

Design Patents and Industrial Designs: traps for the inventor

FOREWORD

This text is of paramount importance. Indeed, it allows us to identify linguistic deviations, insidiously introduced within the formulation of legal texts, and which emphasize arbitrary principles at the expense of ethics. For over two centuries, due to their inherent vagueness and incoherence, such legal texts on all continents have led to the most contradictory rulings.

It is at the heart of this juridical labyrinth inherent in the law on industrial drawings and models (design patent) that one finds the weakness of patent* and the strength of copyright resulting naturally from a Work of the Mind.

In spite of the deceptions and abuses inherent in this confused and incoherent doctrine, the ethical base upon which copyright is founded has remained unscathed... One must yet avoid the booby traps in order to judiciously establish one's intellectual property. This work was written in order to discover the true intentions that lie behind this juridical gibberish, and above all to help the inventor understand the nebulous intricacies of this semantic mystification.

It therefore is with the mind of an investigator that we tackled this fascinating subject. With this in view, a comparison between the European and American legal systems (*including a few specific details concerning Great-Britain that reflect its liberal views*), should lead to a global and well-founded analysis of the matter worldwide.

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I. According to European laws (except for Great Britain): Study based on the Dalloz Précis: The Right to Industrial Property 3rd edition 1990 – ISBN 2-247-01139 X

Drawings and models, two words that are omnipresent in the world of inventors and industrialists. The European laws specify that "*drawings and models can legally be transacted as titles in a number of ways: in the first place, one can assign them; one can also licence them*". Therefore, by definition, just like patent, one can classify such titles of monopolistic production and commercialisation as industrial rights. Note: "Drawings and models" are the European equivalent of Design Patent (U.S.) or Industrial Designs (Canada).

* By opting unknowingly for design patent, the inventor, who is not an expert on semantics, must rely on interpretations of legal texts that obviously avoid dealing with copyright... Inevitably such texts contain patent's Achilles' heel. Indeed, by their formulation, these texts seem to skillfully conceal the ethical and logical basis of intellectual property. It is notably in these texts, where every means possible are used to deny authors their legitimate rights, where the arbitrary is most blatant.

The following text of law reveals in further detail the legislator's **bias towards industrial rights** which he supports through a careful justification of patent's inherent prejudice: *"The rules on copyright, enacted by the 11 March, 1957 Act, are applied in compliance with the rule of artistic unity. Such rules, by their tendency to over-protect the author, are nevertheless ill-adapted to industrial drawings and models..."*

Is the author then but a beggar, a non-entity, viewed and treated as a nuisance by the industrialists and the legal system? Further study of this highly instructive legal text enlightens us as to what we already knew, namely, that the legislation is based on principles that violate natural law... *"When it came to registering a design or a model, authors were left unaccounted for..."* Such a blatant violation of private property has yet to be contested by the most ardent supporters of material privileges, namely the owners and purchasers of material assets...

One is bewildered to find that such rules are applied even though *"some legal experts insist that under no circumstance can this aspect of the law restrict the consequences of the principle of artistic unity"* and, *"failing registration, copyright alone must prevail"*! Why bother to register? According to law, such a right (*i.e. copyright*) belongs to the author of a work.

Great decisions indeed! After drifting aimlessly in their rulings for two centuries, one would expect lawmakers to recognize the fact that intellectual property has precedence over titles of commercialisation. Instead of conceding the obvious, the legislator interprets its application arbitrarily, thus causing artificial confusion as reflected by the jurisprudence worldwide!

With regards to drawings and models, what type of work are we really dealing with, industrial or artistic? Indeed, one enjoys a so-called *"protection"* by virtue of copyright as granted under the regime of artistic property, which is then **denied** as soon as the author registers an application for an industrial title! Thus, without settling the issue, juridical debates continue to focus on form, content and intention, **under the pretence of serving Law, while the ethical and moral principles on which Law is founded are constantly violated with impunity and in the subtlest and most inventive ways.**

In order to more fully comprehend the arbitrary nature of the present legal system, one must determine the extent to which the legal texts have defined **drawings and models**. To begin with, how are they legally classified, as artistic or industrial? Are they considered purely from an aesthetic point of view or, more generally, do we look at the entire scope of what they encompass, namely, what they represent, symbolize, allow, etc.?

The real question that needs to be answered is the following: **do drawings and models have properties that allow them to be classified as a Work of the Mind?** If so, then there is an end to the matter. If not, what are the implications?

What seems to influence the legislator, neophyte on the subject, is the notion that, by recognizing an individual as not only the source, but as the author of a design or model,

this will somehow (*but on what authority?*) **impede industrial and commercial (economic) progress**. This, ultimately, seems to be the cause of his uneasiness.

