

# RIGHTS CONTENT ON DESIGNS

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## Abstract

*Our intellect characterizes us and helps us make a difference in life. Due to our intellect we can understand the world around us, our personality is shaped and developed and, depending on such development, we can learn new things that are beneficial to us both as individuals and the humankind as a whole.*

*Intellectual property focuses on the intellect and the protection of everything that is a creation, represents an important element of day-to-day life and ensures the adequate progress of things deriving from and related to said aspect.*

*Authors are the creators of intellectual property, and their creation must be protected. Furthermore, they benefit from a protection system, respectively a protection title, as well as patrimonial and non-patrimonial rights in connection with their achieved creation and in full dependence thereupon.*

**Keywords:** *intellectual property, patrimonial rights, non-patrimonial rights, author, protection title.*

## 1. Introduction

The field covered by this paper is intellectual property and the themes of the study aim rights content on designs. The importance of the proposed study is to identify the effects of protection and the rights acquired by the authors as a result of mind product protection and the objectives of the paper are to introduce the reader in the intellectual protection area and understand the effects of protection and its importance by showing related structured procedure and a simpler way to understand. I intend to respond to the objectives set by showing main effects of rights on designs and models and their importance, including identification of relevant articles of Law 129/1992 on the protection of designs and models as republished. I would like to show among other aspects presented herein that state of knowledge is high in the matter addressed and the subjects reveal this.

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Intellectual property focuses on the intellect and the protection of everything that is a creation, represents an important element of day-to-day life and ensures the adequate progress of things deriving from and related to said aspect.

Authors are the creators of intellectual property, and their creation must be protected. Furthermore, they benefit from a protection system, respectively a protection title, as well as patrimonial and non-patrimonial rights in connection with their achieved creation and in full dependence thereupon.

Law no. 129/1992, as republished, on the protection of designs and models distinguishes between the author of the design or model and the holder of the registration certificate of the design or model.

Thus, Art. 3 of this law states:

“(1) The right to be issued a registration certificate belongs to the author of the design or model or his/her successor in title for designs or models independently created.

(2) If several people independently created a design or model, the right to be issued the registration certificate belongs to the person who filed the first application for registration.

(3) If the design or model was created as a result of contracts with creative purpose or by employees in their work duties, the right belongs to the person who commissioned.”<sup>1</sup>

The conclusion that can be drawn from this article is that the right to have a registration certificate issued belongs to the author of the design or model or his/her successor in titles for designs or models independently created or if the model or design has been created as a result of a contract with creative purpose or by employees in their work duties, the right belongs to the person who commissioned it - in the absence of contrary contractual provisions explicitly or implicitly stipulating the creative purpose.

With regard to the above, let us take an example in order to clarify convincingly: a person invents a product and puts it up for sale, it being successful in the outlet market. To be sure that product is to be marketed, will be recognized by the consumer, will have the quality of the initial product and the creator will be acknowledged all the rights of creation, it is necessary that the person who created it is protected in terms of acknowledging that, in terms of product appearance - it belongs to that person, that person has the right to market the product and product quality is

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<sup>1</sup> Law 129/1992 on the protection of designs and models, republication 3 in the Official Gazette no. 242/04.04.2014.

recognized, having thus the right to be paid for the product created.

In doctrine, according to Professor Viorel Ros designs and models “are combinations of lines or colours presenting an original character or shapes in volume which gives the product its own and new features, which distinguish it from other products”<sup>2</sup>, and “Products of the spirit must also be protected outside the national borders of their author, when used according to their vocation, in other states”<sup>3</sup>, and thus “Productions of the spirit are, of course, the most direct and personal creation, the most legitimate and less likely to be appealed <property>”<sup>4</sup>.

**Law no. 129/1992 on the protection of designs and models, as republished<sup>5</sup>, in art. 2 d), defines design or model as „appearance of a product or a part thereof, rendered in two or three dimensions, resulting from the combination of the main features, particularly lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation”.**

The protection of the intellectual property also provides economic development, encouraging legality of competition, favouring the creative spirit of the individual and trade of products created both domestically and internationally and it contributes to the development of commercial relations.

