

Reconsideration on the Special Legislation of Appearance Design in China after the Hague Agreement Came into Force

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Abstract: With the continuous improvement of people's living material level, people will more and more focus on the aesthetic value of products when they choose to consume. Correspondingly, the important position of appearance design in the industrial area is increasingly prominent, and the appearance design of products has become a core competitiveness of many enterprises. However, this intellectual achievement with the shortest history of legal protection on the scope of intellectual property is also called "the oldest puzzle in the legal issues of intellectual property", and its whole protection situation is not optimistic currently. At the time of China's accession to the Hague Agreement and in combination with the related guidance of the outline of building a strong country in intellectual property (2021-2035), the issue of special legislation for appearance design has been focused on again. This article summarizes the influence of the new era and new background on the appearance design and relevant laws, analyzes the reasons, summarizes and compares the major legislative selection in the world, and on the basis of the national conditions of our country, expounds the reasons for the formation of the patent system protection and its impropriety, demonstrates the necessity and feasibility of the special law for appearance design, and proposes corresponding legal suggestions, hoping to be beneficial to the legal protection of appearance design.

Keywords: Hague Agreement; Appearance Design; Patent Law; Intellectual Property

1. Introduction

Since the implementation of the Patent Law in 1985, China's investment on the scope of scientific and technological innovation has been continuously enhanced, and the public's

patent awareness has been further improved. In the process of the nearly forty years of the implementation of the Patent Law, the popularization of marketization and the enhancing of the sense of competition have made the same kind of products require to be differentiated. Under such circumstances that no significant breakthrough can be made in technology in a short time, several small and medium-sized enterprises start to turn their eyes to the product appearance, hoping to attract consumers by adding some alterations, thus winning a place, and the importance of appearance design becomes increasingly prominent. Correspondingly, with the quick increase of the amount of patent application for appearance design and the frequent occurrence of infringement cases, the problems related to the legal protection of appearance design appear one after another, and the disadvantages exposed by the current protection mechanism are more and more: the patent quality is generally low, the imitation and plagiarism phenomenon is severe, the application process requires long time, the efficiency is low, the right boundary is unclear, and the rights are difficult to safeguard, and so on. On the whole, the origin of these problems caused is the selection of object definition and protection ideas for appearance design, which is the important thesis that requires to be reassembled. On February 5, 2022, China became the 77th member of the "Hague Alliance", which is a large step towards the world in the field of appearance design protection in China, but it also brings impact to the original protection system of China. Under such circumstances, it is not only to respond to the appeal of the policy, but also to meet the requirements of the development trend of the times^[1].

2. Current Situation and Problems for Appearance Design Protection in China

2.1 The Influence of the Hague Agreement

In accordance with the Hague system, applicants only need to hand over one application in one language and one currency, which not only enables enterprises to reduce the cost of product appearance registration, but also saves time and enhances registration efficiency.

On the one hand, the application of The Hague system provides convenience for the design and creative ideas of China to go to the world arena better, improves the international registration efficiency of appearance design, and expands the international competitiveness of Chinese enterprises. On the other hand, it also brings a certain challenge to the original appearance design protection system of China. There are numerous differences between the stipulations of the Patent Law for appearance design in China and the stipulations of the Hague Agreement. In order to avoid confusion and division in practice, related laws and administrative regulations are revised accordingly in accordance with the national conditions. It is necessary to bring domestic law to the fullest possible closeness and harmonization with the international treaties to which it is a party.

2.2 Current Situation in the Judicial Process

The appearance design has been listed as the object of Patent Law protection since 1984, but until 2009, the related articles in the legal

stipulations are few, and the supporting judicial interpretations are mostly implemented with the invention patent as the core issue. The appearance design has been in a relatively weak sector in the legislative field, even in the revised and successively issued Guidelines for Patent Examination, Some Guiding Opinions on the Trial of Appearance Design Patent Cases, Opinions on Certain Issues Concerning the Determination of Patent Infringement, Interpretation on Several Issues Concerning the Application of Law in the Trial of Patent Dispute Cases, After the supplement of a series of articles such as Guidelines for Determination of Patent Infringement, there is still considerable space for improvement, Even the administrative and legal system of appearance design has been gradually complicated and disorganized. The above stipulations are still the main basis for the trial of appearance design cases in China currently^[2].

