

COPYRIGHT AND DESIGNS - A RENEWED RELATIONSHIP

GLOBAL DIGITAL ENCOUNTER 28,
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PANELISTS:

- **Prof. Enrico BONADIO**, Reader at City University of London
- **Prof. David NIMMER**, Professor from Practice at UCLA School of Law and of Counsel at Irell & Manella LLP
- **Dr. Ingrid SCHMIDT**, Lawyer and Journalist with specialization in Trademarks and Industrial Designs at CEIPI
- **Sergio RIZZO**, Member of the Boards of Appeal and accredited mediator at the EUIPO.

OBJECTIVES

In the Transatlantic Area, the relationship between Copyright and Design is evolving further to Court Decisions and forthcoming Legislative changes. This relationship, which may include elements of cumulative protection, has never been linear and straightforward. Digitalization of society is further spurring new evolutions. What kind of consensus may exist in various parts of the world and in international fora for such changes? For this Session of our Global Digital Encounters, Speakers from Europe, and the Americas with a variety of opinions will provide a worldwide picture of the future of IP protection connected to Copyright and Design, and re-imagining IP in this area in favor of both business and consumers/ society.

REPORT

INTRODUCTION

The 28th Global Digital Encounter organized by FIDE/TIPSA focused on the relationship between copyright and industrial designs, a topic of renewed interest considering recent court decisions within the transatlantic area and relevant legislative evolution in this regard. As stated by **Professor Laurent MANDERIEUX**, the interaction between these two mechanisms has never been easy, and it is far from being linear and simple. For example, issues such as the possibility for cumulative protection are still being discussed, especially in the view of existing different jurisprudential and legislative perspectives across the world and the possibility for further change in this matter pushed by national legislation or by international fora.

For this very session, the Encounter gathered speakers from the United States ("US"), Brazil, the United Kingdom ("UK") and even the EUIPO. Its main goal was not to exhaust a very complex topic, but to think together on the crossroads between designs and copyrights and to discuss which may be the path forward.

Moderator Sergio RIZZO kicked off the Encounter by welcoming the attendees to what is defined as a very complex but fascinating discussion on the relationship between copyright and design law. It was



then highlighted that what made this Encounter particularly interesting were the different perspectives present at the table, referring to panelists coming from distinct backgrounds and several geographic areas.

Mr. RIZZO then made a little recap on the topic, stating that in the European Union ("EU"), the relationship between design and copyright law has always been a hot topic. Today such discussion is more relevant than ever, as a consequence of the ongoing reform of the EU legislation on design protection, the so-called Design Package. It was also emphasized that in the last ten years the European Court of Justice (ECJ), in some landmark cases (e.g., 12 September 2019 [C-683/17], "[Cofemel](#)" and 11 June 2020 [C-833/18], "[Brompton](#)"), confirmed the possibility of dual protection for designs of applied art, both under copyright and design law.

Thus, at least within the EU framework, designs of functional objects such as lamps can nowadays be protected by both regimes. This gives rise to some legal uncertainty, due to the different protection periods and to the fact that the expiration of design rights on an object will not automatically guarantee that that design can be used, since copyright may exist on top of that object. In other jurisdictions, the situation is radically different. For example, Australian law has recently and comprehensively regulated and codified the conflict between copyright and design law, setting out provisions that, for instance, exclude the copyright infringement where there is a corresponding design registered.

He then addressed the three main interrelated questions to be discussed by the speakers, mainly, the adjustment of the principle of accumulation (1), the

consequences of landmark judgments such as Cofemel and Brompton (2) and the intricate relationship between the originality requirement and copyright protection for designs of applied arts (3).