The balance between creation and its knowledge at international level (which encompasses marketing) can only be kept by a more complex and complete legal system, better implemented in as many countries as possible. Therefore the international treaties have a very important role, and their implementation at national level, however in a closer implementation.

Creating a design or model also implies the birth of their protection rights and the need of its registration through a legal procedure. Given that in the matter of designs and models there is plurality of protection, the author of a design or model will have rights arising both from his/her capacity as author and rights arising from their registration with the State Office for Inventions and Trademarks (OSIM)<sup>6</sup>.

Thus, Art. 5 of Law 129/1992, as republished on the protection of designs and models provides in paragraph 2 that: “(2) The protection of registered design or model under this Law shall not exclude or prejudice the protection of copyright thereof.”<sup>7</sup>

Therefore, by making a design and model two distinct categories of rights are born, namely: non-patrimonial rights and patrimonial rights. Non-patrimonial rights are perpetual and patrimonial rights are limited in time.

According to art. 5 paragraph 1 of Law no. 129/1992 on the protection of designs and models, as republished, rights on a design or model acquired under this legislation, shall not prejudice the rights on unregistered designs or models<sup>8</sup>, trademarks and other distinctive signs, patents and utility models, typefaces and topographies of semiconductor products. Also, the protection of design or model registered under this law, does not exclude or prejudice its protection by copyright.

Non-patrimonial copyrights, known as moral rights of the author are inalienable and imprescriptible rights arising from copyright acknowledged by most legislations of the states<sup>9</sup> and whose content is not expressed in monetary form. Non-patrimonial copyrights is a legal expression of the link between the work and its creator, they precede patrimonial rights, survive them and have permanent influence exerted on them.

Non-patrimonial rights are independent of patrimonial rights, the author of a design or model keeps these rights even after assignment of his/her patrimonial rights<sup>10</sup>.

The moral rights are exclusively acknowledged to the author and he/she enjoys in principle the following moral rights:

**a. Right of authorship (paternity right);**

The right to claim recognition of authorship of a design or model is called in the doctrine “the right to paternity of the work” and is enshrined in art. 3 paragraph 1 of Law no. 129/1992 on the protection of designs, republished, being based on the need to respect the natural link between the author and his/her work. Thus, this right is exclusively recognized to the creator. If the design is a collective achievement, the performers are acknowledged as co-authors<sup>11</sup>.

The right to authorship is the most important prerogative which forms the intellectual rights in general and consists in the acknowledgement of rights of true author of a design. This right cannot be the object of a waiver or alienation by acts inter vivos, unlike the right to be issued the registration certificate for the design or model which is transmissible, as shown in the analysis of art. 3 paragraphs 1 of the law.

<sup>2</sup> Viorel Ros, *Intellectual property law*, Global Lex Publishing House, Bucharest, 2001, p.474.

<sup>3</sup> Viorel Ros, Dragos Bogdan, Octavia Spineanu – Matei, *Copyright and related rights*, All Beck Publishing House, Bucharest, 2005, p.24.

<sup>4</sup> Viorel Ros, Dragos Bogdan, Octavia Spineanu – Matei, *Copyright and related rights*, All Beck Publishing House, Bucharest, 2005, p.7.

<sup>5</sup> Law 129/1992 on the protection of designs and models, republication 3 in the Official Gazette no. 242/04.04.2014.

<sup>6</sup> Gabriel Olteanu, *Intellectual property law*, 2<sup>nd</sup> Edition, C.H.Beck Publishing House, Bucharest, 2008, p.214.

<sup>7</sup> Law 129/1992 on the protection of designs and models, republication 3 in the Official Gazette no. 242/04.04.2014.

<sup>8</sup> For details on unregistered designs or models, see Ciprian Raul Romitan, *Protection of unregistered Community design*, in “Revista română de dreptul proprietății intelectuale”, no. 1/2009, pp.182-189.

