



THE PROTECTION OF ICONS AND INTERFACES BY INDUSTRIAL DESIGN

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Recent legal battles involving Apple, Google, Microsoft, Samsung and other major players in the industry have led to true "patent wars". However, the latest dispute between Apple and Samsung in the United States has redirected the spotlight usually aimed at patents towards its lesser-known cousin: industrial designs. Since the object of the conflict was now related to the appearance of smart phones (namely, their rounded corners) rather than their functionality, industrial design protection was thus put to the foreground.

While a patent is intended to protect the functional characteristic of an object, an industrial design aims to protect an object's visual or ornamental aspect. When commercializing a software application, the visual aspect of the application is almost as important as its functionality. Indeed, the visual aspect of the software (the "look and feel") will not only seduce the user, but also contribute to the development of a certain user loyalty towards subsequent versions of the software.

The classic example of an industrial design in the field of information technology is no doubt the visual aspect of Google's homepage (U.S. Industrial Design No. D599, 372), which is recognizable by its bare appearance with a simple search bar and the two famous buttons "Search" and "I'm Feeling Lucky".

Xerox was in fact the first company to obtain registration of an industrial design for a visual aspect of a software. In May 1988, Xerox obtained industrial designs for several icons, most notably one representing a "waste basket" (U.S. Industrial Design No. D295, 632). Every major company in this field, including Apple and Microsoft, now possesses an industrial design for its own "waste basket". These companies have more than a hundred registered industrial designs on buttons, icons, menus and user interfaces.

It is possible to obtain protection for an icon or interface provided that certain criteria are met. Firstly, the icon must be new and sufficiently distinct from any other icon. It must also be ornamental or aesthetic, and not only possess a functional aspect. Finally, it should also be included in an "article of manufacture". This criterion can be easily met: for example, by displaying the icon on a computer screen in the application for registration of the design.

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The registration of industrial designs for icons and software user interfaces can serve as a good addition to patent and/or trademark protection. Protection by industrial design prevents a third party from making, selling or offering the item, for up to 10 years in Canada and for 14 years in the United States. This is different in the case of trademark protection, for which one has to demonstrate that the third party's trademark presents a risk of confusion with the protected mark and that this trademark has an inherent distinctiveness. No such evidence has to be provided for industrial design protection. The protection it offers can, among other things, prevent a competitor from copying or imitating the configuration or pattern of a button, icon or flagship interface as part of a web page or software. Moreover, not only are the costs of filing and registration of an industrial design very affordable, but the preparation of the application is fairly simple. Moreover, average application pendency times for industrial designs are relatively shorter compared to those for patent applications.

However, despite the benefits of registration of industrial designs and the simplicity of procedures related thereto, most companies involved in software development are not compelled by this protection. This is unfortunate, considering that the addition of industrial design to one's portfolio of intellectual property assets can enable a company to better protect its intangible assets, when patent or trademark protection is difficult to obtain.

Companies in the field of information technology and telecommunications should therefore have a vested interest in giving opportunities to this inexpensive, quick and easy to obtain protection offered by industrial designs



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