QUESTION 1: THE ADJUSTMENT OF THE PRINCIPLE OF CUMULATION

Prof. Enrico BONADIO started by pointing out that the desire to adjust the principle of cumulation is explicitly mentioned in the [2022 Proposal for a Design Regulation](#). In particular, Recital 33 clearly says that "it is appropriate to adjust the principle of cumulation of protection under [Regulation \(EC\) No 6/2002](#) and under copyright law by allowing designs protected by EU design rights to be protected as copyright works, provided that the requirements of Union copyright law are met". This seemed to be inevitable after the Cofemel 2019 decision, which concluded that the subject matter protected under design law can at the same time be protected as a copyrightable work, as long as it satisfies the intellectual creation test (i.e., it is the author's own intellectual creation), the so-called originality requirement.

Before the Cofemel decision, it was not clear if the Member States of the EU could independently establish the preconditions of cumulative copyright protection for designs. Art. 17 of [Directive 98/71/EC](#) on the legal protection of designs stated that "a design protected by a design right registered in or in respect of a Member



State in accordance with this Directive shall also be eligible for protection under the law of copyright of that State (...) and the conditions under which, such a protection is conferred, including the level of originality required, shall be determined by each Member State". The Council Regulation (EC) No 6/2002 on Community designs contained an analogous provision in art. 96.

Now, with this new proposal set forth in November 2022, there is a proposed adjustment. A closer look at art. 96, paragraph 2, of the Proposal for a Design Regulation, reveals how according to its text, "a design protected as an EU design shall also be eligible for protection by copyright (...) provided that the requirements of Union copyright law are met".

Therefore, the competence of national MS disappears. It seems that if a work of applied art satisfies the intellectual creation test, it may also be protected under copyright as well. This is the adjustment enshrined in the proposed Package, which may be interpreted as an ex post approval of Cofemel, on the basis of which the European legislator -positive law- ratifies what the ECJ said.

Probably, there is an unintended consequence of this adjustment, related to exceptions to design law. Especially, the spare parts or "must-match" exceptions under EU design law. This exception was already included in the previous Regulation from 2002 (art. 20.2.b), and the new Design Package repropose such repair clause (art. 20.1.g), with the aim of

revamping the spare parts market, especially for the car sector, considering the existing competition between original car manufacturers and independent spare manufacturers. But this exception contained in the package, nevertheless, may be watered down through copyright law: if it is claimed that spare parts may be eligible for copyright, this expansion of copyright might undermine the broader spare parts exception. Time will tell how such interplay plays out, but it will eventually depend on the particular circumstances of the case and on whether the spare parts are actually eligible for copyright protection considering there is no artistic element required.

Moderator Mr. RIZZO then gave the floor to **Professor David NIMMER**, in charge of introducing the perspective from the United States, who began by outlining the different schemes contained within US law.

Professor NIMMER contextualized this discussion by pointing out that copyright protection under federal law goes back to 1791, while design patents date from 1842. For almost all of that period, there was a requirement to elect one or the other, but not both. During that time, formalities were required: in order to obtain copyright, one had to go to the Copyright Office; in order to obtain a design patent, one had to go to the Patent Office. In principle, a given design could have been protected under one or the other, but the proprietor had to make a choice. If the proprietor started down the path of design patent protection, that precluded copyright protection and vice versa.

His position, elaborated in the Nimmer on Copyright' treatise (developed by **Prof. D. NIMMER's** father sixty years ago and carried on by him), has always been against the election doctrine when defending that, in principle, if a work is eligible for both those schemes, there is no reason why they could not accumulate. This, nevertheless, was a minority position. But eventually the US Patent Office came around and agreed to this same point of view. Likewise, in 1995, the US Copyright Office developed a study on the matter in which it quoted Nimmer on Copyright to support the argument that there should not be an election doctrine and concluded, "We agree." As a consequence, from 1995 on, such doctrine no longer applies in terms of the agencies.

The courts tend to take the same position, i.e., ruling that there can be cumulative protection. Therefore, there are different standards for copyright and design patents, distinct terms of protection, results and mechanisms, etc., but as of now in the US it is possible to obtain protection through both of these regimes. And for that matter, also trade dress protection, which is a yet different form of protection.