2.2.1 Evidentiary issue

As indicated in Table 1, in accordance with the 2022 China Patent Investigation Report issued by the State Intellectual Property Office

In the investigation on the difficulty of proof presented by the patentee, the proportion of "difficult" or "extremely difficult" is approximately 50%, and the proportion of "easy" or "extremely easy" is less than 20%.

Table 1. Investigation on the Difficulty of Proof after the Patentee Encounters Infringement

	Very difficult	Difficult	Can't tell	Easy	Extremely easy	Total
Proof of infringement by the other party	13.7	36.9	31.9	16.3	1.2	100.0
The infringement party of proof is intentional tort	20.2	36.3	35.5	7.3	0.7	100.0
Determine the actual loss suffered by the infringement	15.6	36.0	38.5	9.3	0.6	100.0
Determine the interests of the infringement party as a result of the infringement	19.6	36.5	36.9	6.3	0.6	100.0
Determine whether the infringement is severe	11.6	36.3	42.0	9.1	0.9	100.0

Taking the case of M&G conducting proceeding on Deli as an example, the actual profit amount could not be clearly and fully determined by the related profit and sales amount data provided by the Plaintiff M&G company to prove the infringement profit amount of the Defendant Deli company. The court did not support its claim and finally

applied the statutory compensation. In practice, a lot of similar cases could not prove the infringement profit amount of the Defendant for the sake of the insufficient evidence of the Plaintiff, so that the statutory compensation was applied, which often failed to perfectly execute the leveling principle, leading to the

plaintiff's over-compensation or under-compensation^[3].

2.2.2 Contradiction between administration and judicature

Since the patent system was put into practice in 1985, China has been adopting the pattern of "two methods, coordinating operation" of judicial and administrative organization to protect patent right, which is intended to provide full protection for the right holder. However, for the sake of the different perspectives, the same set of rules is formulated by the legislative and administrative departments, and the inconsistency is unavoidable. Not only are the judgment standards different, all parties are pursuing the maximization of interests, which not only increases the unclearness of the appearance design comparison, but also reduces the stability of the power state^[4]. Similarly, a long-term stable and predictable design protection system is essential for designers' confidence in patent protection, and can promote innovation and patent application motivation. The Patent Examination Department hopes that its review opinions will have a huge impact on the adjudication process of the court. From the perspective of improving the efficiency of case trial, such articles have certain positive significance, but may have adverse effects on the independence of judicial trial and the authority of judicial criteria.

2.3 The Problems at Present

With the quick increase of the amount of patent application for appearance design and the frequent occurrence of infringement cases, the problems related to the legal protection of appearance design emerge one after another. With the assistance of the Hague Agreement, the circulation of appearance design at home and abroad will be largely enhanced, and various disputes will emerge more frequently. It is necessary to solve them by means of conducting litigation procedures, particularly on the scope of foreign-related intellectual property rights, which may be unprecedented new challenges. To solve these problems smoothly, the government is required to provide necessary support and corresponding intellectual property assistance^[5].

On the whole, there are several problems in the protection of appearance design in the Patent

Law at present, and it is unavoidable and necessary to change the legal protection pattern of appearance design at present.

3. Comparison and Enlightenment of Appearance Design Protection and Legislation Pattern

The three patterns of appearance design protection in the world at present are as follows: Firstly, the pattern of patent system protection, which is implemented in China currently. Secondly, the appearance design of single independent pattern, which is also the main trend of appearance design protection. Thirdly, in the dual protection pattern of patent and copyright, the oblige can freely choose to seek relief by means of using copyright law or Patent Law.

3.1 Protection Pattern of Patent System

Currently, there are not many countries in the world that adopt patent pattern to protect appearance design. Outside China, the United States is also a typical country to provide protection by incorporating appearance designs into the patent system. However, for the sake of the higher requirements of Patent Law for the protection of appearance designs, only appearance designs that meet the requirements of novelty, decoration and product pertinence are eligible for patent protection. Therefore, American copyright law and trademark law also provide auxiliary protection for appearance design^[6]. However, this protection pattern has some problems in practical application. There is priority in the application of different laws, which increases the complexity of the protection pattern. Other laws may be chosen only if there is no applicable law. Not only does the protection provided in this pattern overlap, but the vulnerability is still inevitable.

