordance with the prevailing ethical and cultural considerations. So, the inclusion of above mentioned provision has potential to upset the unitary concept of European design law because it is so difficult to set out unified standards for public policy or morality in all European Member States.

1. D. MUSKER, *Community Design Law-Principles and Practice*, supra at note 25, p. 51, para 1-088.

2. *Id.*, p. 41, para 1-072.

3. *Id.*, p. 43, para 1-076.

In addition to the above mentioned excluded subject matters, Article 11 of the Design Directive allows each Member State to adopt additional grounds for refusal of registration. These optional grounds include refusing registration if a design incorporates a prior registered or unregistered trademark, or constitutes unauthorized use of a copyrighted work, or constitutes improper use of well known trademark, or is not entitled to be registered under the law of the Member State concerned.

C- Protection requirements:

Article 3 of the Design Directive provides that «1. Member States shall protect designs by registration, and shall confer exclusive rights upon their holders in accordance with the provisions of this Directive.

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

3. 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:

(a) if the component part, once it has been incorporated into the complex product, remains visible during normal use of the latter, and

(b) to the extent that those visible features of the component part fulfill in themselves the requirements as to novelty and individual character.

4. «Normal use» within the meaning of paragraph (3)(a) shall mean use by the end user, excluding maintenance, servicing or repair work.»

The Design Directive requires that a design must comply with two main requirements to be conferred legal protection, that is; a design must be new and have individual character. The definitions of novelty and individual character requirements are obligatory since the European legislature intends to create harmonization in national laws of European Member States.

In addition, visibility criterion must be met, as an additional condition, only to protect component parts. The disclosure, the prior art and the exceptions to the prior art have the same concepts concerning with novelty and individual character requirements. All these principles will be discussed below.

C.1. Novelty:

Article 4 of the Design Directive provides that «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.»

The principle is that a design must be new to be protected. It is considered

new if there is no identical design was made available to the public before the filing date of the application for registration or, if priority is claimed, the date of priority.

The assessment of novelty depends on an objective comparison between a design for which registration is applied and any existing design in the prior art, the former design has to differ in material details to be deemed new. What will be immaterial is a matter of the courts. This comparison is carried out by expert's eye not by end user.

Article 6 of the Design Directive defines the prior art for the purpose of measurement of novelty and individual character requirements. The wording «made available to the public» means that if a design has been published following registration or otherwise, or exhibited, used in trade or otherwise disclosed. So, the prior art must be a «design» as that is now defined, but it can be a design for any kind of item, and this includes most forms of artistic work in a copyright sense. 1.

Consequently, the novelty of a design could be defeated by a prior design of a product other than the product to which the claimed design will be applied since the Design Directive does not require that design registration must be associated with a specific product.

Certain exceptions to the prior art are set out by Article 6 of the Design Directive. A design is not considered to be in the prior art if it could not reasonably have become known in the normal course of business to the circles specialized in the sector concerned, operating within the Community. The Green Paper indicates that the relevant circles would comprise the specialists, designers, merchants and manufacturers operating in the sector concerned. This exclusion is called the «safeguard clause».

A design will not be deemed to have been made available to the public for the sole reason that it has been disclosed to a third person under explicit or implicit conditions of confidentiality. Since there are no harmonized standards for the confidentiality concept within European Union, the determination of conditions of confidentiality will necessarily rely on the different laws of the Member States.

In addition, a design is excluded from the prior art if it was disclosed by the designer, his successor in title, or a third person as a result of information provided or action taken by the designer, or his successor in title during the

1. W. CORNISH-D. LLEWELYN, *International property: Patent, copyright, Trade Marks and Allied Rights*, Sweet & Maxwell, London, 2007, 6th Edition, p.576, para 15-17.

12-month period before the date of filing of the application or, if priority is claimed, the date of priority. The rationale behind allowing a designer 12-month grace period is to enable him to test the reaction of the consumers and the market and to evaluate the viability of his design before applying for registration.

