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RECEIVED 04/20/2024

APPROVED 05/15/2024

PUBLISHED 06/22/2024

Responsible Editor: Carla Caldas

Evaluation Method: Double Blind Review

E-ISSN:2316-8080

DOI:10.16928

PREPARATION OF THE ARTICLE APRIL/2024

The protection of arts applied to industry – an initial approach

A proteção das artes aplicadas à indústria – uma abordagem inicial

Resumo

Nas relações de consumo, o design é um aspecto estratégico, decisivo na tomada de decisão da compra, capaz de justificar um preço diferenciado e de angariar fidelidade da clientela. Sob o ponto de vista jurídico, os designs inovadores, que preenchem os requisitos legais, podem ser protegidos por direitos autorais, de acordo com o que determina a Lei nº

9.610/98, e/ou por desenho industrial, modalidade de proteção da propriedade industrial, prevista na Lei nº 9.279/96. A natureza do design, da sua produção e de seu uso normalmente irão determinar a modalidade de propriedade intelectual mais adequada de proteção. Ocorre que, quando se trata da obra de arte aplicada a um determinado produto, existem divergências, mesmo em sede da Corte Superior do Brasil. Assim, o presente trabalho tem o fito de abordar tais divergências, à luz dos casos concretos, face à doutrina mais robusta, de modo a adensar o respectivo tecido teórico e induzir a reflexão jurídica. A metodologia a ser utilizada é de cunho qualitativo e exploratório, baseada na análise de documentos e na revisão bibliográfica sobre o tema. Para tanto, é retomado o conceito de artes aplicadas e sua evolução na Europa, por se tratar de referência para a construção legislativa brasileira. São abordadas as formas de proteção vigentes no Brasil e a possibilidade de cumulatividade da proteção, considerando seus ônus e bônus. Por fim, são tecidas considerações à guisa de conclusão.

Palavras-chave

design; propriedade intelectual. desenho industrial. artes aplicadas

Protection of applied arts in industry – an initial approach

Abstract

In consumer relations, design is a strategic aspect, decisive in making purchasing decisions, capable of justifying a differentiated price and gaining customer loyalty. From a legal point of view, innovative designs, which meet legal requirements, can be protected by author right, in accordance with what is determined by Law No. 9,610/98, and/or by industrial design, a modality of industrial property protection, provided for in Law No. 9,279/96. The nature of the design, its production and its use will usually determine the most appropriate form of intellectual property protection. It turns out that, when it comes to the work of art applied to a certain product, there are divergences, even in the Superior Court of Brazil. Therefore, the present

work aims to address such divergences, in the light of concrete cases, in the face of the most robust doctrine, in order to thicken the respective theoretical fabric and induce legal reflection. The methodology to be used is qualitative and exploratory, based on document analysis and bibliographic review on the topic. To this end, the concept of applied arts and its evolution in Europe is revisited, as it is a reference for Brazilian legislative construction. The forms of

protection in force in Brazil are addressed, as well as the possibility of cumulative protection, considering its costs and bonuses. Finally, considerations are made by way of conclusion.

Key words

design; intellectual property. industrial design. applied arts

La protección de las artes aplicadas a la industria – una primera aproximación**Resumen**

En las relaciones con el consumidor, el diseño es un aspecto estratégico, decisivo en la toma de decisiones de compra, capaz de justificar un precio diferenciado y fidelizar al cliente. Desde el punto de vista jurídico, los diseños innovadores, que cumplan con los requisitos legales, pueden ser protegidos por el derecho de autor, de conformidad con lo determinado por la Ley nº 9.610/98, y/o por el diseño industrial, modalidad de protección de la propiedad industrial. previsto en la Ley nº 9.279/96. La naturaleza del diseño, su producción y su uso determinarán normalmente la forma más adecuada de protección de la propiedad intelectual. Resulta que, cuando se trata de la obra de arte aplicada a un determinado producto, existen divergencias, incluso en el Tribunal Superior de Brasil. Así, el presente trabajo pretende abordar dichas divergencias, a la luz de casos concretos, frente a la doctrina más robusta, con el fin de espesar el tejido teórico respectivo e inducir a la reflexión jurídica. La metodología a utilizar es cualitativa y exploratoria, basada en el análisis documental y revisión bibliográfica sobre el tema. Para ello, se revisa el concepto de artes aplicadas y su evolución en Europa, referencia para la construcción legislativa brasileña. Se discuten las formas de protección vigentes en Brasil y la posibilidad de protección acumulativa, considerando sus costos y bonificaciones. Finalmente se hacen consideraciones a modo de conclusión.

Palabras clave

Diseño; propiedad intelectual. diseño industrial. artes aplicadas

INTRODUCTION

In the industrialization process of developed countries, the changes resulting from the Industrial Revolution were essential. These changes promoted: the mechanization of production

processes, the modification of the division of labor, the mass production of products, among other phenomena. One of the first sectors to introduce the division of labor and mechanization processes was the textile industry, promoting a true revolution in the ways of producing (Freeman and Soete, 2008).

However, according to what Slater (2007) explained, before the Industrial Revolution took place, another revolution preceded it. The one the author calls the commercial revolution. This was caused by the consumption process generated in the populations that inhabited the Old Continent when they had access to goods from the East, goods that were of superior quality to those found in the European continent. This fact triggered the “desirability” for differentiated products, of better quality than those found in Europe (Slater, 2007).

The growing demand for differentiated products encouraged and even provoked “entrepreneurs” from the Old Continent to seek innovations that would allow such products to compete for this clientele. This search for innovations made it possible to mechanize the production process, as well as invest in differentiation. In the aforementioned textile sector, for example, investment began in the labor of artists and artisans to create prints that would make the products more attractive. According to Pouillet (1884), this investment does not arise without taking care to try to prevent acts of counterfeiting, such as the sale of prototypes of the prints to competitors. In France, again according to this author (Pouillet, 1884), since it was not possible to count on regulations that covered the entire territory, Lyon, known for its textile production, emerged as one of the first places to issue protective acts for the designs used in the sector, but without, however, being able to prevent acts of unfair competition that went beyond the producing location.

This scenario of attempts to protect applied art continued until the beginning of the 20th century, with efforts to establish legislation that was always spatially limited and did not adequately meet the needs of producers in sectors such as textiles and foundry (Pouillet, 1884 and Otero Lastres, 1977). With the changes resulting from the Industrial Revolution and the French Revolution, which put an end to the system of craft guilds in France, a new period began in which attempts were made to regulate protection at national and international levels, culminating at the end of the 19th century with two international conventions providing protection parameters for those who signed them: the Paris Convention for the Protection of Industrial Property, also known as CUP, of 1883, and the Berne Convention for the Protection of Literary and Artistic Works, known as CUB, of 1886. These conventions gave rise to the protection of industrial designs (CUP) and arts applied to industry (CUB).

In the case of Brazil, the industrialization process only gained greater interest and investment with the arrival of the Portuguese royal family to the colony, motivated by the expansion of Napoleon's rule in France. Our late industrialization process, in a way, delayed investment in products with a competitive edge, given the actions of the Portuguese court to prevent the development of an endogenous local production that could not compete with exogenous production, whether from the colonizer or its commercial partners. Thus, while in Europe there was a critical mass to discuss the protection of arts applied to industry, in Brazil, discussions were beginning to take place regarding industrialization itself.

At the initiative of Dom Pedro II, Brazil joined the CUP since its formalization. In turn, we had to wait until the 20th century to finally join the CUB. Protection of industrial designs took even longer to be classified in the Brazilian legal system, only becoming a legal requirement in 1934. As for applied arts, their protection would only be possible when they presented a differentiated degree of originality and, often, could be separated from their industrial and utilitarian effects, and could therefore be claimed for protection through author right.