While in reality, it seems that not recognizing the author renders **the commercialisation incomparably more complex, more irrational**, more arduous, and more dubious than if nature was allowed to take its course with all the moral rights that emanate, that is to say, those pertaining to authors.

True remnants of the Inquisition's tribunals, those who benefit from today's **anachronistic laws** hide in vain behind them, **trying to deny the author his rightful due**. In vain because, in the long run, nothing can stop mankind's progress towards a society that values individual freedom and human rights, and therefore, a society where authors of inventions or any other concept are destined to be freed from an obsolete ostracism.

Behind such a seemingly naive hope lies a belief in the irrepressible power of the human spirit, which, through the millennia, has fought tyranny and provided mankind with the Declaration of Human Rights, quoted by leading authorities as a basic reference before international tribunals.

Human evolution cannot indefinitely be stalled by arbitrary rulings. Galileo's condemnation, while forcing him to renounce the obvious, never prevented the Earth's orbit around the Sun; likewise, no one can deny the author the front-ranking position, which is his, both chronologically and morally.

Let us continue to examine the problem from a juridical point of view. As always, one must start with definitions as they have been proposed.

Industrial design is defined as *"a set of lines or colors representing a figure and having a precise meaning. A new design must therefore create an original decorative effect resulting from a particular set of lines and colors."* In our opinion, any artistic drawing or painting, be it Rembrandt's, falls under this definition...

Industrial model is defined as follows: *"Also known as a plastic shape, a model consists of any kind of wax, plaster or clay modelling, any mould or moulding, any classic or ornamental sculpture, as well as any new kind of hair do, shape of hat, corset, toy etc..."... or "any industrial object whose particular shape gives it a recognizable and new appearance, or whose external effects give it its specific character, thereby making it different from other similar objects"...* Any new combination that gives an industrial object an original appearance can therefore be *"protected"*.

One might add that in order to reach such a result, whose form should also be pleasant, convenient and efficient, one must take the time to reflect upon the matter, mentally gather all the possible parameters, taking into account a generally very large number of different elements which one must place in their proper order without leaving them to chance. In short, a work that a being devoid of rational intelligence, sensitivity, memory or intuition, a baboon, for example, could never hope to achieve. From such a

perspective, mind is essential. The result, **the invention, being a drawing or a model**, must therefore be classified as a **Work of the Mind**.

The articles of law that govern drawings and models were enacted according to the same right as that enjoyed by writers, thereby initially supporting the notion that drawings and models are **Works of the Mind**. However, legislators, more particularly those who elaborated the French law of July 19 and 24, 1793, first of its kind, were thinking only of artistic works and not of inventors, who have their own personal way of creating drawings and models, which, after all, is their right...

It could be that such inventors were only interested in the artistic aspect of the products, in so much that its aesthetic value could attract a large clientele. The law of March 18, 1806, seemed to confirm such a reality by introducing a procedure for deposit. Thereafter, the law of 1793 would apply solely to *pure art* and that of 1806 to *applied art*. Such segregation is, of course, purely arbitrary.

Pure art was thus restricted to authors, while patent law's strict regime reduced the other art to slavery, **provided, of course, that the author would actually register an industrial title**. In total contradiction with a considerable jurisprudence in favour of authors' rights and with the basic principles of the Works of the Mind, various codes of intellectual property have, for nearly two centuries, continued routinely to renew these arbitrary principles, which are intended to induce the author to apply for industrial titles.

The economic impact of industrial drawings and models is beyond question: **The titleholder or his licensee holds a monopolistic right to produce the invention nationwide. The invention must be disclosed. He can extend this right internationally, much like patent, with the same advantages and inconveniences.**

Aesthetics, here, serve as a convenient alibi to dismiss a rival: "**THE AUTHOR**". The industrialist continues to dismiss the latter, perceiving him as a cause for lost profits and diminished control, refusing to understand that the inventor should be encouraged to further invent, not so that he can be a substitute industrial or commercial entrepreneur but rather a valuable source of innovative ideas.

Thus we find ourselves discussing the artistic form and industrial consequences of a design, and if there is functionality to the design, we jump to patent law, thereby denying its rightful place under copyright law. Meanwhile, in this context, such topics as publishing and advertising are avoided.

An ornamental design initially enjoys the benefits of copyright, whereas, if it has a potential for industrial use, **hence commercialisation**, one will try to deny the author's rightful benefits.

The texts of law (*including American laws*) carry this point even further. In certain circumstances, they impose patent's regime without alternative to any object that meets both the criteria of patentability as well as that of industrial drawings and models: ***"One cannot apply patent's protection and that of industrial drawings and models: if an object can be considered both as a new "industrial" drawing or model and as a patentable***

invention and if the characteristics which make the drawing or model original are the same ones as those that make it patentable, then the invention can only be protected by a patent''.