Dr. Ingrid SCHMIDT approached the topic then from the Brazilian perspective and as a way of introduction, highlighted the fact that Brazilian previous industrial property law before TRIPS allowed for designs to be protected through patents, like in the US nowadays. Designs started to be safeguarded from 1934 on through such a mechanism, but after TRIPS (1996), a specific registry was created for the protection of industrial designs.^[2]

Regarding copyright law, the previous law from 1973 explicitly referred to the protection of applied art. But ever since TRIPS, Brazilians do not have this reference or expression in the law anymore. Nevertheless, copyright law includes a non-exhaustive list of works that can qualify for protection, which is open to different interpretations. As a result, Brazilian courts formulate lots of contradictory decisions, addressing the same debate as per whether or not it is possible to accumulate both forms of protection due to the open nature of such a list.

According to **Dr. SCHMIDT**, during the drafting of the current copyright law, legislators argued that they did not want to protect applied art, because designs were already protected through a specific registry and they should not be protected through a patent anymore.

Mr. RIZZO concluded by emphasizing that the diverse viewpoints presented highlight the various ways in which copyright and design protection can interact, noting that the EU's approach is not the sole approach and that there are alternative perspectives to consider. Finding a suitable equilibrium between these different legal frameworks remains challenging, but external perspectives could potentially contribute positively to shaping the European viewpoint on how to strike a proper balance.

QUESTION 2: CONSEQUENCES OF THE LANDMARK CASES COFEMEL AND BROMPTON, MOST SPECIFICALLY ON COPYRIGHT



PROTECTION FOR WORKS OF APPLIED ART.

The debate then shifted into the relevance of Cofemel and Brompton cases and on how they have contributed to change the relationship between these two legal figures. In this regard, **Prof. BONADIO** indicated that as the UK is not part of the EU anymore, their law is not binding in this country. That is the reason Cofemel is not followed in their territory. Nonetheless, there is a particular category of copyrightable works within the closed list system in the UK, referring to works of artistic craftsmanship, which may overlap with design protection available in other jurisdictions, as set in Cofemel.

As an exception to the general rule of copyright law, artistic craftsmanship is protected by copyright when they fulfill the artistic merit test -as it was seen in Portuguese law before Cofemel-. On the other hand, this interpretation on which artistic merit was no longer needed was firstly introduced in the US by the famous *Bleistein v Donaldson* case (188 U.S. 239 (1903)) ("[Bleistein v Donaldson Case](#)") in which it was stated that "it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of artistic merits".

Prof. E. BONADIO added that this general principle is valid also outside the US, but with some exceptions, one of which is exactly represented by the works

of artistic craftsmanship. But such a rule is evidentially in contradiction with what the ECJ said in Cofemel, as no artistic merit is taken into account, and only the originality requirement test, as being the author's intellectual creation, must be met.

Moreover, the High Court of Justice has rendered a decision in the UK on 29 January 2020 -right after Cofemel ([Response Clothing Limited v The Edinburgh Woollen Mill Limited](#) [2020] WLR(D) 88, [2020] EWHC 148 (IPEC) ("Response Clothing Ltd. Case")), where the Court avoided the question on whether Cofemel applies in the UK or not. Therefore, it is yet to be seen whether it is convenient for the UK to diverge from the intellectual creation test, having in mind the single market and that designs made by UK designers may then be sold in the EU and vice versa. Consequently, nothing is clear in the UK yet.

Prof. NIMMER pointed out that the [quote](#) to Justice Holmes' *Bleistein* decision is relevant and as it was correctly indicated by **Prof. BONADIO**: "it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations". But then, Justice Holmes also laid down that it must be "outside of the narrowest and most obvious limits".

In the US, there is a principle according to which all works may be eligible for copyright insofar as they have a minimum

creative spark, thus a very minimal threshold. However, there is a limitation called “useful articles,” which has been a source of tremendous interpretative conflict. To put it into context, the US Supreme Court must solve conflicts between regional circuits, and it typically takes between three and five years for the issue to be solved.