If for those countries that entered into international market, seeking, through their industrial production, to differentiate themselves from their competitors, the protection of industrial design and applied arts was a matter of extreme relevance, in Brazil, such protection seemed to remain dormant, not arousing interest and not promoting discussions.

Although it is not possible to confirm the existence of Brazilian case law on the subject, the rare decisions show a certain gap in the construction of legal knowledge on the protection of applied arts. The scarce but consistent doctrine suffers from legislative gaps and the scarcity of judicial decisions on the subject, most likely due to the timid use of these intellectual property tools at a national level.

In view of the above, this article aims to address the divergences related to the protection of applied arts, shed light on specific cases, considering the most robust doctrine, in order to deepen the respective theoretical framework and induce legal reflection. The methodology to be used is qualitative and exploratory, based on the analysis of documents and the bibliographic review on the subject.

In order to achieve the objective set, it is necessary to outline the evolution of protection in Europe for arts applied to design, as this continent is a reference in terms of legislative construction for intellectual property in Brazil. Without extending the discussion too much, the aim is to address the forms of protection that may be claimed in Brazil for the protection of arts

applied to industry, as is the case with author right and industrial design protection. From the possibility of using or not using these two forms of protection, the aim is to discuss whether or not they should be cumulative, developing a critical reasoning that indicates the burdens and benefits of dual protection. Finally, two recently judged cases will be used to demonstrate the need for further study of the subject.

PROTECTION OF WORKS OF ART APPLIED IN THE INTELLECTUAL PROPERTY SYSTEM

Applied arts may not have the same prominence as pure art, but they were decisive in the process of industrialization, diversification and competition for those who undertook what was understood as the Industrial Revolution. For these entrepreneurs, the beautification of the shapes of products manufactured by the first manufacturing and industrial processes helped to create value and differentiation.

Its importance was so great that some sectors soon began to request from those who represented them before governments forms of protection for designs or ornament applied to products. This happened in France and England, as seen briefly in the introduction. The course of negotiations for the protection of ornamental forms applied to products will become clearer based on two international conventions that sought to bring together what are conventionally called Intellectual Property Rights, such as: invention and utility model patents, trademarks, geographical indications, author rights and industrial designs.

Understanding applied arts as the predecessors of modern industrial design, it is worth recalling some of the attempts to protect it internationally and the specificities found. This begins with the Paris Convention for the Protection of Industrial Property, also referred to as CUP, of which Brazil has been a member since its establishment in 1883. The aforementioned Convention aimed to guarantee minimum standards of protection for industrial property that would be incorporated by member countries into their domestic legislation.

The safeguard of industrial design was typified in the CUP as an extension to foreigners of the protection that member countries guaranteed to their nationals for industrial models and designs¹. However, given the existence of different protection regimes applied to models and

¹ According to the provisions of Decree No. 9233 of June 28, 1884, which promulgates the convention signed in Paris on March 20, 1883, in Brazil, it is stated: "The subjects or citizens of each of the contracting States shall enjoy, in all the other States of the Union, in what concerns the privileges of invention, industrial designs or models,

designs that varied from country to country, it can be inferred that the protection of designs was also included in the Berne Convention for the Protection of Literary and Artistic Property or, simply, CUB, as works of art applied to industry, in accordance with its current article 2°.

Therefore, if the protection born and developed in France and England tended to navigate between industrial property rights (as industrial design) and author rights (as applied arts), the existence of these categories in the first two international Conventions ends up ratifying the hybrid nature of design highlighted by several authors (Perót-Morel, 1968; Otero Lastres, 2008; Cerqueira; 1982, Reichman, 1989). Margins were left, through the participation of countries in the two Conventions, for the possibility of choosing the protection to be granted to applied art or industrial design.

It should be noted, however, that the protections provided by the two Conventions are not comparable. As reported by Otero Lastres (2009 and 2008), the protection systems are different: author law understands that the act of creation is what confers protection, and does not stipulate the deposit in a public office; since it does not require the deposit in a public office, there is no publicity of this deposit so that third parties become aware of it and may even oppose it; as a consequence of the deposit in a public office, the requirements must be verified. Furthermore, there are other differences that shape the protection system given to industrial property. Therefore, if the design is protected by author right, the requirements, protective effects, temporality of the exclusive right and even the existence of moral rights make this protection much less impactful to the dynamics of the industry than that provided for in industrial property, in which the form given to the product will be subject to analysis of specific requirements, and its granting or denial must be communicated (which allows the granting actions, for example, to have effects in relation to third parties), thus providing greater transparency to the investor who does not work with the perspective of a unique work but rather in the investment in a prototype that should generate a multiplicity of copies that will supply the market. These provisions will be revisited later, but for now we should focus a little on the international negotiations for the protection of industrial designs and applied arts.

Perhaps foreseeing the entire path of protection granted to applied arts and to what has been conventionally called industrial designs and models due to the incidence of the two protection systems (industrial property and author rights) and, perhaps, trying to find a

trademarks or trade names, the advantages that the laws currently grant or will grant to nationals. They shall, consequently, have the same protection as these and the same legal recourse against any damage caused to their rights, subject to compliance with the formalities and conditions imposed on nationals by the legislation of each State.” Available at: <https://www.gov.br/inpi/pt-br/servicos/marcas/arquivos/legislacao/CUP.pdf>

conciliation regarding the overlap of both protections, the Berne Convention, in its article 7º, stipulated a different term for works of applied arts. While other works of authorship – with the exception of cinematographic and photographic works (which have different terms) – are valid for the entire life of the author and for an additional 50 years after his/her death, for works of applied arts, the countries belonging to Berne reserve the right to regulate the duration of their protection, and said duration may not be less than a period of twenty-five years, which must be counted from the creation of the work.

It is believed that such differentiated and shorter temporality is in line with the protective term stipulated for industrial designs when they are protected by industrial property in most countries today. Therefore, if a member opts for the protection of both systems to apply to works of applied art and/or industrial designs, there would be no glaring dissonance between the temporalities guaranteed by each system. Even with this care, throughout the 20th century, what can be seen is the difficulty in clearly framing the protection of works of art applied to industry in several European countries (Declayre, 2018), leading to the existence of absolute cumulative, restrictive and non-cumulative protections, in line with what was explained by Otero Lastres (2008).

It can be inferred that these difficulties must have had an impact on the creation of the Agreement on Trade-Related Intellectual Property Rights (TRIPs). This Agreement, which changed the global intellectual property landscape, according to Chaves et al. (2007), places intellectual property at the center of international trade negotiations. It is part of a larger agreement that was created and implemented together with the creation of the World Trade Organization (WTO). It is undoubted that since the advent of TRIPs, intellectual property has become much more important and denser throughout the world. In view of this, it is worth noting how the issue of protection of applied arts and industrial designs was addressed in this Agreement.

There is no mention of the applied arts category in the TRIPS. However, industrial designs are defined in articles 25 and 26 of the aforementioned Agreement. Article 25.1, which contains information about the requirements and limitations of design protection, already assesses the difficulty of including the same in a type of intellectual property right. First, it is stated that Members may choose which requirement to apply: novelty or originality. This has already been criticized by Barbosa (2013) due to the Brazilian legislator's choice of replacing the conjunction "or" with "and". However, the opportunity to choose, reflected here, is related to the possibility of choosing with regard to the protective system and not just the requirement. Thus, if protection is provided by author rights, the originality requirement is applied.

