外观设计的多重保护不是重复保护

Multiple protection is not redundant

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一项好的外观设计往往集技术性、艺术性、识别性于一体，内含不同知识产权保护的元素，可以受到我国专利法、商标法、著作权法和反不正当竞争法等多部法律的保护，持有两项或多项权利。

各部法律的立法旨意不同

诚然，各种权利都有其优点和不足，所以，权利人希望通过多种权利保护其合法权利，这样就会在同一外观设计上出现多重权利保护的现象。多重保护不是重复保护，而是对同一保护主体所承载的多重利益的综合。

首先，允许多重保护并不会非法挤占已进入公共领域的资源，造成社会经济关系的混乱。一方面，商标法和著作权法、专利法的制度是不同的。专利法的立法旨意在于，以向社会的公开来换取限定期限和限定地域内的独占权；著作权法立法意旨在于保护一定期限内的原创性；两者都强调一定期限内的特定保护，期限届满后保护对象则直接进入公共领域，禁止再从公共领域中获取资源。而商标法并不反对在公共领域中汲取资源，实际上大量的商标直接来源于人类共有的词汇和设计，如“苹果”牌电子产品、“彼得兔”系列图书。商标法保护的并不是公共领域中的词汇或者设计，而是其识别性或者显著性，社会公众完全可以在原有意义上继续使用公共领域中的资源。例如“苹果”的商标权人无权干涉人们在通常意义上使用“苹果”这一水果名称；“彼得兔”系列商标权人无权干涉人们对“彼得兔”系列丛书进行著作权法意义上的使用，如对作品内容的直接引用或表述。

另一方面，商标法对外观设计的同时保护或者后续保护，并不会妨碍作品或者外观设计专利在保护期限届满后进入公共领域，他人仍然可以在著作权法或专利法意义上自由使用这些作品或者专利。只是这种自由使用要受到商标法的限制，即不能导致公众对产品来源的混淆或误导。还是以“彼得兔”案件为例，即使权利人的作品已经进入公共领域，只要“彼得兔”的封面图像能够被用于识别权利人，就可以注册商标并得到商标法的保护。同时，只要没有造成消费者的混淆，任何人比如案件中的社会科学出版社完全有权利使用作品中原有的插图或文字。因此，问题的关键并不在于“能否用商标权延续版权生命”，而在于使用彼得兔图像是否会引起消费者混淆。

法律保护的范围和效力有差异

多重保护并不代表重复保护。第一，外观设计专利权、著作权与商标权保护的利益存在实质性区别。外观设计专利保护的是对产品设计外观的创新，新颖性是外观设计获得专利权的必要前提；著作权保护的是作品的独创性，其关注作品是否是作者独立创作，并不关注作品是否是首创；商标权则保护标志的识别性，即使某个标志是作者独立创作，具有很高的艺术性和美感，但只要它不能识别商品或服务的来源，就无法获得商标法的保护。

第二，外观设计专利权、著作权与商标权的保护效力不同。专利法赋予权利人一种独占权即排它权，未经权利人许可，禁止他人对外观设计进行任何使用行为。著作权法仅禁止复制，却不能排除他人独立创作出的类似或相同的设计。商标法则仅仅禁止他人可能对社会公众导致混淆或误导的使用，为权利人提供一种机制以防止不公正的或欺骗性的假冒行为。因此，只要不引起混淆，他人仍然可以自由使用进入公共领域的专利或者作品。

最后，在侵权判定原则上，商标权与外观设计专利权是存在区别的。判断侵犯商标权的基准是消费者是否混淆，产品相同或近似往往是认定消费者混淆的手段；而判断侵犯外观设计专利权的基准则是产品外观是否相同或近似，不论消费者是否会发生混淆。因此，仅仅是产品外观的近似尚不足以导致侵犯商标权。

可见，商标权、著作权以及外观设计专利权在保护的利益、权利效力和侵权判定等方面存在巨大的差异，权利人获得多重保护并不会架空著作权法或专利法的制度设计，并不会破坏知识产权的体系平衡，多重保护并不等同于严格意义上的重复保护。

事实上，专利权、商标权、著作权和知名商品特有的包装装潢权均是法律明确规定的民事权利，根据我国民事法律制度有效保护民事主体的合法权益的基本原则，在法律没有明确排除的情况下，权利重叠具有正当性，在同一外观设计上同一主体可以同时享有多项权利。在权利重叠时，允许权利人在诉讼中主张多项权利，其获得救济的种类可以延及所有权利可获得救济的所有种类，但同一性质的救济方式不能重复使用，赔偿数额不能重复计算。■

A good design often combines a number of elements, including technical merit, artistic merit and distinctiveness. It may contain elements which can be accorded protection under several PRC intellectual property (IP) laws, including the *PRC Patent Law*, the *PRC Trademark Law*, the *PRC Copyright Law* and the *PRC Anti-Unfair Competition Law*.