Also, a design is excluded from the prior art if it has been made available to the public as a consequence of an abusive disclosure. This case could happen if a design was stolen from the designer or his successor in title.

The critical date for considering existing prior art in order to examine novelty requirement is the filing date of the application for registration or, if priority is claimed, the date of priority.

Concerning with the nature of novelty requirement, it is stated that the European legislator adopts relative novelty as opposed to absolute novelty; this is effected by introducing the concept of reasonable Community trade knowledge ¹. So, the public availability is the knowledge of the specialized circles within the territory of the community.

However, this novelty criterion is criticized on ground that in the age of the Internet every part of the world is connected so this kind of knowledge is questionable. Furthermore, the specialized circle of designers is relatively small and designers keep close contact with each other in international organizations like ICSID ².

C.2. Individual character:

Article 5 of the Design Directive stipulates that «1. 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. 2. In assessing individual character, the degree of freedom of the designer in developing the design shall be taken into consideration.»

The second requirement for design protection is that a design must have individual character. An industrial design satisfies individual character requirement if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design has been made available to the public.

1. U. Suthersanen, Design Law in Europe, supra at note 27, p. 43, para 6-058.

2. T. BEZZEGH, Main Features Of The Harmonized European Design Law, European Integration Studies, volume 3, No. 1, 2004, p. 6.

A comparison must be made between a design for which protection is sought and any prior design to determine whether a design has individuality or not. The expression «overall impression» lets me say that the comparison must focus on designs as a whole regardless of the detailed differences between them. The common features must be given more weight than differences. If the comparison reveals that the overall impression is similar, the design under review will lack individual character.

As an industrial design is an important tool for marketing the products, so if the comparison shows that a new design has difference that can have an influence on market success of the product to which it is applied, individual character requirement is present.

In this context it should be considered that the assessment of individual character does not necessitate determination of quality of a design, but it requires that there is a notable or obvious difference when comparing the overall impression produced by a new design on an informed user with the overall impression produced by prior design on such a user.

According to Recital (13) of the Design Directive, 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. Thus, the comparison will rely on a visual test as determined by the informed user. Additionally, this Recital set out relevant factors which should be taken into consideration during the comparison. These factors include, inter alia, the nature of the product to which the design is applied or in which it is incorporated, and the industrial sector to which it belongs.

The prior art of individual character requirement is the same as that of novelty requirement, that is, comparison has to be made between new design and any design which has been published, exhibited, used in trade or otherwise disclosed. This prior art is subject to the same exceptions which have been discussed above.

The relevant date to identify the prior art in order to determine the individual character requirement is, also, the same as the novelty requirement, that is, the filing date of the application for registration or, if priority is claimed, the date of priority.

The measurement of the individual character of a design depends on the opinion of the informed user. The early commentaries suggest that, in line with the design is a marketing tool» theory, the informed user will, though not necessarily, be the end consumer of the product 1.

The term «informed user» could be interpreted to mean a designer who specializes in a certain area of production, or a designer who is generally informed about the market, or an attentive consumer in the market sphere. The European legislature does not require an expertise or special knowledge of all details of a design by the informed user but his general impression. It appears that the informed user shall know more than the average person, that is, he shall have a certain amount of experience in the field of the respective product, or shall at least be aware of this field and similar prior designs 2.

In my view the informed user means the attentive consumer. He differs from the average consumer and the skilled designer. He is in a middle position between both of them, that is, he has general knowledge about the relevant industrial sector to which the design applies and the similar preceding designs more than the average consumer and less than the skilled designer. Consequently, the individual character of a design is determined by the eye of the attentive consumer. It should be noted that this criterion is different from that of the assessment of the novelty of a design, namely, the expert's eye.

The degree of freedom of the designer in developing the design shall be taken into consideration to assess the individual character requirement. To determine the designer's freedom, the courts should look at the standardized features within a particular design or field of product and the environment of the creation.

The degree of designer's freedom in developing the design means that where there is little scope for differences, then relatively little differences from the prior design will be needed to find the individual character requirement, and conversely where design freedom level is great, larger differences are required 3.

