



**„NICOLAE TITULESCU” UNIVERSITY OF BUCHAREST
DOCTORAL SCHOOL**

PhD THESIS

**THE ACQUISITION AND THE LOSS OF TRADEMARK AND
INDUSTRIAL DESIGN RIGHTS UNDER EUROPEAN UNION LAW**

SUMMARY

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The intellectual property law is a law of art and science and it is natural that as technologies evolve and become more sophisticated (including those that contribute to the creation of works of art and in which computers and computer programs make possible artistic productions, unimaginable a few years ago), this field is getting more and more technical. To "master" this discipline requires, however, knowledge from other fields of science and which other branches of law do not claim so deeply.

I have chosen as my research topic *The acquisition and the loss of trade mark and industrial design rights under European Union Law* for several reasons. The first, which concerns the choice of the wider field of intellectual property, is that there is no branch of law today to be given greater international importance and to be the subject of more international conventions than intellectual property law. Creative activity is so rich and technologies in such an expansion that adapting the right to these challenges is a self-imposed measure. And intellectual property law not only protects creativity, it does not only protect creators and the results of their work, but it requires in itself creativity, originality, novelty, a frequently different approach to common law rules and unique solutions. The second reason is that in the legal life in Romania and in the European Union, the most common litigations concern the registration, validity of registrations and infringement of the rights regarding trademarks and industrial designs. The third reason is that the European Union has as stated objective to standardize intellectual property law and create European titles of protection, and until today, a high level of standardization has been achieved in the field of copyright and related rights (with a protection of works without a formal title) and in the field of trademarks and in the field of industrial designs, for which protection is arranged on two levels: one at national and harmonized level and the second at European Union level, which has created the necessary tools for such protection with uniform effects in all Member States.

The research was limited to trademarks and Community designs also for statistical reasons, respectively, because European Union trademarks and Community industrial designs have the tendency to take the place of those protected at national level in the European Union. Consequently, the number of trademarks and industrial designs protected by European Union titles has increased significantly and is, even now, in a continuous increase, the shift of interest to European protection titles not being however, unique to Romania. This happens in the context in which the single market is the one that generates the need for single titles of protection, of titles that produce identical effects in all the countries of the Union and that have the same legal regime. And to the success of the protection titles issued at the European Union level by EUIPO contributed not only the protection system designed for them, but also the fact that EUIPO has become, according to the World Trademark Review, the most

innovative intellectual property office in the world. Therefore, it is not out of the ordinary the constant increase of the number of disputes concerning the rights and, respectively the infringements of trade mark and designs rights protected at Union level, some of them (namely those relating to the acquisition and loss of rights protection) being the subject of analysis in my research.

I have presented in the Introduction several statistical data on inventions, trademarks, industrial designs, the conclusion of their analysis being that the statistical data confirm the interest and preference of Romanian industrialists and creators for issuing European titles of protection and which represents a substantiation for my research and its limitations.

I developed the research topic in nine chapters, followed by the final chapter of the general conclusions, chapters that I will present, briefly, in the following.

Thus, in **Chapter I**, entitled "*Why About Intellectual Property? Why about brands, designs and industrial models?*", which is the introduction of the research, I set out the reasons behind the choice of the topic of the doctoral thesis and I presented some arguments for which I believe, paraphrasing André Malraux, that the "XXIst century will belong to intellectual property or ... it won't be at all". I explained why, in my opinion, trademarks are the "Cinderellas" of intellectual property (since it is not the creative activity that is protected, but the use of the sign, that being the reason why the belonging of trademarks to intellectual property has been challenged in the legal literature), while drawings or industrial models are the "spoilt" objects of intellectual property rights (because they benefit from two systems of protection, defying the general rules of both systems of protection, both by copyright and by industrial property rights) and we have presented the limits of research justified by statistical data in the field of industrial property.

In **Chapter II**, entitled "*Evolutions and revolutions caused by intellectual creations*" I made a brief "foray" into the history of intellectual property rights and started the presentation with a proposal for biblical justification of intellectual property rights. In the following subchapters we have presented the arguments why Greeks and Romans are (between) the fathers of intellectual property rights, we have exposed the evolution of trademarks and designs in the Middle Ages and we have made a brief analysis of how people's innovative activity has generated progress and industrial revolutions which shaped the subsequent developments. Being a doctoral thesis dedicated to "objects" protected by intellectual property rights, I found it useful to dedicate a subchapter to the fourth Industrial Revolution, to which we are contemporaries, namely the Revolution of digitization or artificial intelligence and to the challenges it brings in the field of intellectual property. From the issues and areas

in which artificial intelligence plays an important role, we selected the issue of ethics in the field of artificial intelligence, that of the rights owners in case of creations born of artificial intelligence and, last but not least, the role of artificial intelligence in modern medicine, with a case study on the Da Vinci robot. The conclusion regarding this last aspect was that today, more than ever, intellectual property is face to face with artificial intelligence, digitization, the blockchain, new kinds of creations and machines endowed with creative "skills" themselves, which competes with that of the human being, if it has not surpassed it. And which, if man does not order, could generate chaos not only in everyday life, but also in the regulation of rights: in early 2020, the European Patent Office rejected the patenting of two inventions in which the declared inventor was the "machine" named DABUS, the Office noting in the reasoning of the rejection decisions that the designated inventor must be a human being and not an artificial intelligence system (machine). Unlike the European Patent Office in Australia and South Africa, the DABUS artificial intelligence system has been recognized as an inventor.