Legislative intent

Clearly, a rights holder will wish to protect his lawful rights in as many ways as possible. One design may therefore be subject to multiple forms of protection.

Multiple protection is rarely redundant. The system of trademark law, on one side, is different from the systems of copyright and patent law on the other.

The legislative intent of patent law is to grant an exclusive right for a limited period of time in a limited territory in exchange for a disclosure to the public.

The legislative intent of copyright law is to protect originality for a certain period of time. Both systems of law stress special protection for a specific period of time, after which the subject of protection enters the public domain and recovery of the resources from the public domain is barred.

In contrast, trademark law does not prohibit the extraction of resources from the public domain. In fact, a large number of trademarks derive directly from humankind's common pool of words and designs, such as the Apple brand of electronic products and the series of Peter Rabbit books.

What trademark law protects is not words or designs in the public domain, but rather their ability to provide identification or distinctiveness The public can continue fully to use the resources in the public domain in their original meaning. For example, the owner of the Apple trademark has no right to interfere in people's use of the word "apple" for the fruit in its common meaning, and the owner of the series of Peter Rabbit trademarks has no right to interfere in people's use, as this term is understood in the copyright law, of the content of the series of Peter Rabbit books.

On the other hand, the simultaneous or subsequent protection of a design by the *PRC Trademark Law* will not prevent a work or design patent from entering the public domain once the period of protection has expired under the *PRC Copyright Law* or *PRC Patent Law*. The *PRC Trademark Law* aims only to prevent the confusion or misleading of the public as to the source of the products.

Again taking the case of the Peter Rabbit books as an example, even though the rights holder's works are now in the public domain, insofar as the cover illustration of Peter Rabbit can be used to identify the rights holder, it may be registered as a trademark. However, insofar as confusion is not caused among consumers, anyone (such as, in this case, the Social Sciences Press in China) has every right to use the original illustrations and text in any works they may produce.

Differences in scope and effect

Multiple protection is not redundant protection.

Firstly, there is a material difference in the interests protected by design patents, copyrights and trademarks. A design patent protects the innovation in a product's designed appearance, and the necessary precondition to obtaining a patent for a design is novelty; copyright protects the originality of a work, focuses on whether the work is an independent creation of the author, and does not concern itself with whether the work is novel; a trademark right protects the distinctiveness of a mark, and even if a mark is an independent creation of the author and has a high degree of artistic merit, it will not obtain the protection of trademark law if it cannot be used to distinguish the source of a good or service.

Secondly, the effect of the protection accorded by each type of law is different. Patent law grants the rights holder an exclusive right, which prohibits others from using the design unless they have a licence from the rights holder. Copyright law only prohibits reproduction, and does not prevent others from independently creating a similar or identical design. Trademark law only prohibits use by others that could result in confusing or misleading the public, providing a mechanism for the rights holder to prevent the unfair or fraudulent passing off of his mark.

Finally, in determining whether or not infringement has occurred, there is a difference between trademarks and design patents.

The benchmark for determining infringement of a trademark is whether confusion among the public has been caused. In contrast, the benchmark for determining infringement of design patent is whether the appearance of the products is identical or similar, without consideration of whether public confusion might arise.

Multiple protection justified

In view of the abovementioned differences in nature between trademarks and copyrights, on the one hand, and design patents, on the other, in terms of the interests protected, the effect of the rights and the determination of infringement, it can be seen that the securing by a rights holder of multiple protections is a justified enforcement strategy.

In fact, patent rights, trademark rights, copyrights and rights relating to the unique trade dress of the packaging of well-known goods are civil rights expressly provided for in law.

As it is a fundamental principle of the PRC's civil law system to protect the lawful rights and interests of its subjects, where it is not expressly precluded by law, the accumulation and protection of multiple rights is legitimate. A subject may enjoy multiple rights in one design.

Where multiple rights are accumulated, the types of remedies available to a rights holder extend to all the types of remedies available for all of the rights, provided that remedies that are identical in nature are not used redundantly (e.g. damages may not be calculated by adding up the amounts for the infringement of each right). ■

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