

THE CUMULATION OF COPYRIGHTS WITH INDUSTRIAL DESIGN IN THE PROTECTION OF TYPES: A BRIEF INCURSION IN THE ARGENTINE, CHILEAN AND URUGUAY SYSTEMS

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RESUMO

A natureza híbrida das obras de arte aplicada suscita controvérsias em virtude da possibilidade de cumulação de direitos na sua proteção, notadamente o registro de desenho industrial, na esfera da propriedade industrial, e os direitos autorais. Entre as obras de arte aplicada, a questão é particularmente complexa no que se refere à tipografia, à medida que esta conjuga de modo praticamente indissociável forma e função. Internacionalmente os países adotam sistemas distintos quanto à proteção de obras de arte aplicada e, por extensão, de tipografias, dificultando a aquisição de direitos de exclusiva por designers. Para incrementar o conhecimento disponível sobre a proteção dos tipos no exterior, propõe-se análise qualitativa e documental assentada no arcabouço legislativo de países sul-americanos socioeconomicamente similares ao Brasil: Argentina, Chile e Uruguai. Pela análise comparada da legislação desses Estados, pretende-se reunir um corpo de informações que descreva como os tipos podem ser protegidos e em que circunstâncias admite-se a cumulação de direitos. Os resultados demonstram diferenças legislativas significativas: em que pese a possibilidade de cumulação, a aplicação das normas é divergente e sujeita a critérios subjetivos.

PALAVRAS-CHAVE: Propriedade intelectual. Propriedade industrial. Direitos autorais. Obras de arte aplicada. Tipografia.

THE CUMULATION OF COPYRIGHT AND INDUSTRIAL DESIGN ON TYPE PROTECTION: A BRIEF INSPECTION ON ARGENTINE, CHILEAN AND URUGUAYAN SYSTEMS**ABSTRACT**

The hybrid nature of works of applied art rouses controversies in light of the possibility of cumulative rights in their protection, notably design registration, in the field of industrial property rights, and copyright. Among works of applied art, the issue is particularly complex approaching typefaces, as they combine form and function in a manner that is almost non dissoluble. Internationally countries adopt different systems as to the protection of works of applied art and, by extension, typefaces, making it difficult for designers to obtain exclusive rights. In order to increase the available knowledge about type protection abroad, it is proposed a qualitative documental analysis over the legal framework of South American countries socio-economically similar to Brasil: Argentina, Chile and Uruguay. By a compared legislative analysis point of view, the aim is to gather a body of knowledge that describes how types may be protected and under which circumstances cumulative rights are admissible. The results show substantial legislative disparities: although cumulative rights are deemed possible, the application of norms is changeable and subject to subjective criteria.

KEY-WORDS: *Intellectual Property. Industrial Property. Copyright. Works of applied art. Typefaces.*

LA ACUMULACIÓN DE DERECHOS DE AUTOR CON DISEÑO INDUSTRIAL EN LA PROTECCIÓN DE TIPOS: UNA BREVE INSPECCIÓN EN LOS SISTEMAS ARGENTINO, CHILENO Y URUGUAYO**RESUMEN**

El carácter híbrido de las obras de arte aplicadas suscita controversia por la posibilidad de acumular derechos en su protección, en particular el registro de diseño industrial, en el ámbito de la propiedad industrial y el derecho de autor. Entre las obras de arte aplicadas, la cuestión es particularmente compleja en lo que respecta a la tipografía, ya que combina forma y función de una manera casi inseparable. A nivel internacional, los países adoptan diferentes sistemas para la protección de las obras de arte aplicadas y, por extensión, la tipografía, lo que dificulta que los diseñadores adquieran derechos exclusivos. Con el fin de incrementar el conocimiento disponible sobre la protección de tipos en el exterior, se propone un análisis cualitativo y documental basado en el marco legislativo de países sudamericanos socioeconómicamente similares a Brasil: Argentina, Chile y Uruguay. Al comparar la legislación de estos Estados, se pretende recopilar un conjunto de información que describa cómo se pueden proteger los tipos y en qué circunstancias se permite la acumulación de derechos. Los resultados muestran importantes diferencias legislativas: a pesar de la posibilidad de acumulación, la aplicación de las normas es divergente y está sujeta a criterios subjetivos.

PALABRAS CLAVE: Propiedad intelectual. Propiedad industrial. Derechos de autor. Obras de arte aplicadas. Tipografía.

The cumulation of copyright and industrial design on type protection: a brief inspection on Argentine, Chilean and Uruguayan systems

1 Introduction

According to Santos (2018, p. 850), “the study of the field of intellectual property is laborious and controversial”, especially when it raises discussions about “the legal limits of intellectual property rights protections on the same creation”.

Kilmar (2014, p. 8) observes that there are immaterial goods to be protected in the appearance of new creations and in the new use of existing ones. As the author rightly observes, “if some of these creations are difficult to fit into the classic categories of intellectual property rights, others fall into more than one of them”.

Leite (2014) wonders whether this is not the case for industrial designs, understanding that, as they have an imaginative and creative component, they are similar to works of art: “can designs be protected in the same way as works of art?, that is, protected by copyright? (...) will it be possible for the two protections to coexist simultaneously over the same reality?” (LEITE, 2014, p. 1).

Barbosa (2010, p. 6) already said the protection of industrial design is the most “polymorph of all intellectual property rights”, due to its innumerable intersections with other means of appropriability, such as patents, three-dimensional marks and copyrights. For the author, from the intersections, mixed and cumulative forms of protection are born.