Given the incoherence of these laws and jurisprudence, one better understands our method of reasoning which, since the very beginning of this text, may seem to proceed at random like a hound dog nosing out its game. These same legal texts have classified the aforementioned principles as "*very important*"; nevertheless, its **dismissal** of a primary right, that of the owner (*i.e. the author*), in favour of a secondary right, that of commercialisation, still constitutes a flagrant miscarriage of justice! In other situations, the words "imposture" or "deception" might come to mind. Unfortunately, thanks to their lack of perseverance in examining the issue, legislators have, thus far, treated this otherwise blatant abuse with indulgence. Judges likewise seem to avoid the issue.

Shamelessly, industrialists have frightened many by raising the false threat *that copyright might stall economic development*. Has copyright ever hampered the industry of printing, publishing, television and cinema - all of which are clearly industrial and or commercial activities?

Many years of brainwashing under patent's dominant regime may account for the industrialist's fear. Had one examined everything logically instead of placing effect before cause, subsidiary results before the main source, **the outcome before the origin**, it would have been clear that even the industrialist has everything to gain from a more simple and fair system, as well as one that is easier to understand and apply. The entire debate really centres on "*the inseparable nature of form and technical effects*".

The form of a product is intrinsic to its technical function. Nevertheless, the legislator has tried to dissociate form from the resulting technical effect by using multiplicity of possible forms as a criterion. But, in this respect, can form really be viewed as purely decorative, when functional elements of an invention dictate the form required?

A given concept can be expressed in various ways, each of which would be a **Work of the Mind**, and yet yield the same object. **Was the inventor who lived inside Leonardo da Vinci separable from the creator?** Was his signature not also the intrinsic "mark" of his work?

How could one logically and ethically classify Alexander Calder's "*mobiles*" as an industrial, or even as a patentable invention, based on the mere fact that they have moving parts, as defined by one of the criteria of patentability? Because the author never registered his works as design patents (*industrial designs*) at an institute of Intellectual Property in order to reproduce them as gadgets, these mobiles remained works of art, and are Works of the Mind. Therefore, it is clear that articulated and mobile works of art were not classified as patentable inventions, **provided the author does not register an industrial model or drawing. Thus, the inventor who owns an Intellectual Passport C.B. needs not worry**; even if the artistic designs of his invention represent moving parts, his concept will remain his property as a *Work of the Mind*, and thus will not automatically fall under patent law.

As already emphasized on numerous occasions, the written expression of an invention can take on many forms, even if it results in only one "**mental**" (*virtual*) **prototype**.

Though this virtual prototype may only be visible *mentally* to the author of an invention, prior to his putting it into tangible form (*thus creating a Work of the Mind*), it none the less exists. Tribunals have generally tended to overlook this notion, even if there sometimes appears to be only one known form by which to obtain the end result. To quote a particular case: "*it seems that one cannot apply this criteria in a totally convincing way if several forms yield a similar end product, though one can apply this criteria legally when proof reveals that one cannot change the form in question without changing the result. In this particular hypothesis, the link between form and result has indeed been proven.*"

For example, a new kind of gear-work produces a sequence movement heretofore never created, or even imagined. The elements of the gear will result from an original set of drawings representing a particular graphic work, which, for all intents and purposes, can be described as artistic (*see the groups of objects by Arman*), even if it becomes an actual part of an industrial device. For example, imagine a vehicle especially built to drive on roads made up of a series of semi-spheres, cones or pyramids. In themselves the outcome of a mathematical equation, such designs were obviously not intended solely to earn the plaudits of art lovers... But to deny that such designs are Works of the Mind is tantamount to an abuse of language. They are artistic by nature, even though one may use them for industrial purposes. **And, if they were not for the original Work of the Mind, the industrial and commercial consequences, which are often originally envisioned, would never have materialized.**

Aimed at producing a particular kind of motion or effect, such designs, though obviously a **creation**, exceed their aesthetic dimension. What is the aim of such a series of designs, if not to demonstrate a certain kind of mechanism? Without the original form of expression, *which the designer-inventor obtained thanks to his wide-ranging knowledge and his ability to create an interrelation between various subjects*, such a new mechanism would have remained unknown. However, as soon as an artistic design has been transformed into a *functional* or *technical* design and represents a given part set in motion, which one can therefore use *usefully*, it is then subject to patent law's yoke, with all the unavoidable risks of this regime. On what transcendental principle is such a decision based? How is it justified? By whose authority?