In **Chapter III**, entitled "*Acquiring protection on objects protectable by industrial property rights. The cumulation of protection and the conflict between rights*", we presented, from a procedural point of view, the ways of acquiring the titles of protection of trademarks and industrial designs, at national and European Union level, starting from the definition of industrial property right as an exclusive right conferred by an administrative authority to the holder of the application and conferring him a monopoly on the exploitation of the intangible element to which he is entitled (the definition according to the French author Jérôme PASSA). Before further presenting the issue of cumulation of protection and the conflict between industrial property rights (the central theme of this chapter), I considered it necessary to present the legal nature of industrial property rights, with particular attention to the qualification of this right as a property right. I analyzed this issue, on the one hand from the point of view of the attributes of the property right and, on the other hand, from that of the multitude of "objects" protected as "intellectual property rights", different as a legal regime.

Returning to the protection of trademarks and designs, I have raised this issue both from the perspective of national law and from the perspective of European Union law, because I considered it necessary to emphasize (where appropriate) the regulatory differences in legislation, since the conditions of protection are, for the most part, common in both national and European Union protection systems.

In the subchapter dedicated to conflicts between intellectual property rights we have presented the cumulation of protection by trademarks and copyright, trademarks

and patents, trademarks and designs, by designs and copyright and, finally, by designs and patent.

In summary, the conclusions of this chapter are as follows:

(i) *as regards the conflict between copyright and trademark law*, where a prior copyright is invoked against a trademark right, the method of "comparison of titles" may not be applied, as in the case of a revendication action, because it does not lead to a legally correct conclusion. The comparison of titles in the case of the revendication action starts from the premise of a conflict between two identical rights, so that have the same legal nature (property rights). While the comparison of titles in the case of counterfeiting action, action which is specific to intellectual property rights, implies the comparison of rights of a different nature, completely different objects of protection (namely the work of original intellectual creation through copyright and the use of a protected sign) and rights with a different extent.

(ii) *as regards the conflict between the trademark and the patent*, the conclusion was that the occurrence of a conflict between a trademark right and a patent right is admitted even by the legislator, by establishing absolute grounds for refusal of registration prohibiting registration of the sign consisting exclusively of the shape of the product, of another characteristic imposed by the nature of the product or which is necessary to obtain a technical result or which gives substantial value to the product.

(iii) *as regards, perhaps the most common situation in practice, of simultaneous protection by trade mark and design*, the conclusion is that such protection is permitted by both European Union and national law. The conflict between the rights occurs when the rights belong to different holders. So that whenever the designs, the shape of the product or the packaging of the product meet the conditions of protection both as a mark and as a design, the cumulation of protection is possible, even if the registration of the mark will protect the use of the design, while the registration as a design will protect the creation itself, which is new and has an individual character, but both by issuing titles of protection.

(iv) *as regards the cumulation of copyright protection and as designs*, the conclusion was that the national and European Union case law tend towards a firm separation of the two rights, manifested in particular in the refusal to recognize copyright protection of those "objects" with characteristics which have met the requirements to be registered as designs. The tendency to separate rights, by accepting as an exception the possibility of cumulation of protection, can also be attributed to the fact that from the point of view of the purpose for which they are registered, designs are closer, paradoxically, to trademarks than to intellectual works. However, this jurisprudential view is contrary to the considerations of the European directive

and regulation on industrial designs, as well as to the Romanian law of designs which accepts the principle of unity of art.

(v) Finally, *as regards the conflict between the rights conferred by registration as designs and those conferred by patents*, the conflict it may arise either to the extent that the designs referred to in the description or claims in the patent application infringes previous rights conferred by registered designs, either when a registered design is determined solely by a technical function that is part of a patented invention.

Chapter IV, entitled *"The analysis of the conditions for the protection of a trade mark in European Union law. The contribution of the ECJ to the clarification of the conditions of protection"*, presents the conditions of protection of trademarks, classified by law in absolute and relative grounds for refusal to register, respectively invalidity of trademarks in the order in which they are stipulated in European Union Regulation, as amended in 2015 and 2017 on the occasion of trademark reform.