It is not by chance that “industrial design is currently the most problematic figure of industrial property, due to its hybrid nature”¹ (MONTAÑO, 2013, p. 115). In her speech, Montaño follows the discussion held by Otero Lastres (2008), being it her reference throughout her work. In an interesting article on the cumulation of copyright and industrial property protection, Ghidini (2016) contextualizes this problem:

In the dominant paradigm which lasted until the second half of the twentieth century, copyright protection of works of practical use having also an aesthetic appeal was based on the premise of the ‘separability’ of the (perception/fruition of) the aesthetic

¹ El diseño industrial es actualmente la figura más problemática de la propiedad industrial por su naturaleza híbrida (MONTAÑO, 2013, p. 115).

from the utilitarian features. This premise was coherent with the typical mode of production consisting of artistic elements added (therefore, also in this second sense, 'applied art') to the functional ones (GHIDINI, 2016, p. 1).

The notion of ornament affixed to industrialized products has gradually become obsolete in face of the economic and technological changes that have occurred since the 19th century. The rise of a functionalist conception of aesthetics, partly due to the influence of the German school Bauhaus, resulted in mass manufacturing of products that merged in a single dimension *form* and *function* (GHIDINI, 2016)².

The greater the fusion between the artistic and functional aspects of the form, the more difficult it is to characterize legal protection. A very emblematic example of this complexity are types³, which, as a genre of graphic creation, sit in a gray area where it is practically impossible to draw any limit (in the accurate balance) between *form* and *function*.

(...) There is no specific legal protection in the legal regime for intellectual property that fully covers typographic creations. We will see in this paper that, despite the attempt at specific international regulation raised decades ago, the corresponding legal protection arises from the convergent application of several regulatory standards for intellectual property (MONTAÑO, 2018, p. 2)⁴.

National and international doctrine and jurisprudence face many difficulties in categorizing the versatility of types, commonly called typography. The contradictions are aggravated by the possibility of cumulation of rights, which is also controversial and poorly understood. The importance of deepening studies on the subject is emphatic, in particular, in the Latin American context, since, as researches Doreste (2016):

Latin American typography has undergone major changes during the past three decades. In several publications, texts and regional forums, it was noted that the "democratization" of typography initiated at the end of the 1980s thanks to the use of digital tools – more affordable and easier to handle than the rest of previous typographic technologies – was a determining factor in activation of typographic production in Latin America (DORESTE, 2016, p. 18).

² "Nothing that is not practical can ever be beautiful, Otto Wagner said" (GHIDINI, 2016, p. 1).

³ Montaño (2018) believes that the appreciation of the typographic form implies different valuations: the aspects that are supported by the original elements of the form (copyright); ornamental functionality (industrial design); ability to fulfill distinctive function (brand); and the possibilities for technological innovation.

⁴ Sin embargo, no hay una protección jurídica específica en el régimen legal de la Propiedad Intelectual que abarque de forma integral a las creaciones tipográficas. Veremos en este trabajo que, a pesar del intento de regulación internacional específica planteado décadas atrás, la protección legal correspondiente surge de la aplicación convergente de diversas normas reguladoras de la Propiedad Intelectual (MONTAÑO, 2018, p. 2).

In view of what the author states, which dates back to the beginning of the development of Latin American typography no more than thirty years ago, the timeliness of studies that provide greater familiarity with the theme is undeniable. One of the fields to be explored is legal, that is, the protection of intellectual creation, necessary for the enforcement of rights.

The World Intellectual Property Organization (WIPO), within the scope of the SCT (Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications), awakened to the issue in 2016, when it promoted discussions about the protection of emerging technologies and new technological designs, including typography itself.

In face of the debate that started, WIPO forwarded a questionnaire to its members, hoping to find out more about the legislative practices of each country. The results of the research demonstrated a highly complex scenario in which, depending on the jurisdiction, types can be protected by different assets⁵.

In fact, alternate protections include copyright, patent, industrial design registration, trademark registration and unfair competition law (OMPI, 2017). In addition, partial or total cumulation of these rights are also possible. The effect of this lack of unifying understandings is the difficulty of characterizing both the object itself and the most adequate protection, especially in highly digitalized markets.

Authorialist legislation and doctrine varies the express treatment of typographic creations, depending on the country. There are circumscriptions in which, by their own history, specific legal references, doctrinal analyzes, and jurisprudential cases are found. In others there are mere references in the list of protected works and some others do not even have an express mention (MONTAÑO, 2018, p. 9)⁶.

That said, in order to increase the available knowledge on the protection of types abroad, it is proposed a qualitative and documentary analysis based on the legislative framework of South American countries socioeconomically similar to Brazil, namely Argentina, Chile and Uruguay. Through the comparative analysis of the legislation of these States, it is intended to gather a body of information that describes how the types can be protected and under what circumstances the cumulation of rights is allowed.

⁵ For more information, see: https://www.wipo.int/edocs/mdocs/sct/en/sct_36/sct_36_2_rev.pdf

⁶ Legislación y doctrina autoristas varían el tratamiento expreso de las creaciones tipográficas, según los países. Hay circunscripciones en las cuales por propia historia se encuentran referencias legales específicas, análisis doctrinarios, casos jurisprudenciales. En otras hay meras referencias en la enumeración de obras protegidas y en algunas otras ni siquiera tienen mención expressa (MONTAÑO, 2018, p. 9).