An even stranger paradox is that an invention will be denied patent, unless the inventor includes in his application a descriptive part (*texts and designs*), which clearly demonstrates that he created a new work... This is no printing mistake: it is written that he must produce a "*new work*". And, according to law, just what is the exact nature of this "*new work*"? Let us not be naïve. In almost any language, one single word suffices to sum it up, directly and indubitably, without any misinterpretation; in plain English that word is **creation**, which comes from the Latin "*creatio*" meaning the "*act of bringing into existence.*"

May it be understood once and for all: a creation or "*creative work*" is related to the Mind and therefore to copyright, while an invention, literally, is related to discovery (*i.e. from the Latin inventio, from invenire "to find"*).

Consequently, in total contradiction with the aforementioned evidence, the internal laws of most Nations stipulate that, in order to be granted the title of inventor, the applicant must prove his creative act, though he is denied the creator's inalienable right of authorship (*author being derived from the Latin auctor "he who augments, who founds, a person who is the **prime cause, at the origin** of something"*).

Indeed, if one properly interprets the wording of a patent, the descriptive part of a **new work**, namely the **texts with its claims and associated drawings** is truly a "*Work of the Mind*" and constitutes the essential evidence in a court case for **counterfeit**.

An equivalent description, integrated in a literary and artistic work, can be used as evidence to annul the subsequent registration of a patent.

For all these undeniable reasons, we recommend as a priority that the "*potential inventor*" write a book (including his original texts and designs) that will identify him as the author of his creative concept. Thus he will put his concept into a concrete form recognized as a Work of the Mind. By the same token, he will become an author prior to being an inventor, and will enjoy definite and universal ownership of his creation, prior to registering a title of commercialisation and above all prior to disclosing his project to a third party. The author should not, generally speaking, publish his work, or else he will lose the right to directly or indirectly register a title (*patent, industrial design or model*), thus possibly limiting future opportunities, particularly for procedural, economic or fiscal reasons when dealing with larger organizations.

Nevertheless, all that we have already concluded with regards to **prior personal possession** remains true. Legislators, and judges for that matter, will have to acknowledge these arguments. The present system (*i.e. legal practice and not the law itself*) drastically limits the author's freedom and violates his property rights by forcing him to patent his invention personally, rather than associate himself "*safely*" with an industrialist, who would exclusively assume the costs of the monopolistic industrial title resulting from the author's natural and undisclosed property.

Easy to understand and fairly simple to conceive, the conditions of such an agreement are similar to those used by investors who want to benefit ~ needless to say, at their own costs ~ from the commercial property which results from an author's original property... Thus, without having to take risks that he cannot assume, the inventor can continue to quietly **invent** while honestly earning his rightful due.

The principle that is important to urgently recognize is the acknowledgement of Intellectual Property associated with artistic drawings and models (*industrial designs or design patents*). The mere fact that there is commercial potential behind such works should not nullify this principle.

Incidentally, the copyright of Walt Disney and many other authors is clearly acknowledged, and yet this has never prevented economic spin-off activities, such as

production, distribution, marketing, advertising, etc... The many victories that this world famous company has won on every continent show the power of copyright in all spheres.

The tragedy for inventors is that they were always systematically excluded from the realm of authors and therefore had to expose their global projects without the benefits of copyright: thus becoming easy prey for industrialists. This abuse, now perceived by most inventors, greatly retards social and economic progress. Reform must take place, if not in the name of justice, then for efficiency's sake!

Far from being taken in by the legislator's semantic virtuosity, the authors of the artistic drawings for *Mac Donald's* or *Coca-Cola*, to mention but a few, successfully maintained their international rights for decades. Clearly, they avoided registering design patents (*industrial designs*).

Likewise, secrecy can be used for technical or technological data in the same way as for design patents. Otherwise, what use are confidentiality and non-disclosure covenants? Trade secret being impossible to defend directly in court against third parties, its usefulness lies in the fact that it remains secret.

The *Intellectual Passport C.B.* was conceived, in part, with such a strategy in mind.

While maintaining secrecy, the *Intellectual Passport C.B.* provides every inventor ~ from the humblest to the most powerful ~ with proof of prior possession (*personal property*) which, until now, was unavailable to him.

Furthermore, implementing the strategy elaborated by the "Distribution of Rights" methodology (*i.e. to create a network of commercialisation through licence contracts*) provides the inventor with better and more efficient means to defend his rights in court.

To conclude this section on an optimistic note: According to the Brussels Commission (1993), "*intellectual creation and cultural liberalization are based on copyright and similar rights. Such rights must be protected in order to ensure the survival and development of creativity and cultural differences for the common good of authors, interpreters, cultural (or non-cultural)¹ industries, consumers and, last but not least, all of mankind*".