However, in this case of useful articles, there were two different points of view expressed in 1978 and 1980 judgments and it then took the Supreme Court three decades to resolve the conflict. In *Varsity Brands, Inc. v. Star Athletica* (03/22/2017), the Sixth Circuit observed that there are nine different tests to grant legal protection for useful articles. The US [Supreme Court](#) used that case to articulate new standards.

Prof. D. NIMMER also pointed out that *Star Athletica* is a usual case within US case-law, as it is very often that judges disagree among themselves (e.g., the international exhaustion doctrine). By contrast, in *Star Athletica*, even after the majority adopted its standard, the dissent concluded that it would reach the opposite result even applying the majority’s standard! So, even after this US Supreme Court decision, the test is still cloudy.

Dr. SCHMIDT said that *Cofemel* was criticized by the European doctrine because the court did not detail the patterns of originality: what is original or not or what can be protected or not. But adds that even though the ECJ missed

the opportunity to develop more on these standards, some jurisdictions such as France adopted the application of the total cumulative principle, being now their courts stricter in their judgments because the burden of proof is now for the author to demonstrate what is its originality. Consequently, everything can be protected.

For **Dr. SCHMIDT** the cumulative principle was not applied correctly in the past years. Now it is the duty for the courts to develop these standards as people need legal certainty in their decisions, for it is still controversial not only in national legislations but also in the EU.

Mr. RIZZO agreed that this is a complicated point and once the EU establishes that there can be accumulation between copyright and design law (through the new Regulation), Member States cannot establish further requirements for the protection as copyright or design of applied arts. Nonetheless, he pointed out that the problem is how it can be assessed whether the examiner is dealing with the spark of creativity mentioned by **Prof. D. NIMMER**.

QUESTION 3: THE INTRICATE RELATIONSHIP BETWEEN THE ORIGINALITY REQUIREMENT AND

COPYRIGHT PROTECTION FOR DESIGNS OF APPLIED ARTS.

With all the above in mind, **Mr. RIZZO** asked the speakers if there are any certainties in their different backgrounds about the factors to be considered when evaluating originality or creativity.

Prof. SCHMIDT pointed out that under Brazilian law the definition of originality regarding designs is based on the idea that something original is what differs from the previous objects existing in the market and confirms that protection of industrial designs is obtained by fulfilling the novelty and originality requirements. She then continued by emphasizing that it is easy to evaluate novelty as it is an objective concept, but for originality, the object must be compared to previous objects and consequently apply a subjective approach. The creator must give a contribution to the design, and this must express the "personality of the author". For what it seems, copyright and design law have the same approach for this issue.

Mr. RIZZO confirmed that the situation is more or less the same within the EU and **Prof. BONADIO** illustrated that in general, the originality requirement is interpreted differently in different jurisdictions: (i) in the EU, the intellectual creation test; (ii) in the US, the modicum level of creativity; (iii) in the UK, traditionally, the skill and labor doctrine.

With Cofemel, the originality test is not dependent on subjective values such as good or bad, valuable or aesthetical, and

thus it has become neutral. On the other hand, in the UK the skill and labor doctrine may confirm the fact that this is not a very highly meritorious artistic element test. The opinion of **Prof. BONADIO** was that conflicting decisions shall be avoided and then there should not be any shadow of subjective elements in the examination of protection.