The conclusions of this chapter are as follows:

(i) As regards the most important point in the analysis of the conditions for the protection of a trade mark, namely the *relevant public*, its definition in the examination of the grounds for refusal of registration, whether absolute or relative, starts from the goods and/or services designated by the analyzed trademark. This may have effect on whether the relevant public may be the general public or the specialized public (niche), may consist of women and/or men, children and/or adults - all these characteristics being decisive for the subsequent extraction, as precise as possible, of the average consumer from the relevant public. It is well known that the examination of the incidence of some of the grounds for refusal of registration (including the descriptive nature of the mark, lack of distinctiveness, likelihood of confusion) is made by reference to the average consumer of those goods and services, reasonably well informed and reasonably attentive and circumspect. Therefore, the definition of the relevant public - and not of the characteristics of the average consumer, as we have wrongly identified in the case law of the Court of Justice of the European Union - is the first step, but also the most important, from which to start the analysis.

(ii) the legal life of atypical trademarks from the point of view of the legal security is called into question, given that there is no case-law of either the General Court or the European Court of Justice on the examination of the distinctiveness of a taste mark or the risk of confusion between two olfactory trademarks. The most recent case concerning an atypical trademark, cited in this chapter, concerns the sound mark represented by the opening of the lid of a carbonated beverage container, in which the General Court held, in essence, that the distinctiveness of a sound mark is not assessed after criteria different from those of common law. Admission to the registration of

this new generation of trademarks will pose serious problems, including the fact that the extent of trademark protection will be difficult to establish, especially in the case of olfactory and gustatory trademarks, whose perception is both individual and subjective. The extent of protection is determined by the "representation" in the application for registration of the "sign" as a trademark. The replacement of the graphic representation with the representation "in a way" that allows the authorities and the public to clearly and precisely determine the object of protection including the description of the trademark) will be a challenge to the legal security of the rights conferred by registration.

(iii) the formulation in the normative acts of the absolute reasons for refusal of registration by using the word "*exclusive*" before listing, for example, indications that cannot be part of a trademark (for example, trademarks that are composed exclusively of signs or indications which may be used in commerce to designate product characteristics) shall not be interpreted restrictively. Although at first glance we might think that signs consisting exclusively of descriptive indications may be rejected, in reality there may be situations in which a combined mark has in its composition a descriptive verbal element and a figurative element (for example a color or a drawing) and yet, by the fact that the verbal element is dominant and the figurative element is too weak to neutralize it, the trademark registration should be refused without being made up exclusively of descriptive signs or indications. While acknowledging that that statement in regulations need further analysis, the General Court held in its case-law that if the word element of a mark is descriptive, the mark is as a whole descriptive if the figurative elements of the mark fail to divert the relevant public from the descriptive message transmitted through the dominant verbal element. As regards trademarks composed of several word and figurative elements, the General Court stated that it is necessary not only to examine the various elements of the trademark, but also the trademark as a whole in order to conclude on the general perception of that mark by the relevant public. In such a case, the mere fact that each of those elements, taken separately, has a descriptive character does not automatically result in the lack of distinctive character or the descriptiveness of the trademark.

(iv) *The failure of a trademark to comply with the condition of not having a misleading character* may be sanctioned both on the grounds of invalidity and revocation, the difference being that in the case of a declaration for invalidity, the trade mark shall be examined by reference to the date of filing, while the conditions for revocation of the rights to the trade mark are examined after registration. A declaration for invalidity may be brought if, after the date of registration, because of the use of the mark by either the proprietors or the contractors, the mark has become liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services.

(v) The regulation of the *well-known (notorious) mark* and the *reputed mark*, both in national and European Union law, is unclear, so that it cannot be said with certainty that the well-known mark enjoys extended protection for products and/or services other than those for which it is protected by the effect of notoriety, nor can it be said that the rules in force limit the protection of the well-known mark to the goods and/or services for which it is used. well-known trademarks, whereas it would allow the extension of protection beyond the principle of specialty exclusively to *registered* trademarks.

(vi) In addition, it is not clear whether European Union law sought a strong delimitation of the well-known trademark of reputed trademark, given that both are exceptions to the general rules for the protection of trademarks: the **well-known mark** is protected for the goods and services to which it applies, regardless of registration and it is an exception to the rule of the attributive protection system (formalist or registration priority), while the **reputed mark** is also protected for the goods and/or services for which was not registered, where the use without due cause of the trade mark applied for would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark, so it is an exception to the principle of trademark specialty, according to which trademark protection is limited to the goods and/or services for which it was registered.