Righteous causes are always worth fighting for. In several cases, when arguments based on natural law and on the rule of artistic unity were well presented, the highest courts ruled against the code of industrial property and upheld the basic democratic principles of the constitution of civilized Nations. The "*Universal Declaration of Human Rights*" is based on such principles, which uphold two virtues essential to any healthy system of justice: ethics and logic.

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¹ The Court of Appeal of France has already supported this essential evolution in clear and unambiguous rulings; from the 1930's on, it rules on several occasions that: artistic protection must be granted for any design or model, even of a purely industrial nature and without artistic value (Crim. 30 March 1938)... Appeal from 27/2/57, 8/12/59, 16/3/62, 21/1/76, 16/1/87, etc...

II – According to the laws of North America and their international extension.

Study based on the Canadian and American texts published by the C.I.P.O.
and by the U.S. Patent and Trademark Office, Washington D.C.

What is an “industrial design” or “Design Patent” in North America and, in a wider sense, in other Nations that support the same legal culture? According to the Canadian Intellectual Property Office (C.I.P.O.), for example: *"An industrial design is the shape, pattern or ornamentation applied to a useful article that is produced industrially.... it may be made by hand, tool or machine ~ Copyright is legal protection for an artistic endeavour. ~ An artistic work is protected under the Copyright Act automatically, **but a design is protected under the Industrial Design Act only if it is registered.**"*

Moreover, if a design, (initials or logo) is used with a trademark: *"Therefore, to ensure maximum protection*, you might wish to seek industrial design registration first ... Registration enables you to prevent others from making, using, renting or selling your design in Canada for **up to ten years.** ~ If your design was originally created as a work of art, it would have been protected automatically under the Copyright Act. But once you use it, or intend to use it, as a model or pattern to **produce more than 50 single useful articles or sets of articles**, it becomes an industrial design, which can only be protected under the Industrial Design Act." **Reminder** N.O.A.: "... but a design is protected under the Industrial Design Act only if it is registered".*

Comment: Page 19, second column of the aforementioned Guide on Industrial Designs states: *"The juridical distinction is subtle, and one should therefore consult a lawyer."* N.O.A.: Let us not be taken in. The distinction is not subtle. This passage merely serves to show that statements that arbitrarily deny the truth can only lead to incoherence.

Let me argue against these statements by simply stating that the law on this subject constantly contradicts itself.

First of all: What is a utilitarian object? Is a work of art useless? Can one conceive a work of art for a utilitarian purpose? Etc... (*See the definitions of utility hereunder*).

Second of all: How can one logically reduce a work of art (*whether useful or not*) represented by an artistic **drawing** to a mere **design patent**, in order to acquire a monopoly that is more costly and restrictive than copyright and that leads to mandatory disclosure? ... Who in his right mind would be ready to trade or sell spoons (*or any other utilitarian objects*) with a Mickey Mouse handle in an industrial quantity (*more than fifty copies*) without authorization from Walt Disney studios, even though the latter never registered a design patent on the artist's creation? Furthermore, another artist can create an original handle, without having to comply with design patent's strict regime.

* By *maximum protection*, the legislator means *"as a recourse in counterfeit on a monopoly"*, instead of a recourse in **plagiarism** on a work of art.

The mere fact that an artistic drawing published before the registration of a patent, design patent or industrial design can be used to void such titles, shows that the initial copyright has primacy over secondary rights of commercialisation. Is there any reason on earth that the authors of such gibberish could not express these ideas more clearly? For example, as follows;

Since copyright does not grant any monopolistic rights of commercialisation for the object of the invention defined in an artistic drawing (or a literary work), the author can only obtain these subsequent rights by registering his work as an Industrial Design... This is possible as long as the artistic drawing was not published or publicly divulged before the date of deposit for registration. Its deposit and subsequent registration must be purchased; its application is national but can be extended internationally, country by country, subject to deposits for registration in each country. In Canada, it remains valid for ten years and is not renewable.

One can eliminate confusion merely by avoiding the use of the words “*protect*” and “*protection*”. Before continuing with this explanation, it seems more than necessary, given the aforementioned facts, to emphasize the meaning of the words “*useful ~ utility ~ utilitarian*” (re: A document called, “*The transcendent unity of Art, Function and Utility*”).

Utility: Noun, from the Latin “*utilitas*”, that which is useful by nature; from the Latin “*utilis*”, from the Latin “*utilitas*”, that which can be used in a beneficial way (for an individual or society), that which fulfils a need.

This raises the following questions: What is a “utilitarian” object? Moreover, is a work of art necessarily a Work of the Mind? What are copyright “*protection*” and industrial design “*protection*”?

- As the illusory notion of “protection” was exhaustively covered in the document “...Protection = Illusion”; it suffices to reiterate that no one is exempt from a trial (see the *Prolegomena*, page 25).