In item 2, the protection of applied works of art is problematized, emphasizing Brazilian legislation. Item 3 discusses the coexistence of different protection systems on the same intellectual creation and the cumulation of rights. Item 4 presents the results of the research regarding the Argentine, Chilean and Uruguayan systems. Finally, in item 5, the conclusions of the research are detailed.

2 The hybrid nature of applied works of art

Recognizing that the field is fertile in interpretations, the moment seems appropriate to define work of applied art: “it is an artistic creation with utilitarian functions or incorporated into a useful article, whether handcrafted or produced on an industrial scale, such as models of jewellery, goldsmithery, bijouterie, furniture, dresses and decoration” (PARILLI, 2001, p. 14). And the author concludes: “this category has an artistic nature in its form of expression, but its destiny is for industrial use”.

Besides a myriad of other artistic objects of practical use, the types also combine *form* and *function*, being characterized as a work of applied art. Felici (2012, p. 29), when conceptualizing typeface, identifies it as “a collection of characters – letters, numbers, symbols, punctuation marks, etc. – that are designed to work together like the parts of a coordinated outfit”. Lipton (2009), based on Carroll (1994), provides a similar definition:

A "typeface" can be defined as a set of letters, numbers, or other symbolic characters, whose forms are related by repeating design elements consistently applied in a notational system and are intended to be embodied in articles whose intrinsic utilitarian function is for use in composing text or other cognizable combinations of characters (CARROL, 2012, p. 141).

Due to their hybrid nature, works of applied art (as is the case with types) are compatible with copyright and industrial property at the same time (being a creation of form, the bias is given by the industrial design registration). The first issue that arises is recognizing the extent to which these creations obtain shelter from the two branches of intellectual property in the national system.

In Brazil, industrial designs are protected by Law No. 9,279/1996 (the Industrial Property Law, hereinafter LPI), which provides for the registration of “the ornamental plastic shape of an object or the ornamental set of lines and colors that can be applied to a product” (BRASIL, 1996). It is important to highlight that the artistic dimension (*the form*) is the one that receives registration protection; the technical dimension (*the function*) corresponds to patent protection.

“The protection of industrial design, as with any work of art, is centered on its shape, bi or three-dimensional, a form that, itself, must be necessarily disconnected from any inherent functionality” (GUSMÃO, 2015, p. 284)⁷.

From this asymmetry comes the undeniable mismatch between industrial design as a professional activity, strongly oriented by the binomial *form* and *function*, and viable protection in the legal sphere, which splits the elements of creation in different industrial property assets. In the meaning of the law, industrial design is only *form*.

The interesting thing is that, although it is particular to the registration of industrial design to confer rights on form, the legislation stipulates limits, excluding works of a purely artistic character from its domain⁸. In other words, to deserve protection, it is not enough that the form is not essentially technical or functional: it must also not be essentially artistic.

Works of art are granted protection under Law No. 9,610/1998 (the Copyright Law, hereinafter LDA), which covers “creations of the spirit, expressed by any means⁹ or fixed on any medium” (BRASIL, 1998). Included in the list of protected expressions (considered as merely exemplifying, as the wording of article 7 of the LDA demonstrates) are the works of drawing, painting, engraving, sculpture, lithography and kinetic art.

Barbosa (2010) stresses that purely aesthetic creations, without application to industrial products, can enjoy copyright protection, while so-called “works of applied art”, in qualifying as a type of manufacturing, fall within the scope of the industrial property, more specifically the realm of industrial design. Bittar (2005) clarifies:

The former meet purely intellectual demands (for aesthetics or knowledge). They have autonomous aesthetic value, regardless of their origin, destination or actual use. The attribute ends in itself, in the forms created (romance, music, painting, poetry). The latter aim to achieve direct material utilities. They only have a utilitarian function. They materialize in an object of technical application (romance, music, painting, poetry) (BITTAR, 2005, p. 21).

⁷ In this sense, "the differentiation between the institutes is due to the essentially industrial destination of industrial design (aptitude to serve as a model for the manufacture of a product) whereas the artistic work (...) does not have this characteristic industrial destination" (GUSMÃO, 2015, p. 288).

⁸ “Art. 98. Any work of a purely artistic character is not considered an industrial design” (BRASIL, 1996).

⁹ WIPO (1980, pp. 12-13) teaches that one of the fundamental postulates is that the idea cannot be protected by copyright, “but as long as that idea has been elaborated and expressed, protection by copyright exists in relation to words, notes, drawings, etc. that somehow cover the idea. In other words, it is the expression that is susceptible to protection and not the idea itself”.

A priori, it is tempting to believe that these laws protect different subjects and the boundaries between art and industry are perfectly demarcated. However, criticizes Cerqueira (2010), the differentiation between industrial designs and purely artistic creations is subtle:

But the distinction based on the intrinsic nature of the object or its artistic merit, which would be the most natural, is not to be accepted, in practice, for the countless questions that it would raise whenever there were no extreme cases, in which no doubt is possible. In fact, no one would mistake a figurative work of art, an oil painting or a statue for an industrial design. The difficulty of the distinction arises, precisely, in the cases that are in an intermediate zone, between the fine arts and the industrial arts, when the object presents an accentuated artistic character, being, at the same time, with the characteristics of an industrial article (CERQUEIRA , 2010, p. 227).

Until 1998, Brazilian legislation governed works of applied art under copyright, but conditioned their protection to the possibility of dissociating their artistic value from the industrial character of the object on which they were applied (BRASIL, 1973). Under the current law regime, there is no mention of works of applied art, causing uncertainty regarding the protection of these creations and the admissibility of double protection, given that Article 7 of the current LDA is merely exemplifying.