Conversely, if the option is for industrial property, in particular the use of patent or design in comparison to author right, the choice will focus on the novelty requirement. According to Suthersanen (1999), there are countries that treat design from the perspective of a patent approach, while others apply a author right approach. Thus, the option given to countries regarding the choice of the requirement seems to indicate a more comprehensive option, namely: the choice of the protection system itself.

Article 25.1 adds further information relating to the issue of the legal nature of the design. It concerns the possibility given to Members to establish that protection shall not extend to designs determined essentially by technical or functional considerations. This comes to the fore the interface zone between the protection of industrial designs – as a mere ornament applied to the product – and the utility model patent, which is granted to the shape that presents a useful result or a functional improvement. It is noted that the first article of the TRIPS on industrial designs presents a set of complex issues that are specific to the design and that lead Otero Lastres (2008) to state that it is the most complex intellectual property right and that Reichman (1989) ends up equating the design to a “legal hybrid”.

As stated, in ADPIC, nothing is mentioned about applied works of art. However, it is worth noting that fabrics, which were so decisive for the first structuring of the protection that would later be recognized as an industrial designs, have a privileged space in ADPIC through its article 25.2. In this, we read:

Each Member shall ensure that the requirements for securing protection for textile designs – particularly as regards any costs, examination or publication – do not unreasonably impede the possibility of seeking and obtaining such protection. Members shall be free to fulfil this obligation through industrial design law or through author right law.

The importance assumed by the textile sector in relation to the protection of industrial designs is so significant that it continues to exert the same pressure related to protection, more than a century after the first negotiations regarding some safeguard. And such protection can be provided by industrial design or author right, and cannot be avoided or bureaucratized. This is the greatest emphasis that can be given to applied arts without calling them by this name in the context of ADPIC.

The international protection of applied works of art continues to be defined in the Berne Convention. The protection of industrial designs provided for in the Paris Convention is reinforced by the TRIPS. This, in turn, highlights the hybrid legal nature of designs, situated between industrial property law and author right. It is now time to consider the protection granted to applied works of art in Brazil, as well as to observe some particular circumstances

of the protection of industrial designs that make them so close to applied works of art in Brazil, and this within a context in which modern design brings other and diverse challenges.

THE BRAZILIAN INTELLECTUAL PROPERTY SYSTEM AND THE SILENCE ON THE PROTECTION OF THE WORK OF APPLIED ARTS

In order to achieve the objective of this article, which is: to address the divergences related to the protection of applied arts, considering specific cases, in light of the most robust doctrine, in order to deepen the respective theoretical framework and induce legal reflection, it is understood to be pertinent to say a few words about the author right protection stipulated in the Brazilian legal system, as well as that which was established to account for industrial design, as one of the industrial property rights, highlighting the points that may be problematized below in what concerns the work of applied art.

It is worth remembering that Brazil has been a member of the CUP since its inception. However, the country took a little longer to sign and adhere to the Berne Convention and, as expected, signed and internalized the TRIPS promptly, as the dynamics of insertion in international trade demanded such adherence. Thus, Brazilian legislation is in accordance to other countries that participate in the two conventions and the Agreement, as well as converging on what was stipulated in each of these international statutes.

Regardless of this consonance, Brazil does not have a case law as robust as that found in the European Union or the United States of America (USA) with regard to intellectual property. The doctrine is also somewhat timid when compared to other regions or countries. Brazil follows the system understood as a civil law, which brings it closer to European doctrine in contrast to those originating from countries that follow common law, such as the USA. This, however, does not prevent some case laws from countries that adopt common law are being used in Brazilian judgments. This fact only highlights how much intellectual property seems to have been neglected in Brazil though it has arisen as extreme relevance to the contemporary world and to strategies for entering the international market. Therefore, what will be pointed out forehead about the lack or little critical thinking about the protection of applied arts seems to be in consonance with this lack of understanding by Brazilian policy makers about the relevance of intellectual property.

For now, it is worth mentioning that, although industrial design is considered one of the types of industrial property rights, there are significant gaps in the Industrial Property Law (LPI) 9279/1996, as pointed out by Peralta and Morgado (2023), which greatly suggest that author

right remains a possibility of safeguarding not only applied arts but also the designer's own creation. Examples of these gaps include the lack of provision for the public domain, the requirement for use and the lack of expiry in the event of non-use of the property, as well as the fact that compulsory licensing is provided for in patent titles, but not in industrial design titles.

On the other hand, in the case of author right, regulated in Brazil through the LDA, the fact that author right legislation does not contain in its exemplary list any mention of works of art applied to industry, as was the case in the 1973 Author Right Code that preceded the LDA, does not allow us to state that such a category of works cannot be safeguarded as a author right, given that the list of protected works is exemplary and not exhaustive.

Having presented these introductory notes on the protection of applied arts and industrial design, some notes are needed on each of these protections to provide an opportunity and better support future discussion.

COPYRIGHT

Currently, in Brazil, author right, as a protection, is enshrined in the Federal Constitution and in ordinary legislation, the Author Right Law (LDA) 9610/1998. Through this Law, there are definitions of work, forms of economic use (patrimonial rights), the author's relationship with the work (moral rights), the limits of author right, as well as other regulations that make the work tradable between the author and other market entities (assignment, licensing, etc.).

For the purposes of the discussion here, some general notions are important, such as that about author, temporality of protection, property rights and moral rights, while other definitions, such as that of work, are essential. Before introducing some concepts, we highlight the position of Carlos Alberto Bittar, who states that the objective of Author Right Law is:

(...) a disciplinação das relações jurídicas entre o criador e sua obra, desde que de caráter estético, em função, seja da criação (direito morais), seja da respectiva inserção em circulação (direito patrimoniais), e frente a todos os que, no circuito correspondente, vierem a ingressar (Bittar, 2005, p. 19)².

For the LDA, the author is the natural person. It is assumed, from reading the Law, that the author is the person with the capacity to create the work. Not without reason, Ascensão (1997, p. 30) states that “[t]he creation of the spirit, from the beginning, is necessarily associated with form. It is a formal idea; it must be stated in a form, which is the essence of the work.” In

² (...) the regulation of legal relations between the creator and his work, provided that it is an aesthetic nature, in function of either the creation (moral rights) or the respective insertion into circulation (patrimonial rights), and in relation to all those who, in the corresponding circuit, come to enter (Bittar, 2005, p. 19).

turn, Otero Lastres (2005) adds that there must be a capacity to create, which is the author's, and that such capacity will generate the originality of the work. Souza (2013, p. 3), in his regard, states:

O conceito jurídico de autoria é elemento fundador de toda proteção autoral, independente de filiação aos sistemas de *copyright* ou *droit d'auteur*. Construído, em sua versão moderna, a partir da ideia romântica de genialidade e com base no individualismo predominante então, o conceito de autor tem passado por inúmeros testes e críticas nas diversas disciplinas que abordam o problema³.

Originality is the requirement for a work that seeks protection. However, this requirement is related to it being an original work by an author, the creation of that author. For Bittar, the work “[...] must be integrated with individualizing components, in such a way that it is not confused with another preexisting work.” The author adds that the work must be “[...] intrinsically and extrinsically different from others already materialized. It must have its own features or characters, distinct from others that are already components of reality.” (Bittar, 2005, p. 23).

Ascensão, in his point of view, explains that the relevant work must be human, ruling out the incidence of author right protection on anything that is the object of a natural accident or the result of an animal's activity.

Antes de mais, toda a obra relevante é uma obra humana. Uma forma natural, por mais bela que seja, não é obra literária ou artística: não o é o quadro pintado por um animal; ou o ferro retorcido encontrado nos destroços de um avião; ou formas caprichosas moldadas pela neve. Por mais sugestivos que sejam, não são obras humanas, e não podem, pois, usufruir da proteção do Direito de Autor (Ascensão, 1997, p.27)⁴.