(vii) *Invoking the "reputation" of a well-known mark* for the purpose of extending protection to goods and/or services other than those it designates is wrong in two respects: firstly, the well-known mark is "stronger" than the reputed mark because its protection is recognized without registration; secondly, applying the rule of interpretation *exceptio est strictissimae interpretationis*, provided that the law confers extended protection to the reputed trademarks and well-known trademarks are not registered trademarks (they enjoy protection without being registered in Romania), the conclusion is that reputed marks cannot be subject to the exception of the specialty principle, similar to well-known marks. Practically, in the case of the reputed trademark, what is protected is the "reputation" of the trademark from a parasitism of competitors, without extending the protection to other goods and/or services than those for which the trademark was registered, while in the case of the well-known trademarks, the notoriety has the effect of extended trademark protection.

(viii) In the EU regulations, the meaning of the phrase *risk of association* includes the risk of confusion, while in the national legislation, on the model of the Benelux legislation, the notions are independent. In its case law, the Court of Justice of the European Union has strongly stated that, under Union law, the risk of association is included in the risk of confusion.

Chapter V, entitled "*Conditions for the protection of industrial designs under European Union law*", sets out the conditions for the protection of European industrial designs, in accordance with the legislation in force today. At the date of the present research, there are no proposals for Regulations and Directives, their amendment being proposed in the work program of the European Commission for 2020. But the first steps taken by July 2021 regarding the amendment of the two legislative instruments were to carry out the evaluation impact assessments from key stakeholders in the field and the start of the public consultation phase, scheduled to end at the end of July 2021. According to the timetable posted on the European Commission's website, it is expected that the drafting of directives and regulations to start only in the fourth quarter of 2021, and their adoption to take place in the second half of 2021.

The conclusions of Chapter V are as follows:

(i) Regarding the *extent of the protection conferred by the registration of designs*, the principle of specialty in the field of trademarks cannot be transposed in this field of industrial designs as well. In this respect, the case law of the European Court of Justice has shown that the protection conferred on a design is not limited to products in which the design in question is intended to be applied or incorporated and the examination of the conditions of protection should not be limited to these products only. Otherwise, the situation in which the design in question is subsequently registered for the simple fact that it is intended to be incorporated into a different product may be accepted, which is contrary to the purpose for which the protection of the designs has been recognized.

(ii) The notion of *informed user* is a reference used to examine the condition of novelty and individual character and a concept developed in case law. It is not allowed its interpretation in the sense that only when this user knows the previous design, it can be analyzed whether the subsequent industrial design meets the condition of individual character. Therefore, when a design is considered to be disclosed to the public, the examination of the conditions of protection will be made from the perspective of the informed user who meets the above conditions, without taking into consideration the sector in which the product is incorporated or on which the analyzed design applies to influence or not the knowledge by the informed user of the disclosure.

(iii) As regards the *conditions of disclosure*, in accordance with the rules developed in case-law by the General Court and the European Court of Justice, in order to be taken into account in assessing novelty and individual character, it is not necessary that the disclosure to take place on the territory of European Union, since such a territorial criterion is not imposed by regulation, but it is important that the

facts disclosed can reach the specialized circles in the sector concerned in the territory of the Union. However, a disclosure cannot be considered to have taken place if it could be assumed that the facts disclosed, in the normal course of business, could not reasonably have become known to the specialized groups in the sector concerned operating in the Union. There will be assessed on a case-by-case basis whether persons belonging to these groups could reasonably have been aware of events which took place outside the territory of the Union, according to the circumstances of each case.

(iv) In the examination of individual character, the most important role is played by the *overall impression*, same as in the case of the assessment of the marks by the average consumer. Thus, any comparison of the design whose protection is sought or, where appropriate, challenged with the 'patrimony' of the previously disclosed designs and which may be taken into account under the conditions laid down in Article 7 of the Regulation will be made in accordance with the following rules: 1) by observing the global impression produced on the informed user, and not by comparing the elements that make up the external aspects, taken separately; 2) by comparing the design whose protection is sought with the "heritage" of all previous designs, without allowing a mixture of the characteristics of different previous designs. According to the case-law, the individual character of an industrial design results from a *different overall impression or from a lack of a sense of "déjà vu"* which the informed user may experience when looking at the contested design in relation to any design which is part of the "patrimony" of previously disclosed designs, without, however, taking into account differences which remain insufficiently marked to affect that overall impression.

(v) *The steps and their sequence for the test applied to the individual character of a design* shall, in accordance with the case law of the Court of Justice and the General Court, be as follows: 1) establishing the relevant sector to which the authorized user belongs, the characteristics of the user, including the degree of attention; 2) the exact delimitation of the parts of the design that remain visible, so they can be the subject of assessments by the approved user; 3) establishing the degree of freedom enjoyed by the author of the design on the occasion of its creation; 4) comparing the views of the design; 5) comparing global impressions, taking into account other relevant factors, on a case-by-case basis.