Gusmão (2015, p. 288) warns that, “although each of the aforementioned institutes has its own characteristics and functions, the cumulation of protections on the same object, not being prohibited by the legal text, is allowed”. The opposite position seems to support Chaves (1984), who, relying on Cerqueira (1946), says that it is not reasonable to equate industrial designs with works of pure art simply because some products have an artistic character.

Kilmar (2014, p.13) is more cautious in her positions and makes explicit doctrine cracks with regard to double protection: “part of it [of the doctrine] understands the possibility of cumulative protective regimes, with or without exceptions in this understanding, while another segment defends the need to choose only one among the protective regimes”.

Montaño (2013, p. 115) expresses her agreement, saying the position of the different legislations is not uniform: “some protection systems allow the cumulation of legal regimes, either in absolute or relative form. Other design protection systems do not allow the said cumulation: protection is exclusively under the regime of copyright or industrial property”¹⁰.

Conceptually, cumulating or overlapping rights means “protecting the same matter or object of an intellectual property by several different assets of intellectual property, that is,

¹⁰ Algunos sistemas de protección admiten la acumulación de regímenes jurídicos, ya sea en forma absoluta o relativa. Otros sistemas jurídicos de protección del diseño no admiten dicha acumulación: la protección es exclusivamente según el régimen de los derechos de autor o de la propiedad industrial (MONTAÑO, 2013, p. 115).

under the same manifestation or function of an asset, there is more than one legal monopoly” (MEDEIROS, 2017, p. 304). They are not competing protections, but affect the same aspect of intellectual creation.

In view of this narrative, it makes sense to distinguish the extent to which the cumulation occurs and to what extent the protection of copyright and industrial property overlap with works of applied art. To deepen the issue, an inspection is made on the legal framework of Brazilian intellectual property.

3 Cumulation of rights

“The immateriality of the protected asset is a factor that facilitates the accumulation of protections (or overlap, as some authors prefer), at the same time that it can generate complications” (MORO, 2009, p. 245). Medeiros (2017) justifies the occurrence of overlapping of rights in the fragmented origin of intellectual property: the complexity of the information society and new technologies attenuate the limits between contiguous forms of protection:

It is observed that, increasingly, the scope of protection of one right is very close to the scope of protection of another right, making the interface between them complex, which challenges the traditionalist conception of intellectual property and the existing balance in the system. Among the direct consequences of this phenomenon is the overlapping of intellectual property rights, a problem that goes beyond the simple question of categorizing a particular object of an intellectual property in a specific protection regime (MEDEIROS, 2017, p. 304).

In international law, both the Paris Union Convention for the Protection of Industrial Property (CUP) and the TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights), agreements to which Brazil is a signatory, oblige the protection of industrial designs. The legal texts do not detail how the guarantees must be given, which means that the State has the autonomy to grant the protection that it considers most appropriate¹¹.

The Berne Union Convention on the Protection of Literary and Artistic Works (CUB), on the other hand, places works of applied art on the list of protected intellectual manifestations, although granting States permission to discipline the conditions of protection. In the Guide to

¹¹ When analyzing the intersections between protection systems, Leite (2014) highlights a gap in the relationship between industrial designs and copyright in CUP, which does not confirm anything about the possibility of being protected by this branch of law.

the Berne Convention (1980), we can glimpse the divergences that already surrounded the debate:

2.6.j) applied works of art: the Convention uses this general formula to cover contributions of an artistic nature that are provided by the authors of designs or models in bijouterie, jewellery, goldsmithery, furniture, painted papers, ornaments, clothing, etc. However, the extension of this category allows national laws to determine the conditions for their protection (see Article 2 (7)) and in this respect the differences are numerous. It should be noted that the Tunis Standard Law makes the terms "works of applied art" accompany with precision in terms of its two possible sources: "whether it is artisan works or works produced according to industrial processes", being certain that the former occupies an important place in developing countries (WIPO, 1980, p. 18).

Still in the search for intersections between industrial property and copyright, there is another important ingredient to CUB to consider: although it is reserved to States the power to determine "the scope of application of laws regarding works of applied art and industrial designs and models, as well as the conditions for the protection of such works", for works protected exclusively as designs in the country of origin, only equivalent protection can be claimed in other unionist countries¹² (BRASIL, 1975).

No less important is the fact that CUB provides for the protection of works of applied art through copyright, reports Leite (2014, p. 35), who states: "the Berne Convention recognized the existence of different protection systems, but it chose to leave the choice of one of the systems to the discretion of the subscribing countries, accepting, however, the possibility of cumulation of protections".

Leite (2014), recognizing the impasse in the categorization of works of applied art, conjectures the existence of three protective regimes that diverge in the approach to cumulation of rights: i) the system of non-cumulation, separation or alternation; ii) the absolute cumulation system; and iii) the system of relative, partial or restricted cumulation, as already observed by Otero Lastres (2008).

The non-cumulation system is based on the premise that the protection granted by industrial property does not affect that of copyright, and vice versa, as they would be mutually exclusive. "The fate that the author gives to his creation is very important, so the criterion of

¹² Esta disposição reenvia para as legislações nacionais o cuidado de regularem a duração da proteção destas duas categorias particulares de obras [obras fotográficas e obras de arte aplicada], mas, a partir da revisão de Estocolmo (1967), fixa um mínimo: vinte e cinco anos a contar da sua realização. Este prazo é o resultado de um compromisso que se explica pelas divergências existentes no seio da União quanto aos critérios segundo os quais as obras das artes aplicadas podem ser protegidas pelo direito de autor ou regidas pela legislação específica sobre desenhos e modelos (habitualmente por via de registo) (OMPI, 1980, p. 55).

the fate of the work seems to be relevant, as a way of distinguishing drawings or models from works of art" (LEITE, 2014, p. 27).