In recent years, after the textile industry, the United States has made breakthroughs in the single law of appearance design in the shipping and fashion industries. In addition, the automobile manufacturing industry, semiconductor industry and other aspects are actively exploring the legal protection system suitable for their own characteristics. It can be predicted that it is an unavoidable trend for the United States to issue for enforcement of the special law for appearance design^[7].

3.2 Single Independent Method Pattern of Appearance Design

EU countries, Japan ^[8], South Korea and other contracting powers to the Hague Agreement are all countries adopting the independent law pattern of appearance design. From start to finish, the European Union has special legislation and independent protection for appearance design, and the protection system provided by the European Union has the characteristics of flexibility, which is embodied in three aspects: firstly, the scope of the object is relatively wide; secondly, the classification of types is flexible; thirdly, the authorization conditions are relatively broad.

3.3 Dual Protection Pattern of Unilateral Law and Copyright Law

The UK, France and other countries combine separate law with copyright law to provide double protection for appearance design. In the UK, industrial appearance designs are protected by the Copyright Act, the Appearance Designs Registration Act and the Appearance Designs Copyright Act.

However, the two countries do not seem to conduct incomplete identification on the dual protection mechanism. In the UK, the cross-use of appearance design rights and copyright was avoided as far as possible, and France tried to divide the two laws from the perspective of the object of protection. Finally, the French judge concluded that there was no clearly defined line between appearance design rights and copyright, which made it difficult to distinguish between them, which resulted in the legal protection system at present.

3.4 Reference Significance for China

Appearance design integrates practicality, artistry and certain technicality. Although its technical characteristics are less than functional patents and artistic creation value is not as good as pure art works, they can be protected by copyright law, trademark law, anti-unfair competition law and other laws as long as they meet the requirements of laws, which cannot be completely covered by any other laws. The protection of copyright law is low, the threshold of Patent Law is high, the double protection is too burdensome, and the special law can give consideration to the essential characteristics of appearance design, and has more accurate pertinence and better

protection effect. If a special approach is adopted to protect the appearance design, the protection threshold can be effectively lowered, and the situation that the protection is difficult to obtain can be avoided ^[9]. Therefore, from the perspective of rationality and legitimacy, the special law has more scientific advantages than the other two patterns. In our country, the current protection pattern is not perfect, and it is difficult for the right holder to obtain prompt relief, which has also reduce the initiative of designers to a certain extent, and has a negative impact on the development of appearance design industry. Therefore, in accordance with the actual situation of our country, it is of great significance to formulate a reasonable and effective special law to protect the appearance design in order to improve the current situation.

On the whole, it is the main trend of legislation in the world to protect the appearance design by independent law, and it is also a choice more complying with China's national conditions. The exploration and formulation of special laws and regulations for appearance design, as illustrated in the Outline, is also a decision made by totally considering various factors.

4. System Design of the Special Law on Appearance Design

4.1 Structural Example

Considering the complexity of patent examination and the immediate value of appearance design, and in order to be closer to the Hague system, it is appropriate to adopt the registration system after the appearance design is independent from the Patent Law. With reference to China's intellectual property separate laws at present, the future appearance design law can be composed of the following chapters:

Chapter One: General Principles.

Chapter Two: Application for Appearance Design Registration.

Chapter Three: Examination and approval of appearance design registration.

Chapter Four: Alteration, Assignment and Use License of Registered Appearance Designs.

Chapter Five: invalidation of registered appearance designs.

Chapter Six: Appearance design use management.

Chapter Seven: Protection of exclusive right of registered appearance design.

Chapter Eight: Supplementary Articles.

Each chapter is connected with each other, and in accordance with the life cycle of "generation-sustaining-extermination", it makes a complete and detailed stipulation, which constitutes the legal system of tight structure, internal coordination and comprehensive protection of the legal interests of appearance design.

4.2 Alteration of Core System

4.2.1 Object of protection

The concept of appearance design has been revised many times in the legal articles, and some protection elements have been added in the latest Patent Law, which has become mature. However, some scholars hold the opinions that the boundary between appearance design and practical artworks protected by copyright law is unclear^[10], and this problem can be solved by means of the definition of concept. In addition, special objects such as graphical user interface (GUI) and garment appearance design, which have been much focused on in recent years, should also be protected by legislation^[11].

The appearance design protection should adopt the registration system, but it does not mean to provide protection only for the registered appearance design, and appropriate relief should be given to the unregistered appearance design, which may refer to the requirement of the Trademark Law on unregistered trademarks.