Mr. RIZZO pointed out that when reading Brompton, the originality test for copyright is similar to the one applied in designs: when deciding if a design deserves protection, the essential characteristics of the good / applied art must be identified, and if all the essential characteristics are not dictated by functionality, then there is room for protection. This room could be creativity but then the question whether this creativity -expression of the author- could be protected by copyright arises. Because if all the characteristics are not purely functional, then aesthetic considerations will also play a role there. If then the design can be protected, it must be considered whether copyright can come into play too.❓

Prof. BONADIO expressed that through Brompton, the threshold has been lowered down to the point there might be an overlap. Whether this is desirable is another debate because that may increase litigation. Because of the non-obligation of registration for copyright in the EU there are an exponential number of copyrightable works entering the arena and possibly being litigated.❓

Prof. NIMMER added certain interesting cases under litigation in the US. Contextually, the current US Copyright Act dates to 1976, so the Star Athletica case was interpreting the statutory language from 1976. Before this case, protection was extended to everything from Christmas decorations to artistic jewelry boxes to cemetery monuments.☒

Star Athletica then ruled that the designs of a cheerleader costume (e.g., zig zags, stripes, chevrons, and color blocks) do not necessarily fall outside copyright by virtue of the useful article doctrine. But the further question remains whether those elements of the cheerleader costume were creative or not; unfortunately, that issue remained unresolved by the opinion.☒

After the Supreme Court handed down Star Athletica, the courts have found protectable under copyright a full body banana costume and the design of The Manekin, a skeleton which could be used by people to learn anatomy. On the other side of the ledger, post-Star Athletica rulings have denied protection to: (i) a very large sculpture of a pencil that could hold chalk, which was held to be outside protection because the sculpture just looked like a regular pencil; (ii) a so-called life organizer, with flaps and covers, that looked like a book; (iii) the control panel of a dryer. These elements were held unprotectable. Still, when adding any artistic flourish to a two-dimensional painting or a three-dimensional sculpture, they may actually find protection under US law.

From a practical approach perspective, **Dr. SCHMIDT** clarified that designers

have two possibilities now: (i) Design registration; (ii) Unregistered copyright protection, which implies that their work will be protected for 70 years after their deaths.

However, in the long term, not only the author shall be taken into account in these scenarios and industrial designs duration must be sufficient to protect the aesthetic part of an artistic object. If industrial designs were created to protect applied art, creators shall also be encouraged to apply for this protection.

QUESTIONS FROM THE AUDIENCE



QUESTION 1: ACCORDING TO ART. 59 OF THE BOSNIA AND HERZEGOVINA LAW ON INDUSTRIAL DESIGNS, "A DESIGN PROTECTED BY A REGISTERED INDUSTRIAL DESIGN IN B&H, MAY, AFTER THE EXPIRATION OF THE INDUSTRIAL DESIGN, ENJOY PROTECTION ON THE BASIS OF THE REGULATIONS GOVERNING COPYRIGHT, PROVIDED THAT IT FULFILLS THE CONDITIONS LAID DOWN BY SUCH A LAW, BUT NOT FOR MORE THAN 25 YEARS AS OF THE DAY OF FILING THE APPLICATION FOR THE GRANT OF THE INDUSTRIAL DESIGN". WHAT IS THE OPINION OF THE DISCUSSANTS ON SUCH PROVISION?

Prof. BONADIO highlighted that this provision seems to replicate what the Berne Convention says, i.e., that works of applied art can be protected under copyright if they comply with the requirements in that particular country. Therefore, there might be a window open for cumulation of protection.

QUESTION 2: WHAT ARE THE LIMITS OF COPYRIGHT PROTECTION OF A 3D OBJECT IN THE US?

According to **Prof. NIMMER**, anything in 3D could potentially be conceived as a sculptural work. This form of protection, nevertheless, requires the existence of some distinctive features, it must be an original composition. For example, creating a two meter-long sculpture that has the exact shape of a regular pencil is not sufficient. Only a 3D object which is not simply composed of basic elements would be protected under copyright. To provide another instance, iPads present a mere rectangular shape that could not

be protected under copyright. But if their shape were to have some distinctive character or were made to be some irregular cut out, they may be protected under US law as a sculptural work.