Precisely because it is the result of a creative activity of the human being, in addition to the possibility of economic exploitation of the creation, this creation is subject to so-called moral rights that refer to the persistent relationship between author and work. According to Bittar:

[o]s direitos morais são os vínculos perenes que unem o criador à sua obra, para a realização da defesa de sua personalidade.” Como ressalta o citado autor, isto se dá pois a “[...] obra é emanção da personalidade do autor —, que nela cunha, pois, seus próprios dotes intelectuais [...]. (Bittar, 2005, p. 47)⁵.

³ The legal concept of authorship is a founding element of all author right protection, regardless of affiliation to copyright systems or *droit d'auteur*. Constructed, in its modern version, from the romantic idea of genius and based on the prevailing individualism at the time, the concept of author has undergone countless tests and criticisms in the various disciplines that address the problem. (Souza, 2013, p. 3)

⁴ First of all, every relevant work is a human work. A natural form, however beautiful it may be, is not a literary or artistic work: neither is a picture painted by an animal; nor is it the twisted iron found in the wreckage of an airplane; nor are whimsical shapes molded by snow. However suggestive they may be, they are not human works, and therefore cannot enjoy the protection of Author Right (Ascensão, 1997, p.27).

⁵ []moral rights are the perennial bonds that unite the creator to his work, for the defense of his personality.” As the aforementioned author highlights, this is because the “[...] work is an emanation of the author’s personality — who therefore stamps his own intellectual gifts on it [...]. (Bittar, 2005, p. 47).

The current LDA includes the moral rights typified in the Brazilian legal system. Among these, the following stand out: the right to have the author's name associated with the work, the right to paternity, access to a single copy, the right to waiver and to regret, the right to integrity, among others. Souza (2013, p. 9) states that in its “[...] infra-constitutional conformation, the author's moral rights encompass the rights of paternity, communication, integrity and access.” Bittar (2005, p. 48) explains that the fundamental characteristics of these rights are: “[...] personality; perpetuity; inalienability; imprescriptibility; and unattachability.”

In addition to moral rights, there is the classification of the author's patrimonial rights, which relate to the economic exploitation of the work. According to Bittar:

Direitos patrimoniais são aqueles referentes à utilização econômica da obra, por todos os processos técnicos possíveis. Consistem em um conjunto de prerrogativas de cunho pecuniário que, nascidas também com a criação da obra, manifestam-se em concreto, com a sua comunicação ao público. (Bittar, 2005, p. 49)⁶

Patrimonial rights persist throughout the author's life, adding to this temporality more than 70 years from January 1st of the author's death, when the enjoyment of the right passes to the heirs. After this period ends, the work enters into public domain, becoming its use possible without having to talk about authorization or payment. However, it is understood that there are moral rights that remain preserved, and must be exercised by the heirs and even by the State, such as the right to paternity, since society has the right to know who the author of the work is, and the right to preserve it, since it is part of the community's heritage (Guedes, 1982).

It is also worth pointing out the need to externalize creation, in order to make it an object of protection. In this context, Souza informs that:

[...] a exteriorização é condição mínima para se pretender a incidência da proteção, uma vez que ideias ou simples abstrações amorfas não encontram respaldo jurídico, tornando-se, por vezes, vital a sua inserção em algum suporte, para que seja possível a concretização de sua proteção. Sua manifestação é essencial para dar forma e vida às ideias e concepções de onde as obras se originam. (Souza, 2013, p. 4)⁷

As explained above, Article 7º of the LDA provides an exemplary list of protected works. Works of applied art are not among the examples. The 1973 Author Right Code, in which Article 6, item XI, states that they will be subject to protection: “works of applied art, provided that their artistic value can be dissociated from the industrial nature of the object on which they are superimposed”. By reading this provision, it can be inferred that Brazil followed

⁶ Patrimonial rights are those relating to the economic use of the work, through all possible technical processes. They consist of a set of pecuniary prerogatives that, also arising with the creation of the work, manifest themselves in concrete terms, with its communication to the public. (Bittar, 2005, p. 49).

⁷ [...] externalization is a minimum condition for claiming the incidence of protection, since ideas or simple amorphous abstractions do not find legal support, sometimes it is vital their insertion in some support, so that their protection can be achieved. Their manifestation is essential to give form and life to the ideas and conceptions from which the works originate. (Souza, 2013, p. 4).

the doctrine applied in Italy called “dissociation”, as described by Otero Lastres in his thesis (1977). In other words, if the artistic nature were merely an accessory, and could hypothetically be separated from the industrial object on which it is applied, the work would be protected by author right. Therefore, not every work of applied art nor any design would be protected by author right. It is concluded that Brazil, with the previous Code, followed the restrictive protection, as applied in Spain, cumulating protections only on some works, namely those of applied art (Otero Lastres, 2008). In this way, it moves away from the application of absolute cumulativeness practiced in France and the non-cumulativeness existing in Italy⁸.

It is always worth remembering that the work of applied art for which author right protection is claimed does not need to be registered, does not need to meet requirements that will be assessed by a public office, and does not need to be published for the purpose of publicizing the administrative acts constituting the right. Author right protection follows a system of licensing, assignment and labor rights that are different from those specific to inventions or creations present in industrial property. Its protection period is much longer than that conferred by industrial property, in addition to not requiring its use, under penalty of expiration, or licensed due to lack of local exploitation, points that will be revisited in the last part of this article. First, it is important to say a few words about the current protection given to industrial designs in Brazil, understood as one of the types of industrial property.

INDUSTRIAL DESIGN

Until the current LPI came into force, the protection of industrial designs and models, respectively the two-dimensional pattern and the three-dimensional form, was classified in the Brazilian legal system as a type of patent. This led Barbosa to state that:

Note-se que a proteção dos desenhos industriais é, em direito comparado, a mais polimorfa de todos os direitos de propriedade intelectual. proteção por regime similar ao das patentes, pelo direito autoral, por formas mistas e cumulativas. Há de tudo nas várias legislações nacionais. O certo é que, à luz do art. 25.1 do TRIPs, deverá sempre haver algum tipo de proteção. (Barbosa, 2003, p. 275)⁹.

It is undoubted the influence of the patent system on industrial design. This is the case in references made from the title of industrial designs to the title of patents in the LPI. Design

⁸ It is worth noting that, following the Design Protection Directive in the European Union, only restrictive cumulation and absolute cumulation were accepted, with the non-cumulativeness applied by Italy no longer being accepted, according to Otero Lastres (2008).

⁹ It should be noted that the protection of industrial designs is, in comparative law, the most polymorphic of all intellectual property rights. Protection by a regime similar to that patents, to author right, to mixed and cumulative forms. There is everything in the various national laws. The truth is that, in light of art. 25.1 of the TRIPs, there must always be some type of protection. (Barbosa, 2003, p. 275).

protection is as robust as that present in patents. However, it should be noted that, although there is equivalence in the case of the scope of protection, there are omissions for other issues, as already pointed out, given the lack of provision for expiration due to non-use or the lack of provision for compulsory licensing in the title of industrial designs in the LPI. It can be inferred that such omissions may indicate the permanence of the hybrid nature of the design, which places it between industrial property and author right. Therefore, once the protection of industrial property has ended, author right protection could remain, hence the silence of the LPI also regarding the public domain. However, before going ahead, it is necessary to point out what characterizes the current protection of industrial designs as set out in the LPI.