<sup>9</sup> In the copyright system, moral rights of the author are almost ignored, they are not protected separately. According to art. 4 - 142 of the US Copyright Act, the author has exclusive rights he/she can exercise in contractual conditions such as to guarantee the integrity, but if an author transfers his/her rights without imposing such terms, he/she loses such rights. According to this law, moral rights of the author are a form of property right called right of publicity (e.g., the California Civil Code, Section 3344 regulates the right of publicity).

<sup>10</sup> Ciprian Raul Romitan, *The moral rights of the author*, Universul Juridic Publishing House, Bucharest, 2007, p.48.

<sup>11</sup> Viorel Ros, *works cited*, p.521, Ioan Macovei, *Intellectual property law treaty*, C.H. Beck Publishing House, Bucharest, 2010, pp. 260-261.

In accordance with Art. 50 of the same law indicated above, “unlawful acquirement, in any way, of the authorship of the design constitutes an offense and is punishable with imprisonment from 3 months to 2 years or a fine.”

**b. Right of disclosure, i.e. the right to decide if, when and how the work will be disclosed to the public;**

Art. 30 of Law no. 129/1992 on the protection of designs and models, republished, states that “Throughout the duration of the design registration, the holder has the exclusive right to use and to prevent their use by a third party who has not his/her consent. The holder has the right to prevent third parties from performing, without his/her consent, the following acts: reproduction, manufacture, sale or offering for sale, marketing, importing, exporting or using a product in which the design is incorporated or to which it applies or storing such a product for those purposes.”<sup>12</sup>

Thus, the disclosure of the design or model, bringing it to the attention of third parties, time and method for disclosure to the public, belong to the author, but to benefit from protection, he/she must obey and fall into the legal rigors and procedures.

**c. Right to decide under what name the work will be disclosed to the public (right to name);**

Right to a name is provided in art. 41 par. 1 of the Law no.129/1992 on the protection of designs and models, republished, which states that “The author has the right to have his/her surname, first name and capacity mentioned in the registration certificate, and any documents or publications concerning design or model.”<sup>13</sup>

The author has thus the right to have his/her surname, first name and capacity mentioned in the registration certificate issued by the State Office for Inventions and Trademarks - OSIM,<sup>14</sup> and any other documents or publications on design, and these data will be recorded in the employment record of the author.

**d. Right to claim the observance of the integrity of the work, known as the right to inviolability of the work,**

The same art. 30 of the above mentioned Law regulates this feature of the work.

**e. Right to withdraw the work (right of withdrawal).**

Art. 36 d) of Law no. 129/1992 on the protection of designs and models, republished, provides that “exclusive exploitation right arising from the registration of design ceases d) by waiver of the holder of the registration certificate”, i.e. by withdrawal of work.<sup>15</sup>

The above rights must be recognized to the authors of designs and models on the basis of the principle of unity of art<sup>16</sup> and in the specific protection they are supplemented with the following rights:

**a. right to be granted a specific protection title, recognized by art. 3 of the law mentioned;**

**b. right to transfer the rights upon issuance of the registration certificate, a right provided by art. 30 and art. 34 of the law;**

**c. exclusive right to exploit the registered design or model, a right provided by art. 30 of the law;**

**d. right to have full name and authorship mentioned in the registration certificate to be issued by OSIM, and any documents or publications concerning design or model, as stipulated in art. 37 of the Law;**

**e. priority right of first deposit<sup>17</sup>.**

Concurrently, art. 41 par. 2 of Law no. 129/1992 on the protection of designs and models, republished, provides that data in the registration certificate for the design or model be recorded in the employment record.

Patrimonial rights are rights acknowledged to the creator of a work, in the case of our analysis, of a design or model which is the economic component of copyright and which can be transferred to another person, for consideration or for free<sup>18</sup>.