That is, in situations that may occur the simultaneous application of the rules that govern industrial property law and copyright, the application of one right ends up excluding the other, and yet, when considering the purposes and consequences of protections, it can -if conflicts occur between the author's moral rights, for example, and the property rights of the company's legal guardian (SANTOS, 2018, p. 863).

In the same sense, Barbosa (2006, apud SANTOS, 2018, p. 863) says: "the protection of copyright can be added to that of industrial property rights; but they cannot conflict with each other, that logic repels the coexistence of two excluding exclusives on the same object". It is worth weighing, for the sake of the contradictory, that "the position of absolute impossibility of cumulating protective regimes does not seem reasonable, moreover, for ignoring the new ways of using intangible assets" (KILMAR, 2014, p. 20).

In the system of absolute cumulation, which is rooted in French legislation, the coincidence of rights is integral, with no need to choose one or the other, as both are applicable¹³. In line with Leite (2014, p. 27), "(...) means that any aesthetic creation (pure or work of applied art and industrial design or model) is protected by copyright, being irrelevant the fate, the author or the artistic value of creation".

Otero Lastres (2005, p. 93) is correct in associating the system of absolute cumulation with the theory of the unity of art, elaborated by Eugène Pouillet. The author asserts that, in this system, "every drawing, whatever its degree of creativity and originality, is protected by intellectual property and if, in addition, it is registered as a drawing it is protected simultaneously by the design law and, therefore, by property industrial"¹⁴.

"Now, if industrial design is the result of man's creation of aesthetic form, it is necessarily a work of art. Some call it applied art or decorative art, but it is still art, therefore subject to protection by copyright" (GUSMÃO, 2015, p. 289). Still according to Gusmão, it is not for the legal interpreter to "determine from what degree, moment, or sufficient artistic content, there will be protection".

¹³ "(...)it seems clear that the distinction between design and work of applied art (artistic design or model), loses almost all relevance in the systems of absolute cumulation as both will be equally protected by the two legal regimes, copyright and industrial property" (LEITE, 2014, p. 28).

¹⁴ Sistema según el cual, como es sabido, todo diseño, cualquiera que sea su grado de creatividad y de originalidad, es protegible por la propiedad intelectual y si, además, se registra como diseño es protegido simultáneamente por la ley de diseño y, por tanto, por la propiedad industrial (OTERO LASTRES, 2005, p. 93).

The French position – which is increasingly gaining adherents in Latin tradition and legislation – does not make any exclusive distinction between applied art and industrial design and, therefore, admits the possibility of protection accumulated by both systems, whenever, of course, the asset over which protection is sought meets the existential requirements established in the respective regimes (PARILLI, 2001, p. 21)¹⁵.

Finally, the system of relative, partial or restricted cumulation allows for double protection, provided that specific requirements of each branch of law are met. "In this system, the possibility of a design or model being protected by copyright does not rule out (as in the separation system), but this protection is not attributed to any design" (LEITE, 2014, p . 28).

Otero Lastres (2005, p. 115), who opposes himself to the effects of the theory of the unity of art and the system of absolute cumulation, declares himself in favor of the partial system; for him, it is less serious "to be mistaken and deny protection as an artistic design to one that really is, than to choose to extend the protection of intellectual property to any design, whatever the degree of creativity and originality it possesses"¹⁶.

Cook (2012) notes that the obligation to protect works of applied art, imposed by CUB, is assumed by countries to the extent that such creations are considered works of art. When describing the characteristics of European doctrine, Cook explains that countries tend to demand a higher level of originality from industrial designs, in order to benefit from the protection conferred to works of applied art. For its part, Otero Lastres says:

According to what has just been said, it is clear that, at a conceptual level, the work qualifying as an artistic drawing can also give rise to an ordinary drawing, obtaining protection as such whenever it meets the requirements of novelty and singular character. While an ordinary drawing, even though it is new and has a unique character, it cannot originate an artistic drawing because it does not reach a degree of creativity and originality typical of the artistic work (OTERO LASTRES, 2005, p. 114)¹⁷.

¹⁵ Attention is drawn to Leite's speech (2014, p. 42-43) in the opposite sense: "In conclusion, through a brief study of the French legal regime we find that the absolute cumulation system has an almost unquestionable validity France, assigning copyright protection to all industrial designs or models, whatever their merit or artistic level, equating them, indiscriminately, with works of art (pure). It is, therefore, a unique regime, namely, within the EU and, possibly, even on a global scale, few countries will have a system similar to the French".

¹⁶ Porque, a la vista de las criticables consecuencias a las que conduce dicho sistema (vid. OTERO LASTRES, «El Modelo...cit. p. 156 y ss), es menos grave para los intereses implicados equivocarse y negar la protección como diseño artístico a uno que realmente lo es, que optar por extender la protección de la propiedad intelectual a todo diseño cualquiera que sea el grado de creatividad y de originalidad que posea (OTERO LASTRES, 2005, p. 115).