In Brazil, industrial designs are protected by the aforementioned LPI, enacted in 1996. This Law defines what can be registered as an industrial design at the National Institute of Industrial Property (INPI), the agency responsible for analyzing and granting industrial property titles. Accordingly, Article 95 of the aforementioned Law states:

Considera-se desenho industrial a forma plástica ornamental de um objeto ou o conjunto ornamental de linhas e cores que possa ser aplicado a um produto, proporcionando resultado visual novo e original na sua configuração externa e que possa servir de tipo de fabricação industrial. (Brasil, 1996)¹⁰.

From the content of the aforementioned article, it can be inferred that any three-dimensional shape of an object and the two-dimensional shapes applicable to a product may be protected by industrial design. To this end, such shapes must be new and original, in addition to being prototypes – or types – capable of being suitable for industrial manufacturing process.

As seen in topic 2 of this article, industrial design protection was basically designed for two sectors: textiles and cast metal. The two-dimensional form is linked to the first, while the three-dimensional form to the second one. It was the products of both sectors that demanded forms of protection from governors of 19th century in order to combat counterfeiting widespread at the time of first laws that sought to cover designs and other ornaments applied to industry. These demands resulted in the use of author right to protect designs in the textile sector and molds in the cast metal sector, or in the construction of specific protection for industrial designs and models, or even in the concomitant use of both. In the current LPI, the remnants from the origin of industrial design protection remain. Design is not thought as a project, but rather as an ornament applied to the object or product. The ornamental aspect was

¹⁰ Industrial design is considered to be the ornamental plastic form of an object or the ornamental set of lines and colors that can be applied to a product, providing a new and original visual result in its external configuration and that can serve as a type of industrial manufacturing. (Brazil, 1996).

was extremely criticized when the field of design began to be built, by the end of the 19th century and throughout the 20th century, according to already mentioned by Loos (2004).

Returning to the concept of industrial design for protection purposes, it is necessary to better address the requirements necessary for the form to be eligible under safeguarding as a type of industrial property, starting with the requirement of novelty, which, as already stated, is included in the ADPIC. According to article 96 of the LPI, the industrial design must be considered new when it is not included in the state of the art. Therefore, in order to understand the requirement of novelty, it is necessary to understand what the state of the art is. Accordingly, the same Law establishes what constitutes the state of the art: everything made accessible to the public before the date of filing the application, in Brazil and abroad, by use or any other means (Brazil, 1996).

Otero Lastres (1975) – when analyzing the jurisprudential and doctrinal construction of the novelty requirement in Germany, France and Spain – indicates that novelty is not a requirement consistent with the justifications for design protection. In short, it is worth reviewing some of the notes of the aforementioned Spanish author on the historical construction of the novelty requirement, in order to understand his peculiar criticism toward this requirement for designs. To begin with, we have Germany, where the author reports the existence of three types of novelty: absolute, relative and subjective. When the novelty required is absolute, this means that any object that is publicized, anywhere and at any time, becomes prior to the claimed design. Relative novelty, in turn, limits this assessment of what was publicized only in relation to previous objects communicated to a circle of specialized people or in a territory, in which the form has been disclosed. Subjective novelty concerns the author himself. It has to be new only for the creator, and cannot be copied (Otero Lastres, 1975).

In France, the applied novelty refers to a comparative category. The object seeking protection must be new because it is different from existing ones. In the case of Brazil, the novelty requirement concerns its absolute bias. Therefore, new is considered to be anything that is not in the state of the art at any time and in any place, which leads to greater complexity in the application of this requirement. What we have, from reading the novelty requirement of industrial designs, is the permanence of the patent system from which it emerged.

For Otero Lastres (1975), there is no justification for using a novelty requirement typical of patents for designs, given the justification for each system. The author points out that the patent is granted so that its holder reveals the technical rule, given the possibility that the inventor has of exploiting his invention in secret. In this way, the patent functions as an incentive for the inventor to reveal the technical rule given the possibility of exploiting his

invention exclusively during a time period defined and guaranteed by law. The situation is different in relation to the creation of the form. There is no way for the creator of a new form of an object to exploit it in secret. As soon as the object is placed on the market, the form will be revealed and capable of being copied. In his point of view, Otero Lastres (1975) argues that the justification related to the protection of the design is different. Such protection is granted in order to guarantee the author exclusive exploitation for a certain period of time, as well as aiming for such form to be included in what the Spanish author calls the “heritage of aesthetic forms applied to industry”.

Having concluded the presentation and criticism of the novelty requirement, it is worth pointing out the other requirement that structures the protection system in Brazil and is enshrined in the article 97 of the LPI, which states that an industrial design shall be considered original when it results in a distinctive visual configuration in relation to previous objects, and originality may be obtained through the combination of known elements. Article 97, therefore, comes closer to the concept of novelty applied in France, according to the analysis of the legislation carried out by Otero Lastres (1975). Furthermore, the originality requirement of industrial designs is in no way similar to that of author right, which deals with the work having “origin” in the person of the author. For Barbosa (2009) and Dannemann (2001), originality could be equated with the inventive activity (invention patents) and the inventive act (utility model patents), and should be understood as the requirement of a minimum contribution that the object claimed must fulfill in order to enjoy protection.

Industrial design protection, unlike the long-lasting protection guaranteed by author right, can reach a maximum period of 25 years. However, as highlighted by Moro (2009), the LPI does not state, as it does in patent titles, that once the protection guaranteed to the design expires by this Law, it enters the public domain. This is an industrial property title that, unlike the others (trademarks and patents), appears to have been taken away from institutes common to industrial property titles, such as: public domain, compulsory license and expiration due to lack of use (Peralta and Morgado, 2023).

In order to conclude this brief presentation on the protection known as an industrial designs, it is necessary to highlight some issues. The design considered as a type of industrial property continues to carry with it the notion of ornament, as can be found in article 95 of the LPI. Thus, it is tended to be argued that the protection given to the design is closer to the applied work of art – something that is applied to the product – than to the more recent concept of design linked to the idea of project. In this regard, we have the disposition of Perret (1988)

when this author explains that the design is an implied art and not an applied art, considering that the designer, in the act of designing the form of a new product, has to take into account technical aspects (the designed form must allow the use of the product); economic aspects (this form must allow the mass reproduction of the object and at competitive prices); as well as aesthetic aspects (it must please the consumer). Perret's position (1988), therefore, is very far from the development of an object to which an ornament is merely applied.

The LPI, through its article 95, continues to provide protection to what Perret (1988) calls applied works of art, given the permanence of the notion of ornament. Thus, given the content of the Brazilian legal system, it can be inferred that it is not enough to omit the applied works of art from the Author Right Law, in order to avoid the cumulative protection of this type of form, neither it would be appropriate, if the idea was to avoid the duplication of protections, to maintain the notion of industrial designs linked to that of ornament. The discussion about the existence of cumulative protection for applied works of art deserves greater depth. The Brazilian legislative system placed this category in limbo, by omitting it from the LDA, as well as by persisting in understanding industrial designs as ornament.

In addition, the design, classified as an industrial property, does not provide for institutes specific like to other industrial property titles (such as trademarks and patents). In accordance with the above, the need for use and expiration due to lack thereof, the notion of public domain and even compulsory licensing are avoided. Such omissions seem to lead to the form protected by the industrial design, after having finished the protection, to possibly go on under safeguarding from author right. Obviously, this entire scenario outlined here ends up flowing to the judiciary, where decisions wander through gaps in the Law, leading to uncertainty in regarding the best protection strategy, as will be observed in the following discussion.

DISCUSSION BASED ON TWO RECENT CASES

In 2021, the Superior Court of Justice was asked to examine Special Appeal No. 1,943,690-SP, which involved a dispute over a line of clothing items, in which the possibility of protection under Law No. 9,610/98 (Author Right Law, LDA) was discussed. It was a line of underwear (lingerie) whose marketing triggered accusations of plagiarism. It is worth mentioning that lawsuits of this nature, in which author right protection for clothing is sought, have been the subject of extensive discussions in the European Union, according to Rocha (2020).