Chapter VI, entitled "*The effects of BREXIT on intellectual property rights acquired under European Union law*", sets out the rules for maintaining the protection in the United Kingdom of rights granted or registered in proceedings governed by European Union by the Withdrawal Agreement of the United Kingdom, as well as the procedure for recognizing equivalent rights in the United Kingdom. The solution

chosen following the negotiations between the European Union and the United Kingdom was that both trademarks and designs for which EUIPO granted protection to remain protected in the United Kingdom, without no action by the holder to express agreement or disagreement for national protection in the United Kingdom.

In this context, I also recall that searching for the effects of the UK's withdrawal from the European Union on the rights covered by this research, I noticed that verbal or figurative signs consisting of the words BREXIT, BREXIT LAW, BREXiT, BREXIT KROS, BREXIT NAVIGATOR, BREXITY EX BREXIT all have in common that they were subject of application as European Union trademarks, but their protection was refused by the Alicante Office, mainly as being contrary public policy or to accepted principles of morality, thus being rejected for registration. These trademarks were considered to evoke a still sensitive subject in the collective mind and on the political scene of the European Union.

Chapter VII, entitled "*Loss of trade mark rights*", sets out the reasons for the loss of trade mark rights, namely the invalidity, the revocation, the surrender and the expiry of the term of protection. The analysis in this chapter has a mainly practical perspective, focusing on the judgments of the General Court and the Court of Justice of the European Union, which examined the issue of loss of trademark rights.

The most important conclusions of this Chapter are the following:

(i) *A declaration of invalidity of a trade mark* shall not be preceded by the observations or, where appropriate, opposition, because failure to comply with one of those procedures (although the observations for absolute grounds for refusal it is not a proper administrative procedure, because it doesn't have independent effects and is not an adversarial procedure) cannot have the effect of inadmissibility for an invalidity declaration. That conclusion is all the more necessary since neither the observations nor the opposition are regulated as prior procedures such as to render the action for annulment inadmissible.

(ii) Although the *imposition of absolute grounds for refusal of registration is justified by the protection of a general interest*, they may not be invoked *ex officio* by the court in proceedings for invalidity of a trade mark, no matter if the action is based or not on other absolute grounds than those identified by the court or on relative grounds for refusal of registration. In other words, invested with such an action, the court will be limited to the analysis of the grounds for invalidity that the interested part invokes, without being able to invoke *ex officio* other absolute grounds for invalidity, even if they exist. It is important to note that the *person concerned* is defined by Romanian Trademark Law *as any person who has a legitimate interest in*

a trade mark application or a registered trademark and whose interests could be harmed.

(iii) The purpose of a declaration for invalidity based on relative grounds for refusal is to eliminate the parasitism that trademark owners face on the market though it follows from the interpretations of the European trade mark regulatory framework that the exclusive right of the proprietor of a Community trade mark to prohibit all third parties from using, in the course of trade, signs identical with or similar to its trade mark extends to a third-party proprietor of a later registered Community trade mark, without the need for that latter mark to have been declared invalid beforehand.

(iv) *The case studies for the cancellation of the registration of trademarks* have revealed several directions of interpretation of the reasons for which the cancellation of the registration of a trademark can be requested, as follows:

- in order for a **trade mark consisting of a combination of colors** to be registered, the systematic arrangement of colors must predispose the colors by default to the product to which that trade mark applies, in order to meet the requirements of clarity and precision required for a trade mark, because it is necessary not to unduly restrict the availability of colors to other competitors;
- **the assessment of the distinctive character of a trade mark** must be made taking into account the nature of the trade mark, as determined by the proprietor in the application for registration; the shape of the "collio" glass, which also includes other elements such as the golden color, the letter "B" in capital letters and the design of a flame with a satin finish, is a three-dimensional mark which enjoys a distinctive character, all the more so as the liquid packaging are usually perceived by consumers mainly as necessary containers for these categories of products;
- in the case of invalidity of the trade mark registration of "*LEGO bricks*", although the Court noted the **possibility that the same technical result could be obtained by different solutions**, so that there were alternative shapes with different sizes and different designs to obtain the same technical result, this circumstance may not have the consequence of removing the application of Article 7 para. (1) lit. e) point (ii), because the purpose of this article is to maintain the availability of the technical solution for other competitors on the market. The Court therefore rejected the application of the "multiplicity of forms" theory to industrial design in relation to the examination of these absolute grounds for refusal, which are closest to the legal regime of designs and, in particular, to the ground for invalidity of an industrial design, determined exclusively by the technical function;