¹⁷ De acuerdo con lo que se acaba de decir resulta que, a nivel conceptual, la obra calificable como diseño artístico puede dar lugar también a un diseño ordinario, obteniendo la protección como tal siempre que reúna los re-

Leite (2014), evaluating the words of the Italian author Piola-Caselli, contextualizes:

According to this author, if it is possible to consider that a design or model (the form) can be protected as a work of pure art, when dissociated from the elements that give it an industrial character, then we will be facing an applied work of art. Conversely, if a design or model contains an artistic element, but it cannot be conceived (as an independent work of art) outside the product in which it is incorporated, then we are facing a design (LEITE, 2014, p. 22).

In Brazil, as theoretically the cumulation is prohibited neither by the LPI nor by the LDA, the hypothesis of a separation system in force in the country is ruled out. At the same time, it must be remembered that purely artistic works are not entitled to protection as industrial design, which also allows to refute the incidence of an absolute cumulation system. It is reasonable to propose that the Brazilian system is that of partial cumulation, a thesis also defended by Leite (2014), who in turn supports Newton Silveira's ideas.

The types, as a work of applied art, in spite of being, in principle, registrable as industrial design, are not due to illegal regulations:

Typefaces are not registered as industrial design, as they do not constitute the ornamental plastic shape of an object or the pattern of lines and colors intended to be applied to a product. Applications that claim protection for this matter will be granted registration under art. 106 of the LPI and will be subject to an invalidation procedure for infringing art. 95 of the same law (INPI, 2019).

As creations of the spirit, on the other hand, types are safeguarded by copyright, which makes no judgment about the artistic merit of works of art, nor does it differentiate them in nature (pure or applied). Based on the assumption that types constitute aesthetic creations, it is natural to highlight their intersection with the works of drawing, painting, engraving, sculpture, lithography and kinetic art, regardless of support and form of fixation.

Having briefly painted the legislative landscape, as well as the discussion about protection systems, an analysis of the legal aspects of the Argentine, Chilean and Uruguayan system will now be conducted, with regard to their copyright and industrial property laws. It should be noted that the investigation of national laws will be guided by the identification of the possible cumulation of exclusive rights.

quisitos de la novedad y del carácter singular. Mientras que un diseño ordinario, aunque sea nuevo y posea carácter singular, no puede originar un diseño artístico por no llegar al grado de creatividad y de originalidad propio de la obra artística (OTERO LASTRES, 2005, p. 114).

To guide the research and ensure fidelity to the scientific method, it will be researched: a) accession to CUP; b) accession to CUB; c) accession to TRIPS; d) rules of copyright law; e) norms of industrial property law; f) provision or prohibition of cumulative rights; and g) provision or prohibition of type protection in the applicable laws.

4 Inspection on South American laws

Argentina joined the CUP through the Lisbon Act¹⁸ (1966); later, he would also sign the Stockholm Act¹⁹ (1980). Similarly, Uruguay was a contracting party to the same acts, signed, respectively, in 1967 and 1979. Chile, however, promoted its accession only to the Stockholm Act (1991)²⁰. It is this Act, therefore, that regulates the relations between the three countries under that international treaty²¹.

In terms of copyright, Argentina and Uruguay joined the CUB through the Brussels Act²², both in 1967; Chile acceded in 1970. The three nations would also become contracting parties to the Paris Act²³: Argentina would do so for Articles 22-38 in 1980 and for Articles 1-21 in 1999. Chile signed in 1975. Uruguay joined in 1971, ratifying it in 1979²⁴.

As it can be seen, the integration of these three South American countries into the international intellectual property system took place only during the second half of the 1960s. Chile's participation is especially late, taking place in the following decade²⁵.

In relation to TRIPS, it is noted that the three nations are signatories to the Marrakesh Treaty, signed in the scope of the final minutes of the Uruguay Round, in 1994. It was through this treaty that the World Trade Organization (WTO) was established as successor and substitute of the General Agreement on Tariffs and Trade (GATT). For the record, the dates of accession to the GATT are: Argentina in 1967; Chile in 1949; Uruguay in 1953. Brazil joined early, in 1948²⁶.

¹⁸ Lisbon Act (1958), adopted on October 30, 1958, with effects from January 3, 1962.

¹⁹ Stockholm Act (1967), adopted on July 13, 1967, with effects from April 25, 1970.

²⁰ For information on the CUP Acts and membership history, see: <https://www.wipo.int/treaties/en/ip/paris/>

²¹ Article 27 (1). This Act shall, as regards relations between the countries to which it applies, and to the extent that it applies, replace the Paris Convention of 20 March 1883 and the subsequent Acts of Review (WIPO, 2020a).

²² Brussels Act (1948), adopted on June 25, 1948, with effects from July 31, 1951.

²³ Paris Act (1971), adopted on July 23, 1971, with effects from October 9, 1974.

²⁴ For information on the CUB Acts and membership history, see: <https://www.wipo.int/treaties/en/ip/berne/>

²⁵ Compared to neighboring countries, Brazil entered the system notably earlier, having been one of the original members of the Paris Convention, signing it in 1883 and ratifying it the following year, and acceding to the Berne Convention at the beginning of the 20th century (1922).

²⁶ For information on membership history, see: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm

It is worth mentioning, albeit *en passant*, the Protocol for Harmonization of Standards in Matters of Industrial Designs²⁷, signed under the Treaty of Asunción. In the terms of article 6 of the instrument, “the protection conferred to Industrial Design does not affect the protection that the design may deserve under other intellectual property protection regimes” (MER-COSUR, 1998). Important as it may be, the Harmonization Protocol does not apply in any of the founding countries of Mercosur (MONTAÑO, 2013).