An action for refraining from use and compensation was initially filed, alleging counterfeiting of products. A judgment was issued partially upholding the claims to order the then defendant to refrain from selling products with distinctive elements of the Embrace Lace line, developed by the then plaintiffs, under penalty of a daily fine. The decision also ordered the destruction of all products in question, under penalty of a daily fine, in addition to the payment of compensation for material damages.

In the appeal, a judgment was issued reversing the conviction on the grounds that the LDA was inapplicable to the fashion industry. Furthermore, the judgment indicated that it was not a registered industrial design and that the creation was in the state of the art, with similar products existing, in accordance with the trend in this market segment. Finally, the decision also rejected the claim of infringement of the trade dress due to the lack of proof that the Embrace Lace line was the clothing of the plaintiffs' brands and that it had been reproduced by the defendant.

A Special Appeal was filed against this decision, alleging a conflict in case law and violation of articles 7, 8, 18 and 29, I and VI, of the LDA and articles 2, V, 95, 96 and 195, III, of Law No. 9,279/96 (Industrial Property Law, LPI). According to the appellants, article 7 of the LDA was merely illustrative, “it being undeniable that designs, clothing prints and similar products have author right protection”.

In her vote, the Rapporteur Minister categorically stated that “any creation that configures an externalization of a certain intellectual expression, with an idea and form realized by the author in an original way, is eligible for protection by author right”, and that among the exclusions of art. 8 of the LDA, there are no designs for clothing prints, specifically, which would prevent their exclusion from legal protection in advance.

The aforementioned vote also addressed the difference between aesthetic works (capable of author right protection) and merely utilitarian works (lacking protection under the LDA). According to the aforementioned vote, while the former have an autonomous aesthetic value, regardless of their origin, destination or effective use (insofar as the attribute is an end in itself), the latter aim solely at achieving direct material utilities, that is, only their practical function.

The rapporteur then considered that this was a violation of “applied works of art”, the conception of which corresponds to an intellectual creation that combines an aesthetic character with a utilitarian connotation. Thus, she understood that it was feasible to invoke author right rules.

Finally, the vote focused on the factual premises of the specific case, asserting the need for the appellants to prove that the design of their products would be endowed with originality/distinctiveness, that is, that their creation would not be included in ornamental standard already established in this segment. In addition, it would still be necessary to prove that the commercialization of similar artifacts began after the Embrace Lace line entered the market and that the coexistence of the products would give rise to confusion or undue association by the consumer public.

The expert assessment, carried out at the court of origin, found similarity between the products involved in the dispute, but also with third-party products, reflecting the usual behavior of several players in this market segment. Furthermore, it found that the similarity between the products considered occurs to a greater or lesser extent, that is, there is a coincidence of colors, modeling and the position in which the embroidery is placed on the products. However, in relation to the main element that personalized the lines, the embroidered design, the expert assessment understood that both designs are composed of florals, but have significant differences between them.

Under this understanding, the allegation of plagiarism was dismissed, considering the similarities as trends in the market segment in question. Unanimously, following the vote of the Rapporteur, the 3rd Panel of the STJ dismissed the appeal, thus leaving the decision as follows:

SPECIAL APPEAL. INTELLECTUAL PROPERTY AND UNFAIR COMPETITION. ACTION FOR ABSTENTION OF USE AND INDEMNIFICATION. WOMEN'S INTIMATE CLOTHING. POSSIBILITY, IN THEORY, OF INCIDENCE OF LAW 9.610/98. AUTHOR RIGHT. ABSENCE OF VIOLATION. ORIGINALITY NOT DETERMINED. UNFAIR COMPETITION. VIOLATION OF TRADE DRESS. DISTINCTIVENESS. ABSENCE. CONFUSION AMONG CONSUMER PUBLIC NOT VERIFIED. SUMMARY 211/STJ. SUMMARY 284/STF. SUMMARY 7/STJ.

1. Ação ajuizada em 11/5/2017. Recurso especial interposto em 11/3/2021. Autos conclusos ao gabinete da Relatora em 22/6/2021.
2. O propósito recursal consiste em definir se a recorrida deve se abster de comercializar peças de vestuário que se assemelham à linha de produtos fabricada pelas recorrentes, bem como se tal prática é causadora de danos indenizáveis.
3. São passíveis de proteção pela Lei 9.610/98 as criações que configurem exteriorização de determinada expressão intelectual, com ideia e forma concretizadas pelo autor de modo original.
4. O rol de obras intelectuais apresentado no art. 7º da Lei de Direitos Autorais é meramente exemplificativo.
5. O direito de autor não toma em consideração a destinação da obra para a outorga de tutela. Obras utilitárias são igualmente protegidas, desde que nelas se possa encontrar a exteriorização de uma “criação de espírito”. Doutrina.
6. Os arts. 95 e 96 da Lei 9.279/96 não foram objeto de deliberação pelo Tribunal de origem, de modo que é defeso o pronunciamento desta Corte Superior quanto a seus conteúdos normativos (Súmula 211/STJ). Ademais, as recorrentes sequer demonstraram de que modo teriam sido eles violados pelo acórdão recorrido, o que atrai a incidência da Súmula 284/STF.
7. A despeito da ausência de expressa previsão no ordenamento jurídico pátrio acerca da proteção ao trade dress, é inegável que o arcabouço legal brasileiro confere amparo

ao conjunto-imagem, sobretudo porque sua imitação encontra óbice na repressão à concorrência desleal. Precedentes.

8. Para configuração da prática de atos de concorrência desleal derivados de imitação de trade dress, não basta que o titular, simplesmente, comprove que utiliza determinado conjunto-imagem, sendo necessária a observância de alguns pressupostos para garantia da proteção jurídica (ausência de caráter meramente funcional; distintividade; confusão ou associação indevida, anterioridade de uso).

9. Hipótese concreta em que o Tribunal de origem, soberano no exame do conteúdo probatório, concluiu que (i) há diferenças significativas entre as peças de vestuário comparadas; (ii) o uso de elementos que constam da linha estilística das recorrentes revela tão somente uma tendência do segmento da moda íntima feminina; e (iii) não foi comprovada a prática de atos anticoncorrenciais que pudessem ensejar confusão no público consumidor.

10. Não sendo cabível o revolvimento do acervo fático e das provas produzidas nos autos em sede de recurso especial, a teor do entendimento consagrado na Súmula 7/STJ, é de rigor o desacolhimento da pretensão recursal.¹¹

SPECIAL APPEAL PARTIALLY GRANTED AND NOT GRANTED.

(SPECIAL APPEAL No. 1,943,690 - SP (2021/0177329-5), REPORTER: JUSTICE NANCY ANDRIGHI, tried on 10/19/2021, before the Third Panel of the Superior Court of Justice).

It is noted that, from the decision brought here, the gap in relation to the protection of applied works of art becomes an element brought to the fore. It was understood that such pieces could be understood as works of applied art and covered by author right law. However, in compliance with what is discussed here, author right protects the creation of the spirit. As long as something is created and not copied, such creation will deserve protection. This is

¹¹ 1. Action filed on 11/5/2017. Special appeal filed on 11/3/2021. Cases submitted to the Rapporteur's office on 22/6/2021.

2. The purpose of the appeal is to determine whether the defendant should refrain from selling clothing items that resemble the product line manufactured by the appellants, as well as whether such practice causes compensable damages.

3. Creations that configure the externalization of a certain intellectual expression, with an idea and form originally implemented by the author, are eligible for protection under Law 9.610/98.