Prof. BONADIO then provided the English perspective, highlighting that sculptures are 3D objects explicitly mentioned in UK copyright law and therefore eliminating any possible doubts in this regard but recognizes that potential issues may arise when the 3D object has predominantly functional elements: if there is just technical functionality and the person/artist criteria has been dictated by functional considerations, then there is no room for copyright protection. On the other hand, if the useful object does have elements which go beyond the basic functionality principle they can be protected under copyright. An American case from the 50s, *Mazer v. Stein*, 347 U.S. 201 (1954) "[Mazer vs Stein](#)" is specifically referred to. It concerned some table lamps shaped after artistic statuettes of dancers. Considering US copyright law requirements, a normal lamp without any kind of decoration probably would not be eligible for copyright protection, because it is just a functional object. But in this case, a lamp made as an artistic statuette has a design which is more than just functional, making it capable of falling under copyright law.

Prof. NIMMER stressed that any lamp is a 3D sculpture potentially eligible for protection unless it has no minimum decoration (e.g., a basic column with a bulb on top), since any distinctive shape can be protected by copyright if it is original. **Prof. BONADIO** agreed and highlighted how this could increase the potential for litigation, considering the amount of lamps that are produced and distributed. **Prof. NIMMER** tried to qualify this statement by pointing out that, for a copyright dispute to arise, there would have to be an actual copy of an original lamp. If a given individual developed its own model and did not copy from a plaintiff, there would be no liability, even if they happened to look identical.

As a conclusion, **Mr. RIZZO** pointed out that the protection of both 3D and 2D objects presents similar challenges apart from the issue of functionality. Assessing whether a given object has a creative component is independent from its potential three-dimensional nature. **Dr. SCHMIDT** then informed that the situation is quite similar in Brazil, where they might protect 3D objects under copyright insofar as the requirements of novelty and originality are met (and where a 3D object may even be protected as a trade mark).

QUESTION 3: MOST IP LAWS GIVE PROTECTION FOR 15 YEARS, WHEN

THE DRAWINGS ARE SUBMITTED. SO, IF YOU TAKE PHOTOGRAPHS OF THE DESIGN, WOULD THIS BRING IT UNDER COPYRIGHT PROTECTION? WHETHER THE DESIGN PROTECTION THEN FINISHES IN 15 YEARS, CAN THE PHOTOGRAPH WHICH HAS CODED THE DESIGN BE PROTECTED BY COPYRIGHT?

Prof. NIMMER highlighted that photographs are eligible for copyright protection under US law and last for a full term. For instance, architectural blueprints can be submitted for copyright protection and do not themselves constitute a useful article; instead, they consist of instructions on how to produce a a useful article (i.e., a building).

Prof. BONADIO established that this question is relevant for museums that take pictures of paintings or sculptures within the public domain. There is a big debate after the *Bridgeman Art Library v. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999) "[Bridgeman Case](#)", as on the one hand, when a work falls in the public domain, owners should not rely on another IP right to revive IP protection and thus this goes against the general principle of IP law. On the other hand, many examples of the contrary can be found. For instance, the photograph of the Mona Lisa. In this case, the Louvre treats such photographs as copyrightable work, and photographers

need to pay to get the license to use such pictures, considering that to get a good photograph, the Mona Lisa shall be transported to a studio, an insurance must be paid, etc.

Moreover, there is a provision in the [Directive \(EU\) 2019/790](#) of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC which says that such photograph of a public domain work is protectable if it is the result of an intellectual creation. This concrete aspect must be treated carefully if the resurrection of IP rights wants to be avoided.

Mr. RIZZO agreed and pointed out certain practices from companies that, once design and copyright protections expire, try to register a given work as a trademark, aiming for an infinite protection of such elements, a relevant issue which should not be overlooked.

QUESTION 4: GIVEN THE OPEN DEFINITION OF A COPYRIGHTABLE WORK AND THE ABSTRACT NATURE OF THE CONTENT OF RIGHTS COMPRISING COPYRIGHT, THE QUESTION IS: WHY WOULD ANYONE SEEK PROTECTION OF INDUSTRIAL DESIGNS LIMITING THE PROTECTION THEY HAVE UNDER COPYRIGHT? BECAUSE IF YOU CHOOSE DESIGN, YOU ARE POTENTIALLY LIMITING IN TIME THE RIGHT CONFERRED AND YOU ALSO FURTHER REVEAL TO THE PUBLIC THE CONCEPTION OF THE REGISTERED ELEMENT.