Confirming that Argentina, Chile and Uruguay are subject to the rules of the two main conventions in the field of intellectual property, in addition to being also subordinated to TRIPS, it is now necessary to follow the legal framework of each country individually.

4.1 Argentina

In Argentina, industrial designs are regulated by Decree-Law No. 6.673, of 1963²⁸. In the preamble there are already nuances in the interpretation of the cumulation of rights:

[Seen and considering] That it is necessary, then, to fill the void existing in our positive right regarding industrial models or designs, establishing for them a register: admit them to registration regardless of their artistic value and allow, when a model or industrial design has artistic value, its author to rely on the Intellectual Property law (ARGENTINA, 1963)²⁹.

The Decree-Law is relatively short, concentrating only 31 articles. By Article 3, industrial design³⁰ is considered the forms and the appearance incorporated or applied to an industrial product that give it an ornamental character.

Protection is granted by registration (Article 4), excluding industrial designs published or publicly exploited on a date prior to the date of deposit (with the exception of the priority right and the grace period³¹), those who do not have “their own and new physiognomy”, those

²⁷ See: MERCOSUL/CMC/DEC. N° 16/98. The Protocol is an integral part of the Asunción Treaty and was signed in Rio de Janeiro, on the 10th of December 1998.

²⁸ For information, see: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/25000-29999/27687/norma.htm>.

²⁹ VISTO Y CONSIDERANDO: Que es necesario entonces llenar el vacío existente en nuestro derecho positivo respecto de los Modelos o Diseños Industriales, estableciendo para ellos un registro: admitirlos al registro independientemente de su valor artístico y permitir que cuando un modelo o diseño industrial tenga valor artístico, su autor pueda ampararse en la ley de Propiedad Intelectual (ARGENTINA, 1963).

³⁰ The Argentine Decree-Law actually mentions industrial models and designs, which will be cited simply as industrial designs in the present work.

³¹ The priority right is guaranteed in art. 4 of the CUP and grants the applicant of a patent, industrial design or mark the possibility of filing subsequent applications for the same subject in other countries, maintaining the filing date in the country of origin. To benefit from it, subsequent filings must occur within twelve months of the

that have elements imposed by the function of the product, those that result from the mere change of colors and, finally, those that violate morality and good customs (article 6).

Industrial designs, if granted, are valid for a period of five years, renewable for other two five-year periods, reaching the limit of fifteen years (Article 7). It should be noted that the claim for the rights acquired by the registration takes place exclusively at the courts, where the substantive issues are also assessed, if applicable³².

Special attention is paid to the first paragraph of article 28, transcribed below: “when a model or industrial design registered in accordance with this decree may also have been the subject of a deposit under Law 11,273, the author may not invoke it simultaneously in the judicial enforcement of their rights”³³ (ARGENTINA, 1963).

Law 11.723³⁴ is the one that regulates, in the country, since 1933, the copyright on literary, artistic and scientific works. In addition to the preamble to Decree-Law No. 6,673 transcribed earlier (*seen and considering ...*), this indication is added that the absolute cumulation is rejected in Argentine legislation.

Already investigating this second rule, it is noteworthy, at first, the fact that “models and works of art or science applied to commerce or industry” are included in the list of protected expressions³⁵ (ARGENTINA, 1933). Hence, at least theoretically, the viability of protecting through copyright objects with industrial aptitude is verified.

filming date of the initial application, in the case of a patent, or within six months, in the case of industrial design or brand. The grace period, on the other hand, is a provision accepted by some laws by which the novelty of the patent or industrial design disclosed before the filing is preserved, provided that such advertising has not occurred on a date that exceeds the legally stipulated period.

³² Article 12 of the Decree-Law governs: the application for registration cannot be refused except for non-compliance with the formal requirements set forth in Article 10, whereby the application must contain the application, proof of payment, drawings, description and power of attorney, if any (ARGENTINA, 1963).

³³ ARTICULO 28. – Cuando un modelo o diseño industrial registrado de acuerdo con el presente decreto haya podido también, ser objeto de un depósito conforme a la Ley 11.723, el autor no podrá invocarlas simultáneamente en la defensa judicial de sus derechos. Cuando por error se solicite una patente de invención para proteger un modelo o diseño industrial, objetada la solicitud por la Dirección Nacional de la Propiedad Industrial por tal motivo, el interesado podrá convertirla en solicitud de registro de modelo o diseño (ARGENTINA, 1963).

³⁴ Para informações, consultar: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/40000-44999/42755/texact.htm>.

³⁵ Artículo 1º. – A los efectos de la presente Ley, las obras científicas, literarias y artísticas comprenden los escritos de toda naturaleza y extensión, entre ellos los programas de computación fuente y objeto; las compilaciones de datos o de otros materiales; las obras dramáticas, composiciones musicales, dramático-musicales; las cinematográficas, coreográficas y pantomímicas; las obras de dibujo, pintura, escultura, arquitectura; modelos y obras de arte o ciencia aplicadas al comercio o a la industria; los impresos, planos y mapas; los plásticos, fotografías, grabados y fonogramas, en fin, toda producción científica, literaria, artística o didáctica sea cual fuere el procedimiento de reproducción. La protección del derecho de autor abarcará la expresión de ideas, procedimientos, métodos de operación y conceptos matemáticos pero no esas ideas, procedimientos, métodos y conceptos en sí (ARGENTINA, 1933). The regulation of this law was given by Decree No. 41,223, of 1934, which detailed the administrative procedures. According to what is set forth, registration, although optional, requires the filing of “a copy or photograph of the model or work, accompanied by a written list of the characteristics or details that cannot be seen in the copies or photographs” (ARGENTINA, 1934).