If the author of the design or model is also the holder of the registration certificate, he/she will be the exclusive holder of the patrimonial rights<sup>19</sup>. In this case, as provided in art. 39 par. 1 of Law no. 129/1992 on the protection of designs and models, republished, which states that “The author, holder of the registration certificate of the design or model, enjoys patrimonial rights established under contract with people who exploit the design or model.”, the author-holder of the registration certificate of the design or model enjoys patrimonial rights established under contract with

<sup>12</sup> Law no. 129/1992 on the protection of designs and models, republished,

<sup>13</sup> Law no. 129/1992 on the protection of designs and models, republished,

<sup>14</sup> State Office for Inventions and Trademarks is the specialized body of central government, sole authority in Romania in ensuring the protection of industrial property, in accordance with national legislation and the provisions of international conventions and treaties to which Romania is a party, in accordance with provisions of GD no. 573/1998 on the organization and functioning of OSIM, as amended, art. 68 of Law no. 64/1991 on patents, republished, art. 96 of Law no. 84/1998 on trademarks and geographical indications, republished and art. 48 of Law no. 129/1992 on designs, republished. The organization, functioning and powers of OSIM are provided in GD no. 573/07.09.1998 on the organization and functioning of the State Office for Inventions and Trademarks, as amended by GD no. 1396/2009.

<sup>15</sup> Law no. 129/1992 on the protection of designs and models, republished,

<sup>16</sup> Viorel Ros, *works cited*, p.520.

<sup>17</sup> For details, see Badea Liliana, *Establishment of regular national deposit on industrial designs* (Case Study), paper presented at the Seminar “Industrial property protection in the context of new regulations”, Tulcea, August 30 - September 2, 2004.

<sup>18</sup> European Union, *Terminology glossary on intellectual property (industrial property, copyright and related rights)*, a PHARE programme for OSIM and O.R.D.A., 2005, p.52.

<sup>19</sup> Viorel Ros, *works cited*, p.521.

persons who exploit that design or model. In the event of an assignment contract, the author's patrimonial rights are established in the contract, according to art. 39 par. 2 of Law no. 129/1992, republished, which states that, "In case of concluding a contract of assignment, the author's patrimonial rights are established in this contract."

If the author of the design or model is not also the holder of the registration certificate, his/her patrimonial rights are limited. The author has, as mentioned, only those rights based on his/her employment contract or contract of assignment of the patrimonial rights on design or model.

Art. 2 letter c of Law no. 129/1992 on the protection of designs and models, republished, defines "registration certificate" as "title of protection granted by the State Office for Inventions and Trademarks for registered designs."

From the analysis of art. 3 paragraph 1 of the law, according to which the right to have registration certificate issued belongs to the author of design or his/her successor in title for the designs and models independently created, it results that the right to have the registration certificate of a design or model issued, is transferable.

Utilization of a registered design or model may be made personally by the holder of the right, by reproduction, distribution, importation for sale, public exhibition or indirectly, by assigning the right of utilization. According to art. 38 par. 1 2<sup>nd</sup> sentence of Law no. 129/1992 on the protection of designs and models, republished, rights arising from the registration may be transferred in whole or in part. The transfer may be made by succession, assignment or license.

Transfer by succession of patrimonial rights on designs or models is subject to common law, and in terms of duration and territorial boundaries, the provisions of the special law, i.e. Law no. 129/1992 on the protection of designs and models, republished, shall be taken into account.

The assignment may be total if it relates to all the rights conferred by the registration certificate of the design or model or partial if it relates to only some of the rights conferred by the registration certificate. Partial assignment of rights arising from the registration certificate of a design or model determines a co-ownership regime<sup>20</sup>.

The license may be exclusive, in which situation the licensor undertakes not to transfer the rights of exploitation of the design or model to others, or non-exclusive if the licensor retains a right to exploit the design or model and/or may grant the right to exploit

the design or model to others also. However, the license may be total if it relates to all the rights conferred by the registration certificate, or partial if it relates to only some of the rights conferred by the registration certificate.