- We have already given a thorough definition of a *Work of the Mind*.

- Literally, a “utilitarian” object is an object that can be used in a beneficial way or that can fulfil a need, or both. At the risk of repeating oneself, in order to objectively analyse the following text, one must bear in mind all the elements that make up the unity of art, function and usefulness.

Following the same trend as their European counterparts, the legislators of North America and Great-Britain have constantly tried to insidiously annul the strength of the author’s initial and primary right for the exclusive benefit of the industrialist’s secondary right. Without arousing suspicions as to the reasons for such deceit! ...

Rather than raising an issue of equity or logic, the major concern here is to ensure that material interests arbitrarily precede moral interests. In other words, consolidate the power of those who possess material goods at the expense of those who have a natural right.

Shamefully, one is reminded of a lord's feudal privileges over his vassal's wife.

Based on the rudimentary principle that creativity has no place in the industrial world, the legislators have wrongfully considered that the creator must pay for industrial and/or commercial rights for his artistic drawings, if he wishes to bring three-dimensional products, resulting from his work, to market. However, a discriminating look at these legal texts will suffice to reveal their juridical voids and incoherence. However, such incoherence, which we discuss for "*purely instructive purposes*", cannot help but reveal facts that could not be totally concealed.

- Quotation from the CIPO: (Industry Canada © Minister of supplies and services of Canada 1994 - IC n° 11072 F 94-03 - ISBN -662-99816-2 - N° de cat. RG 43-28/1994F). In order to register a design patent application, the applicant must: "*sign a declaration attesting that he is the owner of the design.*"

NOA: What a waste of time, effort and money... Anyone can sign such a declaration, including copiers. In reality, if the author dates and signs his drawing as an artistic creation, he can readily prove his natural ownership. In this case, he is under no obligation to sign such a meaningless and pointless declaration. As with patent, there is no need to know who is the "*true*" drawer. One merely needs to ascertain that he is the author of the work... Such a question on behalf of the CIPO creates confusion and disinformation.

The CIPO further states that: "*A **copyright** is legal protection for an artistic endeavour. Often an industrial design is created as a work of art, and as such, is originally protected by the Copyright Act. An artistic work is protected under the Copyright Act automatically, but a design is protected under the Industrial Design Act only if it is registered.*" "*Why should you register? The advantage of registering your industrial design is that it gives exclusive rights to your design. Registration enables you to prevent others from making, using, renting or selling your design in Canada for **up to ten years**. Keep in mind that, **unless you register your design**, you can make no legal claim of ownership and have no legal protection from imitation. **This is different from trademark and copyright protection, which allow you to claim ownership even without registration.***"

Who in his right mind could, in full knowledge of facts, contemplate trading a right that is free, universal, inalienable and permanent for a right that one must pay for, that only applies nationwide, is transferable and temporary? Such a choice seems even more preposterous when one considers the way in which the quotation ends: "*and copyright protection, which allow you to claim ownership even without registration.*" (It is property that grants rights, not the contrary, see: Glossary, property rights).

The CIPO insists: "*The certificate (of registration) is evidence of ownership and the originality of your design and gives you the exclusive right to **make**, import for trade or business, rent or sell ... any article ...*". NOA: False! Legally speaking, such a declaration does not constitute irrefutable evidence. Were it otherwise, the CIPO would guarantee the title's validity... Moreover, the true author does not need the CIPO's

blessing to make and own his drawing. He alone decides to create it in the first place. Also, what kind of manufacturing is the CIPO referring to? One must read between the lines: the CIPO means producing the product as a three-dimensional version of the drawing. Why register such a drawing? The CIPO explains that: “*As proprietor, you may take legal action against anyone who infringes your design*”. NOA: As a titleholder of an industrial design, your legal recourse is limited to counterfeit of a manufactured object. On the other hand, the owner of a creative artistic drawing can take action in plagiarism (*i.e. illegal reproduction*) of the author’s *Work of the Mind*. Thus the CIPO wilfully fails to mention the notion of “plagiarism”, since the originator who registers a work as an industrial design also systematically loses his copyright on an inalienable property.

Once and for all, one must conclude that every object produced in three dimensions in hundreds, thousands or even millions of copies, whether "useful" or not, which represent creations by Walt Disney, Mercedes, Shell, or any other commercial brand or sign of any other enterprise, **would have ceased to be their author's property for several decades**, had the latter registered their creation as industrial designs. Indeed, such titles are valid for only ten years and are non-renewable...

One must take into consideration the difference between **the author's natural ownership of his work, the copyright resulting thereof, and the “self-styled relatively proportionate protection”** (*i.e. where the level of protection varies according to the amount of money paid*).