The courts follow a four level test to decide upon the individual character requirement 1. First, the courts will assume the mantle of the relevant informed user. It depends on the kind of product. The application for registration is relevant in this regard. Second, the courts have to estimate the probable level of the informed user's knowledge. Third, the courts determine the boundaries of the existing design corpus within the relevant

-
1. U. Suthersanen, Design Law in Europe, supra at note 27, p. 39, para 6-046.
 2. U. KOSCHTIAL, Design Law: Individual Character, Visibility and Functionality, in 36 IIC 2005, 297 ff., at 299.
 3. D. MUSKER, Community Design Law-Principles and Practice, supra at note 25, p. 33, para 1-057.

territory. Fourth, the overall impression of new design is compared with that of formerly known design.

C.3. Visibility:

According to Article 3(3) of the Design Directive, the visibility is a condition for registered design protection. Only designs of component parts are subject to this condition. A design which constitutes a component part of a complex product must be remain visible during the normal use once it has been incorporated into a complex product. Moreover, the visible features of the component part have to fulfill in themselves the requirements as to novelty and individual character.

The visibility means that a design can be visible by the average observer with ordinary effort. This indicates that one could demand that the average observer uses glasses, but not a microscope, moreover, visibility dose not necessitate that a design must be visible at all times 2.

This legal norm is confined to the concept of complex product, e.g. a vehicle as a whole is a complex product, while wing mirror and steering wheel of that vehicle could constitute component parts which must remain visible during the normal use of such vehicle to be protected.

The visibility of a component part of a complex product is a new concept in the European legal system since it concerns parts design of a product whereas the traditional legal norm concerning with product design as a whole and not parts of it.

Once a component part has been incorporated into a complex product, it must remain visible during normal use of such product. The term «normal use» means the final use of the product by the end user and not exposition of such product for sale. Consequently, uses by virtue of repair, maintenance, servicing or care are excluded from the concept of normal use.

According to Article 3(1) of the Design Directive, a design must be registered to be protected. Member States are required to protect industrial designs through registration. However, it is said that this merely means that a registration-based system must be established in each Member States. The Design Directive does not prevent supplementary protection of designs by other means including unregistered design right or copyright 1.

This allowed the Commission to develop the protection of design through

-
1. U. Suthersanen, *Design Law in Europe*, supra at note 27, pp. 39-40, para 6-048.
 2. U. KOSCHTIAL, *Design Law: Individual Character, Visibility and Functionality*, supra at note 40, p. 310.

providing for a new means of protection which is unregistered Community design by the Council Regulation (EC) No. 6/2002 on Community designs 2. The Regulation states that an unregistered Community design is automatically protected for a period of three years as of the date on which the design was first made available to the public within the territory of European Union. The substantive provisions of that Regulation concerning with definitions of key terms, requirements for protection, exceptions, exclusive rights and scope of protection are identical to the corresponding provisions of the Design Directive.

It must be noted that Article 17 of the Design Directive allows Member States to protect design by copyright law. According to this Article, a design protected by a design right registered in a Member State in accordance with the Design Directive shall also be eligible for protection under the copyright law of that State as from the date on which the design was created or fixed in any form. Each Member State is free to determine the extent to which, and the conditions under which, copyright protection is conferred, including the level of originality required. This discretion granted to Member States may conflict with the main purpose of the Design Directive which is harmonization of national design laws throughout Europe.

Section two

The requirements for protection of Industrial Designs under the Egyptian Law

The Egyptian Law on the Protection of Intellectual Property Rights No. 82 of 2002 (the Egyptian Law) replaced a collection of laws enacted over fifty years ago with a unified body of laws that brings Egyptian IP legislation into line with most of the developed world and the various intellectual property treaties to which it is a party. The Egyptian Law regulates the protection of industrial designs and registration proceedings in the Articles from 119 to 137 thereof. This section of the paper will focus on the definition of industrial design and model, excluded subject matters and protection requirements in accordance with the Egyptian Law.