Following the topic of the previous question, **Prof. NIMMER** highlighted

that the US law traditionally protected the reproduction of a work of art (such as photography) as they imply lots of economical and human efforts, insurances, etc.

However, he referred again to the [Bridgeman Case](#) (1999), where a very eminent judge, Louis Kaplan, reached the opposite result when ruling that it is not an intellectual labor to transport the painting, to ensure it, etc. So, in limiting the options for protection, there could be a copyright in the reproduction if it was from an unusual angle, a lighting from down below, etc., but not otherwise.

Another question is the consequences of falling in the public domain. There was a case in which a copyright expired and yet, they tried to protect it by saying that anyone who uses it has to prove its origin, and if they neglected to say the original producer, that is called reverse passing law and that would have been similar to copyright protection. This reflects the opinion that once there is an expiration of copyright, trade mark law should not come in. On the other hand, after the expiration of a 3D trade mark, if the work was also protected by copyright, then there should be no issue.

As a response of the attendee's question, **Prof. BONADIO** said that even though the duration of copyright is

much longer, the scope of protection given by design rights is wider (at least registered designs in the EU), because you are able to prevent everybody from exploiting the design even if such design has been created independently, while in copyright an independent creation is not attackable by the copyright owner.

Moreover, industries such as fashion do not really require a long copyright protection as new collections arise quickly and a fifteen-years of strong protection against independent creation is rather convenient.

Prof. NIMMER added that certain of his UCLA colleagues went further in an article called "The piracy paradox" which says, for an Yves Saint Laurent dress, that not having protection at all might even be preferable as all customers want to have the newest items from the collection, so sometimes it is better to have effectively only six months of protection and then move forward.

Mr. RIZZO enumerated the advantages of design protection by saying that creators are paying for an easy enforcement of their right as they receive a certificate of registration with a presumption of validity, with no proof of authorship for its enforcement. So, it is the counterparty who has the burden to invalidate the design. This is very practical for electronic commerce platforms, as it is very easy to enforce a design protection.❏

CONCLUSION

Prof. Manuel DESANTES concluded that the debate could have been enlarged for hours, and that some very important topics were addressed in this 28th Global Digital Encounter regarding the constant interaction between designs and copyright.

Among many other issues, the panelists discussed at length on: (i) the judgements on the principle of accumulation after Cofemel; (ii) the crisis of the competence of the MS for dealing with this matter; (iii) the new ex post approval of Cofemel; (iv) the unintended consequences of these judgements for instance when dealing with the spare parts market, and other possible conflicts and implications in relation to copyright law; (v) the evolution of the election theory and the compatibility theory in the US and in Brazil; (vi) the relevance of TRIPS in all this discussion; (vii) the trade dress protection and how to make compatible the trade dress protection and copyright in the US; (viii) the effects of Cofemel and Brompton at the national level; (ix) the effects on works of artistic craftsmanship; (x) the application of the intellectual creation test and the 9-test proposed by the US Supreme Court; (xi) the different approaches to the originality test; (xii) how this test has been deprived of subjective perceptions after Cofemel, and (xiii) the room for something else that brings creativity upfront in this discussion and many more.



According to **Prof. DESANTES**, the panelists brought the audience to the real world of what happens day by day in these topics, a debate in constant evolution and in which nothing is written on stone.

Alejandro GARCÍA MARTÍNEZ and Raúl RUIZ RODRIGUEZ

[Fide](#) and TIPSA (Transatlantic Intellectual Property Academy) join forces to organize a series of digital encounters to try and find out if Intellectual Property is equipped to face the ongoing changes that our world is experiencing.

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