4. The list of intellectual works presented in art. 7 of the Author Right Law is merely illustrative.

5. Author right does not take into account the intended use of the work for the granting of protection. Utility works are equally protected, provided that they can be found to express a "creation of the spirit". Doctrine.

6. Articles 95 and 96 of Law 9,279/96 were not the subject of deliberation by the Court of origin, so that the pronouncement of this Superior Court regarding their normative contents is prohibited (Summary 211/STJ). Furthermore, the appellants did not even demonstrate how they were violated by the appealed decision, which attracts the incidence of Summary 284/STF.

7. Despite the lack of express provision in the Brazilian legal system regarding the protection of trade dress, it is undeniable that the Brazilian legal framework provides support for the image-set, especially because its imitation encounters obstacles in the repression of unfair competition. Precedents. 8. In order to establish the practice of acts of unfair competition resulting from imitation of trade dress, it is not enough for the owner to simply prove that he uses a certain image; it is necessary to comply with certain prerequisites to guarantee legal protection (absence of a merely functional nature; distinctiveness; confusion or undue association, prior use).

9. Specific hypothesis in which the Court of origin, sovereign in the examination of the evidentiary content, concluded that (i) there are significant differences between the garments compared; (ii) the use of elements that are part of the stylistic line of the appellants reveals only a trend in the women's underwear segment; and (iii) the practice of anticompetitive acts that could give rise to confusion among the consumer public was not proven.

10. Since it is not admissible to review the factual record and the evidence produced in the proceedings in the context of a special appeal, according to the understanding enshrined in Summary 7/STJ, it is essential to reject the appeal claim.

independent of whether the new and original creation resembles an existing one. Therefore, the fragility of author right protection in relation to that conferred by industrial property is revealed by the reading and analysis of this procedural document, and it is now up to the analysis of the second document.

In 2022, the Fourth Panel of the STJ, in the judgment of Special Appeal No. 1,561,033-RS, did not share the same understanding set out in the previous judgment, when analyzing the case that became known as “WHEEL MAGIC”.

According to the Rapporteur, the protection of the creation by author right, in this case, was limited exclusively to the recognition of an innovation, which is, in fact, a concept specific to industrial protection. Furthermore, this innovation would reside in the way of presenting the results, in a new and original graphic form, and not in the outline of the circle.

The ruling, in the lower court, ruled that plagiarism had occurred, recognizing its innovative nature in the way the search results were presented on the Internet. According to this ruling, this innovation would require an analysis of whether or not it was protected by author right law. The single-judge decision was confirmed by the collegiate body of the 2nd instance, which concluded that plagiarism had occurred.

In his leading vote, the Rapporteur understood that there would be confusion in the concept of protection of author right works and utilitarian works, distinguishing works externalized to satisfy aesthetic interests from those that sought to satisfy utilitarian interests, with the former being protected by author right law and the latter by industrial property rights.

The vote even cited the understanding of the 4th Panel of the STJ, considering the issue settled:

INTERNAL APPEAL IN THE SPECIAL APPEAL. ACTION FOR DAMAGES. AUTHOR RIGHT. ALLEGATION OF PLAGIARISM OF A THEATRICAL WORK IN AN ADVERTISING CAMPAIGN. NON-CHARACTERIZATION. WORKS THAT BASE ON A COMMON IDEA. DECISION UPHOLDED. APPEAL DISMISSED.

1. É pacífico o entendimento desta Corte de que o objeto de proteção do direito autoral é a criação ou a obra intelectual, e não a ideia em si mesma, sendo plenamente possível a coexistência, sem violação de direitos autorais, de obras com temáticas semelhantes.
2. O Tribunal de origem, soberano na análise dos elementos coligidos e amparado na prova pericial, concluiu que as obras partem de uma mesma ideia, antecedente ao desenvolvimento da própria obra da autora, relacionada ao perigo do álcool na direção e à importância de alguém não consumir bebida alcoólica em ocasiões sociais e momentos de lazer para conduzir o automóvel. Trata-se de um conceito comum e até internacional (designated driver), que já foi mote de campanhas promovidas em todo o mundo.
3. Rever o entendimento quanto à inexistência de plágio, mediante o afastamento da conclusão pericial de que as obras possuem coincidências genéricas, porque oriundas de uma ideia comum, mas possuem naturezas, cenários, enredos e desfechos distintos, demandaria o reexame do contexto fático-probatório dos autos, providência vedada no recurso especial, a teor do disposto na Súmula 7/STJ.
4. Agravo interno desprovido.

(AgInt no REsp 1.540.743/SP, Relator MINISTRO LÁZARO GUIMARÃES, Quarta Turma, julgado em 5/6/2018)¹².

The rationale behind this decision was based on the understanding that, if the idea can be used to create new works of authorship, as it escapes the limits of author right protection, it can also be used for utilitarian creations.

According to the Rapporteur, the protection of the creation by author right, in this case, was limited exclusively to the recognition of an innovation, which is, in fact, a concept specific to industrial protection. Furthermore, this innovation would reside in the way of presenting the results, in a new and original graphic form, and not in the outline of the circle.

Considering that the core of the business in question is the search tool and not the way in which results are presented, the innovation, embodied in the way in which results are presented or even the way in which results are filtered, is merely the commercial use of the tool.

Therefore, the similarity between the formats used by the parties in notably different commercial applications could technically characterize the use of the same industrial design, which is not to be confused with the appropriation of author right. Thus, if there are no aesthetic reasons at stake, this would be a case of protection of an industrial design, which, in this case, is not registered with the National Institute of Industrial Property (INPI) and does not even have any claim to that effect. The only procedure adopted, in this case, was an insufficient registration with the Registry of Titles and Documents.

For these reasons, the Fourth Panel of the STJ rejected the recognition of plagiarism and the ruling to pay compensation, in a decision with the following summary:

AUTHOR RIGHT AND INDUSTRIAL PROPERTY. SPECIAL APPEAL ACTION FOR REPARATION OF DAMAGES DUE TO IMPROPER USE OF WORK. OMISSION NOT CONFIGURED. VIOLATION OF REGULATORY RULES. NOT ADMISSIBLE. IDEA MATERIALIZED IN SKETCH. AUTHOR RIGHT. ABSENCE OF PROTECTION. NEW FORMAT. COMMERCIAL USE ALLOWED. PLAGIARISM REJECTED. APPEAL GRANTED.

¹² 1. This Court's understanding is unanimous that the object of author right protection is the creation or intellectual work, and not the idea itself, and that it is entirely possible for works with similar themes to coexist without author right infringement.

2. The Court of origin, sovereign in the analysis of the elements collected and supported by expert evidence, concluded that the works are based on the same idea, prior to the development of the author's own work, related to the dangers of alcohol while driving and the importance of not consuming alcoholic beverages on social occasions and leisure moments when driving a car. This is a common and even international concept (designated driver), which has already been the theme of campaigns promoted throughout the world.

3. Reviewing the understanding regarding the non-existence of plagiarism, by setting aside the expert's conclusion that the works have generic coincidences, because they originate from a common idea, but have different natures, scenarios, plots and outcomes, would require a reexamination of the factual and evidentiary context of the case, a measure prohibited in the special appeal, according to the provisions of Summary 7/STJ.

4. Internal appeal dismissed.

(AgInt in Resp 1.540.743/SP, Rapporteur MINISTER LÁZARO GUIMARÃES, Fourth Panel, decided on 6/5/2018).