A- Definition of industrial design and model:

Article 119 of the Egyptian Law provides that «An industrial design or model is any composition of lines or any three-dimensional form whether

-
1. U. Suthersanen, Design Law in Europe, supra at note 27, p. 44, para 6-066.
 2. The Council Regulation (EC) No. 6/2002 of 12th December, 2001 on Community designs, which came into force on 6th March, 2002.

or not associated with colors provided that such composition or form gives a special appearance of novelty and is industrially applicable.»

It is clear that the Egyptian Law differentiates expressly between industrial design and industrial model. An industrial design is two-dimensional shape on the surface of a product to make it attractive and distinctive. It is defined as any arrangement of lines with or without colors if it is distinctively novel and applicable for industrial use. It may be drawings of nature or parallel lines or squares. For example, patterns on carpets and masterpieces.

An industrial model is the three-dimensional form of a product. It represents the shape of a product itself which gives it an aesthetic appearance. For example, the shape of perfume bottle. In addition, an industrial model may be concurrently protected as trademark if it satisfies the conditions of trademark protection.

It should be noted that the making of both design and model could be done manually or automatically in order to make a product, to which it is applied, distinctive from identical or similar products. An industrial design or model is required to have a special appearance of novelty and industrial applicability to be afforded with legal protection. These conditions will be explained later.

B- Excluded subject matters:

Article 124 of the Egyptian Law stipulates that «The following are industrial designs or models that shall not be registered:

1- A design or model necessitated by the customary technical or functional considerations of the product.

2- A design or model which includes slogans, religious symbols, seals or flags of the Arab Republic of Egypt or any foreign country, or if consequences of its utilization results in breach of public order or morality.

3- A design or model that is identical, similar or resembles a registered trademark or a well-known mark...»

The Egyptian legislature excludes expressly three subject matters from design protection. **First**, an industrial design or model whose shape is basically due to the technical or functional requirements of the product shall not be registered. This exclusion is justified by that the protection of the technical or functional considerations of the product would prevent the competition in the market.

Additionally, this exception goes well with Article 25(1) of the TRIPs Agreement which allows Member States to exclude the technical or

functional features from design protection.

Second, an industrial design or model which includes emblems, religious symbols, stamps or flags of Egypt or any other country can not be protected. Moreover, if the use of an industrial design or model undermines public order or offends public morality, this design or model can not be registered.

It should be noted that this exclusion agrees with Article 25(1) of the TRIPs Agreement that does not prevent Member States from adopting additional substantive requirements for design protection.

Third, an industrial design or model which is identical, similar or closely resembles a registered trademark or a well-known mark is excluded from legal protection in order to protect consumers against any potential confusion. However; the owner of a registered trademark may register his trademark as an industrial design or model if it meets the protection requirements of industrial design. In this case, this design or model would enjoy dual protection during the term of protection of industrial design 1.

C- Protection requirements:

The Egyptian Law protects industrial designs and models through registration. This registration is effective with novelty examination. According to Article 119 of the Egyptian Law, an industrial design or model must satisfy two main requirements to qualify for registration. An industrial design or model must give special appearance of novelty as well as must be industrially applicable.

C.1. Special appearance of novelty:

An industrial design or model must be distinctively novel. It seems clear that use of word «appearance» covers all visual and tactile features of a product. Moreover, the wording of «special appearance» could be interpreted to mean that an industrial design or model has to have special features which make it distinctive from any similar existing design in the prior art. In other word, a design or model must not be copied from prior design or model to be registered.

-
1. In fact this presumption has already occurred in Egypt in some cases. In my view the main aim of the owner of a registered trademark is to be overprotected. However, I think that there is no practical justification for this overprotection because the fact that design protection should be limited in time, whereas trademark protection does not have a final term, accordingly, the design will fall in the public domain after the end of limited term of design protection whereas the trademark may last forever. In other words, I see that this overprotection has no legal value since the trademark protection is stronger than design protection.