One must therefore examine on what basis a Work of the Mind, registered under copyright, can be **used almost universally** as evidence against a third party's subsequent registration of a copy for an industrial or commercial purpose.

By virtue of what law, if not copyright (i.e. granting the exclusive use of an inalienable property), can the publication of an artistic drawing prevent the validation of an industrial design subsequently deposited?

One owns a work, permanently and universally, by virtue of its originality; consequently, one can always use it as an anteriority (prior art) against third parties. In other words, a third party who, **either involuntarily or through plagiarism or counterfeit**, reproduces a copyrighted artistic drawing in order to register it as an design patent (*industrial design*), cannot use such titles of commercialisation to “*protect in any possible way*” its resulting industrial or commercial product.

In order to conquer the market quickly and by surprise, the author of an artistic drawing must therefore, by licence or assignment, contractually transfer his commercial rights to investors or to his own enterprise, if he has one, prior to any form of production, even handmade, whatever the volume. Thus the author can separate the private interests of his physical person and his heirs, on the one hand, from the interests of the moral person of his enterprise, on the other. Let us now further analyse the law.

In its short introductory text on intellectual property, the afore-mentioned C.I.P.O. states the following: "Save a few exceptions, **you** can only protect a design that was used to manufacture 50 articles or more by registering it as an industrial design." Who does the legislator mean by this repetitive use of "**you**", if not the author? And what exceptions is he talking about?

This constant use of the word "**you**" is probably aimed at further misguiding the author, who is already lost in a labyrinth of contradictory and uncertain juridical notions, and thus convince him to choose the path of industrial designs... In reality, it is neither mandatory nor necessary for the designer (*individual entity*) to commercialise (*legal entity*) the product resulting from the application of his drawing.

Even if such an iniquitous principle were true, why should the author's universal property be reduced to a national level and why should he be forced to pay for his rights? It is his legitimate property already recognized as such by law, and which no one can deny him without committing violation and theft according to Article 17 of the Universal Declaration of Human Rights, sanctioned by laws and constitutions of Nations, including the United States, Great-Britain and Canada.

As if to reinforce his allegation, the legislator adds that: "*It is the production of the design in three dimensions by "its" author in more than fifty copies that makes it compulsory to register his creation as an industrial design.*"

Given the foregoing information, one begins to see:

1) Why law omits the innovating design as an integral part of a creative literary and artistic work, hence of a "*Work of the Mind*".

2) Why legal texts describe the design, in its original state, purely as a "*work of art*" but never as "*a Work of the Mind*", since the latter alone guaranties the author's property.

3) Why legal texts governing institutes of deposit state the following: "*a design is protected by the law on industrial designs only if it is registered as such*". According to this law, the designer has an industrial monopolistic right to "*develop the object*" represented on the original design, much like patent law allows an inventor to commercialise his product. Reproduction of this original artistic design by a third party is still strictly forbidden, despite ***this optional registration***, as long as the author, armed with an *Intellectual Passport C.B.*, has not registered his design.

Texts published by every institute of Intellectual Property worldwide remind the reader that reproducing all or part of their content for commercial purposes is strictly forbidden. Likewise, such a practice provides the *USD-System* editors with **unquestionable proof** that the rights of inventors who use the *Intellectual Passport C.B.* are well founded.

Written and published by every copyright institute in the world, this warning to the reader can be interpreted from our point of view as **the tacit and universal validation** of the *Intellectual Passport C.B.* as a useful and helpful product for its users.

* * *

CONCLUSIONS:

Until proven otherwise, copyright's so-called "*protection*" or "*non-protection*" for artistic designs cannot alter the author's ownership of his works and consequently the rights resulting thereof: Copyright.

1) A design created according to the rules of art and representing an object or a tool which previously never existed, indeed is the Work of the Mind of its author.

2) If the author, for example, uses techniques related to graphic arts in order to create a drawing or model, it is nevertheless a Work of the Mind; without application of such rules of art for a creative purpose, its copyright could be invalidated and therefore nullified.

3) Strictly by virtue of being his natural property on a Work of the Mind, the author's right to reproduce (© of copyright) an artistic design (*and not the object itself*), namely the expression of his idea, can always be used as evidence against a third party, who subsequently registers the artistic design as a design patent or industrial design after making an identical copy of it from the author's book. The same rule applies to patent.

4) When discussing the industrial manufacturing of several parts of an object according to an artistic design, the legal texts refer to the "*object*" of the design, to which one can add a title of monopolistic commercialisation, while the design itself ~ which the same legal texts ignore ~ remains permanently the work and property of the author.