1. Não se verifica a alegada violação do art. 535 do CPC/73, porque a eg. Corte de origem dirimiu, fundamentadamente, todas as questões que lhe foram submetidas, declinando, de forma expressa e coerente, todos os fundamentos utilizados como razões de decidir. Não se confunde julgamento desfavorável, como no caso, com negativa de prestação jurisdicional ou ausência de fundamentação.
2. "O recurso especial é via inadequada para análise de portarias, resoluções, regimentos ou qualquer outro tipo de norma que não se enquadre no conceito de lei federal" (AgInt no AREsp 325.019/SP, Rel. Ministro ANTONIO CARLOS FERREIRA, QUARTA TURMA, julgado em 03/12/2018, DJe de 13/12/2018).
3. No caso dos autos, debate-se a utilização não autorizada, pela promovida, de formato gráfico concebido pelos promoventes, inicialmente apresentado em esboço de site idealizado para criar plataforma de conexão ágil e facilitada entre internautas, fornecedores, anunciantes e consumidores. Esse esboço fora levado pelos autores a prévio registro perante Cartório de Títulos e Documentos e, após apresentado à ré, teria sido por esta incorporado às suas ferramentas de busca, em formato gráfico semelhante, denominado "RODA MÁGICA", consistindo nisso o alegado plágio.
4. O ordenamento jurídico brasileiro protege as obras intelectuais, em regra, pela via dos Direitos de Autor, quando prevalece o interesse estético da obra; ou pela via dos Direitos de Propriedade Industrial, quando o interesse prevalente é utilitário (comercial ou industrial).
5. Os projetos e as ideias subjacentes não são objeto de proteção pelas regras de direito autoral, podendo ser reutilizados tanto para novas obras autorais como para fins industriais e comerciais (Lei 9.610/98, art. 8º).
6. Os formatos gráficos, resultado do "[...] conjunto ornamental de linhas e cores que possa ser aplicado a um produto, proporcionando resultado visual novo e original na sua configuração externa [...]" (Lei 9.279/96, art. 95), configuram desenho industrial, cuja proteção legal depende de registro perante o Instituto Nacional de Propriedade Industrial.
7. No caso dos autos, não se cogita de registro de desenho industrial, razão pela qual a obra intelectual sub judice não goza de proteção legal, impondo-se o afastamento da alegação de plágio.
8. Recurso especial provido.
(RECURSO ESPECIAL Nº 1.561.033 - RS (2014/0123880-2), RELATOR : MINISTRO RAUL ARAÚJO, julgado em 20 de setembro de 2022)¹³

¹³ 1. There is no alleged violation of art. 535 of the CPC/73, because the e.g. Court of origin settled, with reasoning, all the issues submitted to it, expressly and coherently declining all the grounds used as reasons for the decision. An unfavorable judgment, as in this case, should not be confused with a denial of jurisdictional provision or lack of reasoning.

2. "A special appeal is an inadequate means of analyzing ordinances, resolutions, regulations or any other type of rule that does not fall within the concept of federal law" (AgInt in AREsp 325.019/SP, rapporteur Justice ANTONIO CARLOS FERREIRA, FOURTH PANEL, decided on 12/3/2018, E-DJ of 12/13/2018). 3. In the present case, the defendant's unauthorized use of a graphic format designed by the plaintiffs is at issue, initially presented in a draft of a website designed to create a platform for agile and easy connection between Internet users, suppliers, advertisers and consumers. This draft had been submitted by the plaintiffs for prior registration with the Registry of Titles and Documents and, after being presented to the defendant, it was allegedly incorporated by the defendant into its search tools, in a similar graphic format, called "WHEEL OF MAGIC", which constitutes the alleged plagiarism.

4. The Brazilian legal system protects intellectual works, as a rule, through Author Right, when the aesthetic interest of the work prevails; or through Industrial Property Rights, when the prevailing interest is utilitarian (commercial or industrial).

5. The underlying projects and ideas are not subject to protection under author right rules, and may be reused both for new works of authorship and for industrial and commercial purposes (Law 9.610/98, art. 8).

6. Graphic formats, resulting from the "[...] ornamental set of lines and colors that can be applied to a product, providing a new and original visual result in its external configuration [...]" (Law 9,279/96, art. 95), constitute an industrial design, the legal protection of which depends on registration with the National Institute of Industrial Property.

7. In the present case, there is no question of registering an industrial design, which is why the intellectual work under consideration does not enjoy legal protection, requiring the dismissal of the allegation of plagiarism.

8. Special appeal granted.

Returning to Special Appeal No. 1,943,690-SP, it is worth highlighting that it clarifies the system of the LDA with regard to the scope of protection of this legislation. The aforementioned decision teaches that, while art. 7 provides an exemplary list, art. 8 exhaustively lists the exceptions to the provisions of the previous provision. Thus, any creation that embodies the externalization of a specific intellectual expression, with an idea and form originally realized by its author, can be protected by author right, as explained and defended in the first procedural document cited here, when clothing models were equated to the category of works of art applied to the industry.

Therefore, when the fashion industry, as in the case dealt with in this judgment, inserts possible elements into its embroidery, lace or print designs, the industrial nature of this production does not deprive them of the protection of the LDA. What underlies this understanding is the inclusion within the scope of the author right of all works that fulfill aesthetic purposes, regardless of whether or not they are used for industrial purposes.

The aforementioned decision is also based on the doctrine that distinguishes aesthetic works (capable of author right protection) from merely utilitarian works (without author right protection). While the former have autonomous aesthetic value, the merely utilitarian works are restricted to their practical function, as they only aim at their direct material utility.

Therefore, in this specific case, the STF understood that it was a work of applied art, since it was an intellectual creation that combined aesthetic character and utilitarian connotation, serving commercial or industrial purposes. Therefore, the invocation of author right was made possible to protect intellectual creations in the fashion sector.

On the other hand, the same STF restricted such protection with regard to the art style called fragmentism, which uses colors to allow any visual composition to be shown as a drawing or figurative abstract composition, in Special Appeal No. 906,269-BA. Since fragmentism is considered a technique, it was denied protection on the grounds that it would be an absolute restriction on creativity, with only the individual result being eligible for protection, that is, the work that uses the methods, styles and techniques that should remain unprotected.

The lack of decisions by the Superior Court on the subject and the divergence of positions between its Panels indicate the need to deepen the discussion and understanding of the subject.

(SPECIAL APPEAL No. 1,561,033 - RS (2014/0123880-2), REPORTER: MINISTER RAUL ARAÚJO, decided on September 20, 2022).

By way of Conclusion

Intellectual property plays a significant role in the international market. The latest international regulations on patents, trademarks, geographical indications, author rights and industrial designs serve as proof of the relevance of such rights in a world supported by increasingly intangible assets. Brazil must pay close attention to these regulations in order to position itself in the international intangible goods market proactively and not in the wake of other nations' interests.

To this end, it is necessary to have a real understanding of each type of protection in order to achieve benefits for the country itself. Taking care of the protection of design and encouraging it may be opportune for endogenous creations. It is also considered opportune to guarantee the correct protection for the work of applied art and to distinguish it from design, granting the latter protection that is consistent with its design field.

Not knowing how to exercise intellectual property rights is as harmful as not knowing how to frame them within the legal system, preventing a more intense discussion that could yield results in terms of what needs to be protected or what should be protected. Brazil has a creativity that is highlighted in many speeches, but it does not seem to believe in it or, at the very least, believe that the fruits of this creativity deserve protection.

It is not counterproductive that some works – such as those understood as works of applied art – may enjoy differentiated protection. What is counterproductive is the limbo in which they find themselves and the lack of discussion about which protection system would be interesting for the country's level of social, economic and technological development: total cumulativeness, restricted cumulativeness or non-cumulativeness. May new air be able to ventilate the reflections held here to propose alternatives to the silences and omissions of our legal diplomas.

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