The Egyptian Administrative Adjudication Court said that a design or model must include amount of creativity and novelty in order to justify granting the legal protection. The criterion of this protection is that a design or model has to be new per se and must not be copied from preceding design or model ¹.

Since the Egyptian Law adopts worldwide novelty, the Industrial Designs Office is obliged to examine the novelty of a claimed design or model before registration. Therefore, it has to find the prior art in order to compare a design or model as a whole with any prior design which has been disclosed to the public anywhere in the world before the filing date of the registration application.

Such comparison does not focus on the detailed differences, so where the Industrial Designs Office finds that a design or model as a whole has a distinctive shape from existing similar designs or models, this design or model will be considered new. In practice, the Industrial Designs Office relies on the national public record and Internet to find the prior art and to evaluate the novelty of a design or model.

It should be noted that the Egyptian Law does not provide specific criterion to be used to assess the distinctive appearance of novelty of a design or model, so that I can say that the novelty examination is to some extent subjective process.

A design or model will lack novelty in certain cases in accordance with Article 120 of the Egyptian Law which provides that «An industrial design or model shall lose its novelty if:

1- It has been disclosed, described or uses thereof are displayed to the public prior to the filing date of the application for registration thereof. However, an industrial design or model shall still be considered new if the disclosure or description thereof has been made after the application for the registration thereof in a Member State of the World Trade Organization (WTO) or in a country that treats Egypt on reciprocal basis, or if it has been displayed in national or international exhibitions, or it has been published in a conference or in scientific periodicals, all these within a period not exceeding six months prior to the filing date of the application for the registration in Egypt.

2- It includes non-fundamental differences in respect of a prior industrial design or model, or it is dedicated to another type of products other than

1. Egyptian Administrative Adjudication Court, 3rd May, 2003, case No. 8500 of year 52.

to which the previously industrial registered design or model was designed for.»

Consequently, Article 120(1) of the Egyptian law states that a design or model will not be considered new if it has been publicly disclosed, described or exposed before the filing date of the registration application. This means that the Egyptian legislature requires an industrial design or model must have absolute novelty like patent. Furthermore, it was said that mere explanation of description of a design or model prior to the filing date of the application for registration thereof is sufficient to say that such design or model loses its novelty 1.

In this respect, the Egyptian Court of Cassation stated that the disclosure of a design to the producers and traders before its registration will lead to lack of novelty, so that every person can make or use this design without authorization from the designer 2.

Nonetheless, the Egyptian Law stipulates that the disclosure or description of a design or model would not affect its novelty if it has been carried out after the filing of a registration application in a Member State of the World Trade Organization (WTO), or in a country which deals with Egypt on basis of reciprocity within a period not exceeding six months prior to the date on which the registration application was filed in Egypt.

It should be noted that this exception agrees with the priority right set out by Article 4 of the Paris Convention which provides that «Any person who has duly filed an application for a patent, or for the registration of a utility model, or of an industrial design, or of a trademark, in one of the countries of the Union, or his successor in title, shall enjoy, for the purpose of filing in the other countries, a right of priority during the periods hereinafter fixed...»

It is known that the Paris Convention stipulates that the period of the priority right is six months. It starts from the date of filing of the first application for registration of an industrial design. Consequently, any subsequent filing in any of the other countries of the Union before the expiration of the period referred to above will not be invalidated by reason of any acts accomplished in the interval, in particular, publication, exploitation, or putting on sale of copies of a design or model.

In addition, the Egyptian Law excludes a design or model from the prior art if it has been displayed in national or international exhibitions, or it has been published in a conference or in scientific periodicals, provided that

-
1. S. Elkaliouby, *The Industrial Property*, Dar Elnahda Elarabia, Cairo, 2005, 5th Edition, p. 668, para 467.
 2. Egyptian Court of Cassation, 6th December, 1971, case No. 665 of year 41.

this display or publication has been occurred within six months prior to the filing date of the registration application.