- as regards **the conflict with a protected designation of origin**, the General Court annulled the decision of the EUIPO Board of Appeal rejecting the declaration of invalidity of the GRANA BIRAGHI mark on the ground that the name "grana" is generic and the GRANA BIRAGHI mark does not affect the protected designation of origin "grana padano". The declaration of invalidity has been introduced by the *Consorzio per la tutela del formaggio Grana Padano*, which claimed that GRANA PADANO is a protected designation of origin both at national and European Union level, that the term "grana" indicates, from geographic perspective, a tributary of the river Pad, being located in the area called *Valle Grana* and following the establishment of the system of protected designations of origin in Italy, the category of cheese "grana", originally existing as a general category, was divided into two different types, respectively *grana padano* and *parmigiano reggiano*, protected as a designation of origin, the difference being that the first type of matured cheese is produced in the territory located in the North of the river Pad and the second is produced at the South of the same river;
- on the figurative mark, on a black background, containing a rose "*La mafia se sienta a la mesa*", the General Court held that it was contrary to public policy and morality, on the ground that the term "mafia" was in the foreground and attracted attention and is perceived everywhere as designating the criminal organization in Italy, being known for the "techniques" of intimidation, physical violence and acts of murder used by the organization, but especially the activities of illegal drug trafficking, weapons, money laundering and corruption; given that these activities fall within the scope of the criminal offense and violate the values of the Union which, in the form of specific legislation, penalize organized crime, the verbal elements "*la mafia*" will be perceived profoundly negatively, especially in Italy;
- as regards **the invalidity of a mark for which the applicant acted in bad faith**, the Court has shown that an applicant may be considered as acting in bad faith when applying for registration of a mark although he has no intention of using the mark for goods and services and whether its intention is either to harm the interests of third parties, contrary to fair practices, or to acquire an exclusive right, without targeting a particular third party, for purposes unrelated to the functions they are to perform. meet a brand.

(v) *The case studies on the revocation of trade mark* also revealed directions of interpretation of the General Court and the Court concerning the loss of rights as a result of revocation, which can be presented as follows:

- **a trade mark is subject of "genuine use"** only where the use is made in accordance with the essential function of the trade mark, to distinguish between the goods and services of one undertaking of those of other undertaking, enabling the relevant public to recognize the commercial origin without any possibility of confusion;
- the affixing of a European Union trade mark on a product as a **quality certificate**, either by the proprietor or with his consent, does not constitute use of the mark within the meaning required to avoid the revocation of the mark, unless the use of the trademark in relation with the goods and services offers the guarantee to the relevant public about the origin of the products of a given undertaking, which has control over the manufacture of the products in question and which, at the same time, is responsible for their quality;
- **in the case of a "position mark", the examination of the genuine use must take into account the mark** and not the actual use of the product on which the mark is placed. Position marks are close to figurative and three-dimensional marks, as they often involve the application of figurative or three-dimensional elements to a product. The option to qualify during the application the trade mark as being a "figurative mark" does not rule out the possibility that the mark may be, at the same time, a "position" mark, provided that the dotted lines (used for the representation of the mark) usually suggest the outline of the product to which the position mark is affixed;
- **the genuine use** must be proved from all the facts and circumstances which show that the mark was actually used for commercial purposes, focusing on maintaining or creating market shares, the nature of the goods or services, market characteristics, extent and the frequency of use of the mark. Finally, the genuine use of the mark cannot be demonstrated by probabilities or by presumptions, but by concrete and objective elements;
- sales of the products to the US Department of Defense and State Department for military bases in Belgium and Germany are not likely to characterize **the appellant's intention to set up a point of sale in the European Union** for the products in question. Thus, the documents consisting of declarations and invoices, according to which the products were ordered by the US Government Departments, the products being brought from the USA, Mexico and Turkey, can not represent evidence of the serious use of the mark, except for some products mentioned in an invoice as being shipped from Poland. The General Court recalled that the notion of effective use in the European Union implies the use of the mark

in the European Union, which means that its use in third countries cannot be taken into account;

- the use of the mark on the packaging of the products in order to describe the main ingredient of the products in question does not constitute a serious use of the mark in accordance with its essential function, and EUIPO's finding, in the context of the analysis of the declaration of revocation that the trademark has a weak distinctive character does not mean that it has been made an analysis of the absolute ground for refusal, provided by article 7 para. (1) lit. c) of Regulation (EU) 1001/2017;
- as regards the action for revocation of a weakly distinctive figurative mark represented by a polygon, used in forms other than that registered, the General Court found that there has been proved the genuine use of the mark, since the added element of the trademark and the registered trademark form a separable whole, the added circle forming the impression of a juxtaposition to the trademark, without being confused with it. Even if in certain situations, the less distinctive a trademark is, the easier it will be to influence it by adding a figurative element or not, which is itself distinctive, in which case there is a possibility that the trademark in the registered form loses its capacity to be perceived, in itself, as indicating the origin of the products or services for which it was registered. However, in the present case, the General Court held that the use of the registered trade mark by the addition of a non-distinctive element cannot result in a substantial change in the registered trade mark;
- The General Court also held that the conditions for the serious use of the mark were met even in the situation in which the proprietor of the mark had entered into franchise agreements and a license for the mark in question with companies operating a "coffee shops" chain, so that the goods belonging to classes 21 (including coffee grinders, coffee makers) and 25 (including clothing, aprons, polo shirts) are sold by them on the basis of a franchise or license agreement. These sales lead to a public and external use of the contested mark, regardless of the fact that the owner did not engage in direct relations with final consumers.