Note that, according to art. 38 par. 3 of Law no. 129/1992 on the protection of designs and models, republished, transfer of rights shall be registered with OSIM in the Register of designs and models and produces effects to third parties only from the date of publication in the Official Bulletin of Industrial Property (BOPI) of OSIM<sup>21</sup> of notice of transfer. The registration of transfer of rights on designs or models in dispute is suspended until the date of the final judgments on rights (par. 4).

Although Law no. 129/1992 on the protection of designs and models, republished, makes no reference on this point, having regard to the provisions of art. 55 of the legislation analysed, according to which, in the case of legal persons, registration certificates of designs and models in force represent intangible assets and may be registered in the property of the holder; transfer of patrimonial rights for these persons can be done by division, merger, liquidation, absorption<sup>22</sup>.

In art. 37 special law also provides that holders of registration certificates of designs or models may mention on products the sign D or the letter "D" uppercase, enclosed in a circle, accompanied by the holder's name or by the certificate number.

According to art. 34 par. 10 of Law no. 129/1992 on the protection of designs and models, republished, as of date of publication of the application, the natural person or legal entity entitled to have the registration certificate issued, shall temporarily enjoy the same rights conferred on the holder. This provisional protection lasts until the issuance of registration certificate unless the application was rejected or withdrawn<sup>23</sup>.

The exclusive right of exploitation arising from the design or model registration provided for in art. 30 of the law referred to above shall cease in the following cases:

a) at the expiry of the validity date (period of validity of a design or model registration certificate is 10 years from the establishment of the regular deposit and can be renewed for 3 successive periods of 5 years);

b) by cancelling the registration certificate. Date of cancellation of registration certificate is the date the court judgment ordering or finding the nullity of the registration certificate, becomes final<sup>24</sup>;

<sup>20</sup> Gheorghe Bucsa, *Protection of designs and models. Case studies and case law*, OSIM Publishing House, Bucharest, 2008, p.54.

<sup>21</sup> It has 12 annual issues and includes applications for registration of designs and models submitted to OSIM, lists of registered certificates, changes in legal status etc.. For details, see Gheorghe Bucsa, Tiberiu Popescu, *works cited*, pp.49-50. For further study, see also Stefan Cocos, *The a, b, c of protection and enhancement of industrial property*, Rosetti Publishing House, Bucharest, 2004, pp.210-212).

<sup>22</sup> Viorel Ros, *works cited*, p.536.

<sup>23</sup> See Ioan Macovei, *works cited*, p.262.

<sup>24</sup> Teodor Bodoaşcă, *Intellectual property law*, C.H. Beck Publishing House, Bucharest, 2006, p.313.

c) by holder's forfeiture of rights for failure to pay fees for maintenance in force of the design or model registration certificate;

d) by waiver of the registration certificate holder<sup>25</sup>.

As a conclusion on the above, we can say that the exclusive right of exploitation is temporary (as mentioned above, the validity of a registration certificate is 10 years from the date the regular deposit is established and can be renewed for 3 successive periods of 5 years) and territorial (exclusive exploitation rights is limited to the territory of the state which issued the registration certificate).

According to art. 30 of Law no. 129/1992 on the protection of designs and models, republished, the following deeds constitute infringement of the exclusive right of exploitation of the design or model: reproduction, without right, of the design or model for the manufacture of products with identical appearance, manufacture, offer for sale, sale, import, use or storage of such products for circulation or use, without the consent of the holder of design or model registration certificate, in the period of validity thereof<sup>26</sup>. All disputes arising from the infringement of the exclusive right of exploitation, in accordance with art. 43 of the law fall within the jurisdiction of the courts under common law.

Concurrently, according to art. 52 par. 4 of Law no.129/1992 on the protection of designs and models, republished, for damages caused, the holder is entitled to damages under common law, and may request the competent court to order the seizure or, where appropriate, the destruction of counterfeit goods. This applies to materials and equipment used directly in the crime of counterfeiting.