Consequently, the Egyptian Law gives 6-month grace period to the designer during which he can display his design or model in national or international exhibitions as well as publish it in a conference or in scientific periodicals and journals. These acts will not affect the novelty of a design or model as long as they have been made within a period not exceeding six months prior to the filing date of the registration application.

According to Article 120(2) of the Egyptian Law, the novelty of a design or model would be defeated if it was not essentially different from any existing industrial design or model, or if it was intended for another kind of products other than those of the previously registered industrial design or model.

It is manifest that a design or model must include basic differences that make it distinctive from any prior design or model in order to decide that it is new and protectable. Moreover, a design or model has to have fundamental differences from previously registered industrial design or model even if the former is dedicated to another type of products 1 .

C.2. Industrial applicability:

According to Article 119 of the Egyptian Law, an industrial design or model must be industrially applicable. Industrial applicability indicates that a design or model must be capable of being manufactured by industry or handicraft to be registerable.

This requirement means that a design or model must be confined to distinguish the industrial products. The industrial applicability must be interpreted in broad sense to include all fields of industry. Therefore, designs or models which are printed in catalogues or advertisements to be distributed among the public as well as pure artistic designs can not be registered and protected under industrial design protection 2.

However, Article 140 of the Egyptian Law provides that «Protection under this law is conferred to authors of literary and artistic works, in particular the following works:

1- ...

9- Works of drawings with lines or colors, sculpture, lithography, printing on textile and any other similar works of fine arts...»

1. S. Elkaliouby, *The Industrial Property*, supra at note 48, p. 663, para 464.
2. Id, p. 670, para 469.

Hence, the Egyptian Law allows protecting design or model concurrently under industrial design protection and copyright if such design or model is, at the same time, industrially applicable and has subjective artistic value.

No doubt that this dual protection of a design or model is very useful for the designer since the term of protection conferred by the registration of an industrial design is short i.e. ten years as of the date of filing the registration application in Egypt and may be renewed once for a further period of five years. Whereas the term of protection conferred by the copyright is author's life and is extended for fifty years as of the date of his death.

It is worthy to say that Article 123 of the Executive Regulation of the Egyptian Law on the Protection of Intellectual Property Rights states that the Industrial Designs Office may remove words, letters, or numbers from an industrial design or model if they are not indispensable fundamental components of such design or model.

CONCLUSION

It could be finally concluded that the Paris Convention and the Berne Convention oblige the contracting countries to protect industrial design, yet, they don't specify certain requirements for industrial design protection whereas the TRIPs Agreement obliges the WTO Member States to protect industrial design and determines the protection requirements, that is, a design must be independently created as well as must be new or original to deserve protection. Industrial design protection gives its owner a property right which grants him exclusive use and exploitation of his creation by excluding the others from using it without his consent.

Since industrial design has noticeable impact on the marketing of products and plays a significant role in promoting industry, trade, and economic development, most countries implement their international obligation to provide legal protection for industrial design in their domestic legislations.

As we have seen, the European legislator protects industrial design through registration; additionally, it protects unregistered Community designs for a period of three years only from the date on which the design was first made available to the public within the European Union whereas the Egyptian legislator protects industrial design only by registration and does not provide protection for unregistered design.

The European and Egyptian legislators follow to some extent the TRIPs Agreement regarding the requirements for design protection. Both of them require that a design or model must be novel to be conferred legal protection. The assessment of novelty necessitates a comparison between the claimed design and the prior art. This design will be considered new if it is sufficient

different from the prior designs.

However, there is an important difference between the two legal systems regarding the criterion of novelty which they follow. On one hand, the European legislator adopts relative novelty. In fact, it seems to me that it applies this kind of novelty in order to protect European designers against any similar design has been disclosed outside the European Community as well as to save time and cost of the novelty examination process. On the other hand, the Egyptian legislator, like most countries, adopts absolute novelty to register industrial design or model. So, the examination of novelty in Egypt takes more time to be sure that the claimed design is sufficient different from any prior similar design anywhere in the world.