Chapter VIII, entitled "*Loss of rights in industrial designs*", has a dual structure: the first part presents the most important procedural aspects concerning the declaration of invalidity of designs, the expiry of the registration period and the surrender, with emphasis on some new aspects such as the one according to which the declaration of invalidity can be ordered even after the extinction of the right by expiration of the duration or by surrender; the second part presents the conclusions

drawn from the analysis of the case law of the General Court and the Court of Justice of the European Union.

Thus, the most important conclusions of this chapter are the following:

(i) **the invalidity of the design may be ordered even after the right has been ceased by the expiry of the duration or by surrender**, a provision which is also found in national law. The Regulation also provides that **even an unregistered design** may be declared invalid, but this time not by EUIPO, but by the competent court for the settlement of such a request, by a request for invalidity or by a counterclaim filed in a litigation against infringement.

(ii) As regards **the steps in examining the ground for annulment consisting in the absence of individual character**, the General Court found that it was carried out in four stages, namely: determining the sector to which belong the products in which the design is to be incorporated; determining the characteristics of the informed user of the products in relation to their purpose, respectively the level of knowledge of the prior art and the level of attention when making the comparison; determining the degree of freedom of the author in the elaboration of the industrial design whose influence on the individual character is inversely proportional; direct comparison, if possible, of the overall impressions produced on the authorized user.

(iii) Although **originality** is not a condition for protection for industrial designs, it plays a role in examining the individual character of the design, a role which we consider more important than how it was reflected in the Court's considerations: if we agree that originality is not a condition for the protection of designs, but is close to the condition of individual character, it can still be considered as an element of the degree of freedom of the author in developing the design and which is a criterion that is taken into account in the analysis of the condition of the individual character of the design.

(iv) The Court of Justice has also established the **characteristics of the informed user**, based on his jurisprudentially developed characteristics, according to which the user in the case of designs is a person with special vigilance, who has some knowledge of the previous technical stage, represented the patrimony of the designs relating to the product in question. The authorized user is between the average consumer in the field of trademarks, who is not required to have specific knowledge and who, as a rule, does not make a direct link between the conflicting marks and a qualified person with in-depth technical skills. Consideration of the user's low, medium or high level of attention, given that he shows "specific vigilance", is not in accordance with the interpretative guidelines envisaged by the Court in the case.

(v) **Evidence of disclosure of the previous design** need not fully reflect its characteristics, where such evidence makes it possible to distinguish its appearance

and clearly and unequivocally identify its characteristics in such a way that it has been possible to examine the individual character. In one case, the General Court pointed out that although certain components of internal combustion engines, such as the tank and the fan, are essential and must exist in any internal combustion engine, their shape, configuration and location are not dictated by constraints of technical and functional nature. Therefore, the general appearance of the internal combustion engine, in particular the appearance of the upper part of the engine in question, is not determined by technical constraints, and the designer of the internal combustion engine referred to has great freedom in choosing the shape of the components of this engine type and their arrangement.

Chapter X, entitled "*Before the conclusions, on the principle of exhaustion of intellectual property rights, parallel imports and the gray market*", showed that the principle of exhaustion of rights has gained importance after the rise of a real danger of an exorbitant right, an exclusive right, unlimited for the proper functioning of the Common Market, although initially there was a tendency to give more importance to intellectual property rights without any limitation. According to this theory, the owners will not be able to invoke and oppose their exclusive intellectual property rights in order to control, restrict or prohibit the movement of products bearing such rights which they have themselves placed on a market or which have been placed on that market with their consent, the rights being considered exhausted.

In order for the exhaustion effect to occur, it is not necessary for the product to reach the final consumer, as it is sufficient for them to be available to the wholesaler. But for the effect to occur, the marketing must be voluntary, come from the right holder or be done with his consent. There is no consent with the effect of exhaustion of the right when the products are put into circulation under the cover of a legal license.

Finally, the **Conclusions** chapter confirms the statistics presented in the introductory chapter of the thesis and reveals that most of the judgments of the Court in the field of industrial property derive from the application of the rules on trademarks, and among these, most cases of the General Court examine the incidence of article 7 par. (1) lit. b) and c) of Regulation (EU) no. 1001/2017, respectively the absolute grounds of refusal of the distinctive character and of the descriptive character of the trademark. On the other hand, the vast majority of design disputes concern the invalidity of registrations for failure to fulfill the condition of individual character.