4.2.2 Protection term

The period of validity of international registration of appearance designs stipulated in The Hague Agreement shall be "original term+renewal term", which shall be allowed to be renewed at least twice, each for 5 years, so that the protection period shall be at least 15 years. The protection period of appearance design patent originally stipulated in China's Patent Law is 10 years, but it was extended to 15 years in the latest revision to make it reach the standard of The Hague System. However, in combination with Article 44, Item 1 of the Patent Law, it is deemed that the patent right shall be terminated in advance if no annual patent cost is paid, which still guarantees the appearance design patentee's right to maintain the appearance design patent right.

There is an opinion that our legislation should also be consistent with the Hague Agreement^[12], but the author considers that such a design is even more ingenious, not only reducing the labor cost and time cost of renewal, but also compared with the "10 years+5 years+5 years" three pieces of segmentation, the oblige can choose to terminate the rights without paying the annual cost every year. The latter is obviously more flexible, and this kind of design can be adopted.

4.2.3 Protection of similar appearance designs

In view of the appearance design patent system of major patent regions and countries in the world, the protection mechanism of similar appearance design is the strictest in China. On the one hand, similar appearance designs must be handed over on the same day; on the other hand, one appearance design cannot include over 10 similar appearance designs, which is too strict, and there are certain restrictions on the protection of similar appearance designs, which is inconsistent with the legislative purpose of the Patent Law of China to encourage innovation. After a patent application for an appearance design is filed or granted, others may create a series of similar appearance designs on the basis of the appearance design. In practice, if the application time and quantity of similar appearance designs are strictly limited, the patent appearance designs are easy to be copied and misappropriated by others, thus damaging the legitimate rights and interests of the patentee.

The author hold the opinion that it is necessary to relax the restrictions on the registration of similar appearance designs, so as to prevent the infringement and imitation of the appearance design patent right from the system, and to encourage and protect the design innovation of patent applicants more effectively and fully. The system of Europe, America or Japan and South Korea can provide reference for improving the road and direction.

4.2.4 Judgment rule of infringement

As mentioned above, the tort judgment standard in China at present adopts the confusion pattern, but the appearance design is a new design in essence and belongs to the creative intellectual achievement. The protection of appearance design is firstly to protect innovation, and the anti-unfair competition law protects the related legal

interests infringed by the confusion behavior. In combination with the overall judgment principle of similarity in judicial practice, local innovation cannot affect the overall appearance of the product, and the unique innovation of the sued design is easy to be ignored, so it is difficult to acquire protection under the pure "confusion criterion".

The author hold the opinion that we can adopt the combination of "innovation criterion" and "confusion criterion", i. e. the following judgment steps are formed: Firstly, confirm whether the two designs can confuse the general public in terms of overall visual effect. If so, judge whether the cause of confusion is centered on innovation; if not, the possibility of infringement cannot be ruled out completely. The second step is to clarify the design innovation points of the patented product in combination with the claims and other evidences. The third step is to judge whether the alleged infringing products contain the design innovation points of the right products, and determine whether the infringement facts are true or not in accordance with the influence and proportion of the innovation points.

5. Conclusion

For the sake of the long-term disregard for private rights by the imperial political system, the protection of intellectual property rights in China started late. Looking at the development process of the legal protection system of appearance design in China, it is not easy to set up a complete mechanism within just 30 years compared with the developed countries. However, under the quick development speed and special protection mechanism, some problems are gradually exposed. With the great abundance of material wealth in the industrial revolution period, people's demand for products or commodities is no longer limited to practical functions, but more and more attention is paid to their aesthetic functions. The more developed countries understand the protection and use of knowledge products, the appearance design requires a set of custom protection rules. Rather than continuing to reside in Patent Law.

The new era and new background are providing an opportunity for the reform of the appearance design protection system in our country. I hold the opinion that one day will see the appearance design law of the People's

Republic of China. In addition, in order to increase the international competitive advantage, China shall continue to actively take part in other international the new era and new background are providing an opportunity for the reform of the appearance design protection system in our country. I hold the opinion that one day will see the appearance design law of the People's Republic of China. In addition, in order to increase the international competitive advantage, China shall continue to actively take part in other international design law treaties in the future, so that China's appearance design protection rules always maintain advanced. Law treaties in the future, so that China's appearance design protection rules always maintain advanced.

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