It should be noted that the European legislator does not require that a design has to have industrial applicability to be registered, whereas the Egyptian legislator stipulates expressly that a design or model must be capable of being manufactured by industry to be protected.

In addition, the European and Egyptian legislators provide grace period during which the disclosure of a design or model to the public does not defeat the novelty thereof. However, there is another difference between the two legislators. The European legislator provides 12-month period before the filing date of the registration application whereas the Egyptian legislator stipulates 6-month period only before the filing date of the registration application.

Finally, both legislators allow designer to seek protection of his design under copyright law beside the design protection. Indeed, copyright protection is an important way to protect design since it lasts longer than industrial design protection.

BIBLIOGRAPHY

Books:

B.G. GRAY-E. BOUZALAS eds., Industrial Design Rights, An International Perspective, Kluwer Law International, 2001.

C. M. CORREA-A. A. YUSUF, Intellectual Property and International Trade: the TRIPS Agreement, Kluwer Law International B V, The Netherlands, 2008.

D. COHEN, The International Protection of Designs, Kluwer Law International, London, 2000.

D. GERVAIS, The TRIPs Agreement: Drafting History and Analysis, Sweet & Maxwell, London, 2003, 2nd Edition.

D. MUSKER, Community Design Law-Principles and Practice, Sweet & Maxwell, London, 2002.

F.M ABBOTT-TH. COTTIER-F. GURRY, International Intellectual Property in an Integrated World Economy, Aspen Publishers, Wolters Kluwer, New York, 2007.

G. H. C. BODENHAUSEN, Guide to the application of the Paris Convention for the Protection of Industrial Property, BIRPI, WIPO publication, 2004.

N. PIRES DE CARVALHO, The TRIPS Regime of Trademarks and Designs, Kluwer Law International, London, 2006.

S. Elkaliouby, The Industrial Property, Dar Elnahda Elarabia, Cairo, 2005, 5th Edition.

U. Suthersanen, Design Law in Europe, Sweet & Maxwell, London, 2000.

W. CORNISH-D. LLEWELYN, International property: Patent, copyright, Trade Marks and Allied Rights, Sweet & Maxwell, London, 2007, 6th Edition.

WIPO Intellectual Property Handbook, Industrial Design and Integrated Circuits, WIPO Publication, 2004.

Articles:

A. KUR, TRIPs and Design Protection in (F.K. Beier & G. Schricker

eds.), From GATT to TRIPS: The Agreement on Trade Related Aspects of Intellectual property Rights, Studies in Intellectual Property and Copyright Law, 1996.

C. D. THORNE, European Community Design Regulation, in EIPR 2000.

K.A. LEVIN-M.B. RICHMAN, A Survey of Industrial Design Protection in the EU and the US, in 25 EIPR 2003.

T. BEZZEGH, Main Features Of The Harmonized European Design Law, European Integration Studies, volume 3, No. 1, 2004.

U. KOSCHTIAL, Design Law: Individual Character, Visibility and Functionality, in 36 IIC 2005.

V. SAEZ, The Unregistered Community Design, in EIPR 2002.

Conventions and Legislations:

Agreement on Trade-Related Aspects of Intellectual Property Rights, 15th April, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C.

Berne Convention for the Protection of Literary and Artistic Works, Berne, 9th September, 1886, which came into force on 5th December, 1887.

Paris Convention for the Protection of Industrial Property, Paris, 20th March, 1883, which came into force on 7th July, 1884.

The Council Directive 91/250/EEC of 14th May, 1991, on the legal protection of computer programs, which came into force on 16th May, 1991.

The Council Regulation (EC) No. 6/2002 of 12th December, 2001, on Community designs, which came into force on 6th March, 2002.

The Directive 98/71/EC of the European Parliament and of the Council of 13th October, 1998, on the legal protection of designs, which came into force on 24th December, 1998.

The Egyptian Law on the Protection of Intellectual Property Rights No. 82 of 2002, 2nd June, 2002, which came into force on 3rd June, 2002.