The infringement proceedings<sup>27</sup> fall also in the jurisdiction of the courts and also action for unfair competition, whose conditions of exercise are regulated by Law no. 11/1991 regarding control of unfair competition<sup>28</sup>. Art. 2 of this legislation defines the unfair deed as any deed or fact contrary to fair practices in industrial or commercial activity. In order that unfair competition action be admitted, it is necessary to fulfil the prerequisite on action in tort<sup>29</sup>.

Under art. 53 of Law no. 129/1992 on the protection of designs and models, republished, holder

of a registered design or model may request the court: to order precautionary measures when there is a risk of infringement of rights on a registered design or model and if the breach is likely to cause irreparable harm or if there is a risk of destruction of evidence. In taking precautionary measures ordered by the court, establishment by the applicant of a sufficient security to prevent abuse may be requested. For ordering precautionary measures common law provisions<sup>30</sup> are applicable.

In accordance with art. 35 par. 2 of Law no. 129/1992 on the protection of designs and models, republished, throughout the period of validity of the registration certificate the holder has the obligation to pay fees for its maintenance in force. For the payment of fees for certificate maintenance in force, OSIM granted a grace period of 6 months, instead charging increases. Under paragraph 3 of the same article, failure to pay such fees shall cause the forfeiture of rights.

We should mention that the Romanian legislator, as well as legislators in other states of the European Union has not provided the obligation for the certificate holder to exploit registered design or model. Therefore, the inaction of the holder of registration certificate does not attract penalty of forfeiture of rights for non-exploitation<sup>31</sup>.

## 2. Conclusions

The main focus in the present paper was about the content of the rights on designs or models, with the expectation of an optimal impact of these results, in terms of presentation of elements that define the procedure, what needs to be followed and what must be done so as their author benefit from their protection.

A suggestion for future activities would be a comparison of application of design and model protection in different countries, depending on their accession to international conventions, to see the implementation of international conventions at national level and alignment of countries to these so as an uniform national or international protection be implemented.

<sup>25</sup> According to art. 35 par. 3) of Law no.129/1992 republished, O.S.I.M. grants a grace period of 6 months for the payment of fees for maintenance in force, which are subject to penalties. Failure to pay such fees shall cause the forfeiture of rights (paragraph 4). Under paragraph 5) the forfeiture of rights shall be published in the Official Bulletin of Industrial Property of OSIM.

<sup>26</sup> See Viorel Ros, *works cited*, p.522.

<sup>27</sup> See Ciprian Raul Romitan, *Crime of counterfeiting industrial design or model. Need to have an expertise ordered. Case Law* in "Revista română de dreptul proprietății intelectuale", no. 1/2006, pp. 49-51; Ciprian Raul Romitan, Elena Tanislav, *Counterfeiting industrial models and designs*, in "Revista română de proprietate industrială", no. 2/2003, pp. 68-71; Gheorghe Bucsa, Liliana Badea, *Case studies on attempted counterfeiting of industrial designs and models*, in "Revista română de proprietate industrială", no. 2/2004, pp. 35-37; Mirela Radu, *Counterfeiting industrial property, theoretical aspects*, in "Revista română de proprietate industrială", no. 5-6 / June, 2001, pp. 82-87.

<sup>28</sup> Published in the Official Gazette no. 24 of January 30, 1991 with subsequent amendments and supplements. See Mioara-Ketty Guiu, *Unfair competition offense*, in "Revista de drept penal", no. 3/2003, pp. 43-47; Catalin Paraschiv, *Unfair competition offense*, in "Dreptul" no. 3/1997, pp. 63-65.

<sup>29</sup> Gabriel Olteanu, *works cited*, p. 217.

<sup>30</sup> For further study, see Alina Iuliana Tuca, *The competent court to order measures of preserving evidence, interim and assurance measures in the field of industrial property rights*, in "Revista română de dreptul proprietății intelectuale", no. 1/2008, pp. 44-62.

<sup>31</sup> Ioan Macovei, *works cited*, p.264.

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