From this perspective, the more than 200 preliminary rulings or, as the case may be, decisions pronounced in appeals of the Court of Justice of the European Union, as well as decisions rendered by the General Court in appeals against EUIPO

decisions - analyzed in this research - are a very useful tool for to become familiar with the directions of interpretation of European Union law. This, all the more so as the trademark reform that took place in the European Union in 2015 and the adoption in national law of the rules of Union law, by transposing the Trademark Directive and the entry into force of the new amendments to the Romanian Law on trademarks in July 2020, leads to a more in-depth analysis of the case law of the Union courts.

Although the doctoral thesis focuses mainly on the EU regulatory framework in the field of Community trademarks and designs, the research could not ignore the provisions of national law (and even other states, such as France or the United States). of America), which, where I deemed it necessary, I have also mentioned. Thus, the study of normative acts, jurisprudence and specialized doctrine has led to the outlining of several proposals of *de lege ferenda* for internal normative acts, which I will summarize below:

(i) A first *de lege ferenda* proposal - perhaps even the most important - is the need to adopt, following the French model, an Intellectual Property Code, which should include, in the following order: the rules in the field of copyright and related rights, inventions, new plant varieties, utility models, designs, trademarks, indicative signs, topographies of semiconductor products, at the end of which there shall be a special chapter devoted to the rules of private international law and procedures in front of OSIM. The intellectual property code, in my view, would have ten books (parts) of its own. It is recommended to adopt a unitary normative act and because many of the implementing provisions, at least in the system of appeals before OSIM, are common and can be regulated in a single title or chapter.

(ii) As regards the proposals for *de lege ferenda* in the field of trademarks, we have indicated that they would be premature at this time, given that the Romanian Law on Trademarks, as amended in July 2020 by transposing Directive (EU) no. 2436/2015, has not reached maturity to allow the formulation of new changes. In addition, the case law of the Court of Justice and the General Court is very clear in defining the key concepts in the field, so that I am against excessive regulation which does not give the judge freedom and flexibility to make the most appropriate decisions, taking into account of the particularities of each case. In the medium term, however, it is worth considering the opportunity to regulate the possibility of „implied” or „explicit” surrender of trademark rights, including by tolerating a market competitor that also uses an unregistered sign (which may gain protection as a well-known trademark), and not just of a registered trademark, as currently provided by law (we refer here to the impossibility of the proprietor of an earlier mark to seek the annulment of a later registered mark, if it has been tolerated for five years).

(iii) A proposal of *de lege ferenda*, this time in the field of designs, aims to clarify the normative status of the principle of unity of art, in the sense that an option unequivocally manifested by the legislator is necessary, in the sense of a admission or not of the cumulative protection by copyright and industrial designs, of works that meet the conditions of protection by both rights, especially in the case of works of applied art.

(iv) Regarding the legislation in the field of designs, we propose the amendment of Article 8 of Law no. 129/1992 in accordance with the provisions of art. 7 para. (1) of Directive (EC) no. 71/1998 (and of Article 8 (1) of Regulation (EC) No 6/2002), according to which the registered design does not confer rights on the characteristics imposed exclusively by the technical function of the product in which the design is applied or incorporated or the model in question. On the contrary, it gives protection to those characteristics that are part of the external appearance and meet the conditions of novelty and individual character. The Romanian law of designs does not confer the possibility of excluding from a design the characteristics imposed by the technical function of the product and examining the other remaining characteristics to see if they together fulfill the ornamental function that confers rights as a design. It is true that Article 8 para. (1) of Law no. 129/1992 provides that the design determined exclusively by a technical function cannot be registered, which would mean that the design containing other characteristics may be subject to protection, but I think that a clarifying text is welcome. Moreover, Recital 10 of the European Industrial Designs Regulation states that those characteristics which are excluded from protection because they are determined solely by the technical function of the product in which the design is incorporated or to which it applies should not be taken into account to determine whether other features of the design in question meet the conditions for protection. These provisions, as we have already shown throughout the research, have been interpreted by the French authors François and Pierre GREFFE as a basis for the existence of a cumulation of patent protection and as a design on the same object, if the protection conditions are met for each means of protection.

(v) If in case of trademarks, the legal literature and case law uses the concept of „*average consumer, reasonably well informed and reasonably attentive and circumspect*” and in case of inventions „*the specialist*”, in case of industrial designs there is used the concept of „*informed user*”, who is a „virtual person”, through whose mind and eyes the judge or, as the case may be, the examiner, will appreciate the fulfillment of the novelty conditions and, especially, of the individual one. I have shown in the research that, despite its importance, this informed user is not defined, but also that, in reality, his task is performed by the examiner/judge who

will be in a double difficulty, because, on the one hand, he may not know the field of the products and, on the other hand, because he is put in a position not to operate with his own judgment and arguments, but with those of the "informed user".

Finally, I will expose below the detailed content of the doctoral thesis in order to give the possibility to whom is interested, to examine the main issues that have been analyzed and that can be more easily identified from the titles and subtitles that make up, finally, the structure of the paper.

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