5) No matter how many times the object is manufactured, and by virtue of the author's inalienable property, copyright as such cannot be annulled. Thus is it written that only the "*protection*" of the right falls, in other words, "*protection*" of the author's potential monopoly on manufacturing for which he has no claim or use, since copyright does not provide a monopolistic right of production. This means in plain English that copyright does not give a commercial monopoly on the manufacturing of the product of the invention. Every jurist knows this... Such a nuance may a priori seem subtle. However, much like a mirage, it has a perverse effect. The word "*protection*" is used to distract the reader from the fact that in any case a third party cannot, by any technique, produce, reproduce or interpret the author's work (*the drawing, which expresses the idea*) without the latter's authorization. And yet, such a principle, repeated endlessly on videocassettes and literary works, is applicable in national as well as international courts of law.

6) In order to manufacture hundreds or thousands of copies of a "useful" object (*namely, an object that brings benefits or fulfils a need*) from the author's original design, *which he did not register as a design patent*, the manufacturer must reproduce the

author's said drawing or design *for commercial purposes*, irrespective of the technique (e.g. by computer or otherwise) in order create a mould or a part. Reproducing all or part of the author's work without his authorization is illegal, and constitutes an act of *plagiarism*.

7) In court, the author's rights on the property of his work must be defended and not the monopolistic rights to produce it for commercial purposes. In such a case, the defence applies strictly to the right of production, reproduction or interpretation of all or part of the work or of its expression. Whether its function is utilitarian or artistic, this work remains, come what may, the author's unalienable (*and therefore definitive*) property, since it is based on the unity of art and function.

8) Also protected are the texts describing the invention in a literary work, including its operating instructions. *Much like the publications from the institutes of intellectual property*, original texts that are part and parcel of a Work of the Mind come under literary property.

* * *

This being said, we may conclude (as co-authors of the present work) that no one can manufacture and sell utilitarian objects representing characters and/or objects created decades ago by Walt Disney, Hergé, etc., without fear of effective retribution from the authors, their heirs or trustees. Likewise, one cannot safely reproduce the logos of such enterprises as Mc Donald's, Shell, Coca-Cola, Sony, BMW, etc... In each of these cases, these creations are artistic drawings which, had they been registered as design patents, would long have become a part of the public domain.

* * *

III - Conclusion with regards to national and international laws on design patent and industrial designs, drawings or models

One comes back to the rules of board games (*literary property*) and the drawing of its pieces (*artistic property*). Even though a board game is not a priori utilitarian (*according to certain juridical interpretations*), it nevertheless is an object that provides a practical benefit and fulfils a given human need (*according to dictionaries and numerous legal texts*).

The *Intellectual Passport C.B.* establishes the inventor as the author of a book, a true *Work of the Mind*. In referencing such a work, the original *expression of an idea* can be used as evidence against a third party who subsequently registers or simply reproduces all or part of the work, whether he copied knowingly or in good faith. **Until now, this approach was never clearly perceived.**

Another ~ previously unforeseen ~ advantage of this system is that the author, *without having published* his *Intellectual Passport C.B.*, can still assign or licence all or part of his copyright to third parties who are interested in registering a patent, a design patent or an industrial design.

Through the primary² use of design patent and industrial design, practitioners and others have failed to recognize that, without a literary and artistic work, the originator who has been copied has unknowingly lost one of the best means of publicity (i.e. a book) by which to attack his copiers and claim his rights (*see Emile Zola's "J'accuse" published at the height of the Dreyfus case, last paragraph, page 114*). In certain circumstances, the inventor can even coerce the copier from carrying on his business illegally. *In such cases, publishing the Intellectual Passport C.B. may be necessary.*

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² With the *Intellectual Passport C.B.*, this primary use becomes secondary. Far from a heroic deed, the *"Intellectual Passport C.B."* merely aims at putting an incoherent legislation, which was created and has developed against natural law, back into proper sequence.

**With regards to the texts of the present
publication**

The authors of the present publication aim first and foremost to liberalize access to intellectual property by making it affordable to the general public and to distribute its benefits equitably among people, in consideration of their material or moral interests, in accordance with articles 1, 17, 22 and 27 of the Universal Declaration of Human Rights.

This published work is the result of its authors' research and analysis as well as a logical and philosophical approach used to formulate the criteria for validating a Work of the Mind, based on principles established by the Berne Convention and the Universal Convention on Copyright.

In accordance with the policy of Intellectual Property institutes and offices worldwide to disclaim responsibility of their texts in official documents, the information contained in the present work is for guidance purpose only, and should not be quoted or interpreted as texts of law. All or part of the present work can become obsolete at any time, without prior notice. The legal basis for this work can be found in the laws governing patents, design patents (industrial designs and/or models), trademarks and copyright, the regulations related thereto as well as the judicial interpretation of such texts by tribunals.

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**For further information on
the *Intellectual Passport CB*,
visit our website at www.univention.ca**