In the case of non-protectable expressions, Argentine law provides only that the protection of copyright does not comprise ideas, procedures, methods of operation and mathematical concepts per se (note that their expression is liable to be protected). Other exclusion hypotheses are not identified.

From the joint reading of the standards in reference, it is interpreted that there are no obstacles to the double protection of industrial designs, which, in theory, finds support in both copyright and industrial property. However, in the form of Decree-Law no. 6,673, the title-holder must choose one of the ways to contest possible violations before courts.

It is understood that the Argentine system is of partial cumulation, offering double protection, with reservations. Conceptually, the laws evaluated do not reject the cumulative acquisition of rights over a given intellectual creation – of course, industrial design does not undergo more than a formal examination before being granted, and registration is optional in the copyright sphere. There is no prior critical verification of the proper framing of the work to the chosen tutelage.

Lima (2014, p. 96) has a similar opinion: “in the Argentine Republic ‘double protection’ is permitted, that is, the protection of the same works under two different legal regimes, but in the event of a violation of rights by a third party, the rights holder can only sue under one of the two legal figures”. The exercise of the right, in this way, is restricted by the mandatory choice, that is, it must be subordinated to the alternative that, presumably, the holder considers to be more advantageous.

4.2 Chile

In Chile, Law No. 19,039³⁶, enacted in 1991, regulates industrial property rights. The law distinguishes “industrial designs” from “industrial designs” (which will henceforth be simply called “industrial designs”):

Article 62. Under the designation of industrial design, any three-dimensional shape associated or not with colors is understood, and any industrial or artisanal article that serves as a standard for the manufacture of other units and that is distinguished from its similars, whether by its shape, geometric configuration, ornamentation or a combination of these, whenever these characteristics give it a special appearance that can be perceived through vision, in such a way as to result in a new physiognomy. Under the designation dibujo industrial, any arrangement, set or combination of figures, lines

³⁶ For information, see: <https://www.bcn.cl/leychile/navegar?idNorma=30406>.

or colors that is developed in a plan for its incorporation into an industrial product for ornamentation purposes and that gives this product a new appearance (CHILE, 1991)³⁷.

Next, it is possible to confirm the possibility of cumulating ownership of industrial designs with copyrights (article 62 bis³⁸), governed by Law No. 17,336, which will be discussed below. For now, suffice it to say that in such law there is a reciprocal provision, with which it is ensured that copyright and related rights do not affect the protection that is granted to the holder of rights by the Industrial Property Law (article 89)³⁹.

The hypotheses of exclusion from protection cover industrial designs whose appearance is dictated entirely by technical or functional considerations, as well as products of clothing of any nature (Article 62 *ter*). The registration granted is valid for a non-extendable term of ten years (Article 65), a noticeably shorter period of time than that generally granted by other jurisdictions for such asset.

In the scope of copyright, Law nº 17.336⁴⁰, of 1970 is used. In the list of protected parties, “the sculptures and works of analogous figurative arts rest, even if they are applied to industry, whenever their artistic value can be considered with separation from the industrial character of the object to which they are incorporated”, as well as “the designs or textile models” (article 3, items 12 and 18; CHILE, 1970)⁴¹.

³⁷ Artículo 62. – Bajo la denominación de diseño industrial se comprende toda forma tridimensional asociada o no con colores, y cualquier artículo industrial o artesanal que sirva de patrón para la fabricación de otras unidades y que se distinga de sus similares, sea por su forma, configuración geométrica, ornamentación o una combinación de éstas, siempre que dichas características le den una apariencia especial perceptible por medio de la vista, de tal manera que resulte una fisonomía nueva. Bajo la denominación de dibujo industrial se comprende toda disposición, conjunto o combinación de figuras, líneas o colores que se desarrollen en un plano para su incorporación a un producto industrial con fines de ornamentación y que le otorguen, a ese producto, una apariencia nueva. Los dibujos y diseños industriales se considerarán nuevos en la medida que difieran de manera significativa de dibujos o diseños industriales conocidos o de combinaciones de características de dibujos o diseños industriales conocidos. Los envases quedan comprendidos entre los artículos que pueden protegerse como diseños industriales, siempre que reúnan la condición de novedad antes señalada. Los estampados en géneros, telas o cualquier material laminar quedan comprendidos entre los artículos que pueden protegerse como dibujos industriales, siempre que reúnan la condición de novedad antes señalada (CHILE, 1991).

³⁸ Artículo 62 bis.... - La protección conferida a los dibujos y diseños industriales establecida en esta ley se entenderá sin perjuicio de aquella que pueda otorgárseles en virtud de las normas de la ley Nº 17.336 (CHILE, 1991).

³⁹ Artículo 89.- Los derechos otorgados por esta ley a los titulares de derechos de autor y conexos, no afectan la protección que les sea reconocida por la Ley de Propiedad Industrial y otras disposiciones legales vigentes que no se deroguen expresamente (CHILE, 1970).

⁴⁰ For information, see: <https://www.bcn.cl/leychile/navegar?idNorma=28933&buscar=Propiedad%2BIntelectual>.

⁴¹ Artículo 3º – Quedan especialmente protegidos con arreglo a la presente ley: 1) Los libros, folletos, artículos y escritos, cualesquiera que sean su forma y naturaleza, incluidas las enciclopedias, guías, diccionarios, antologías y compilaciones de toda clase; 2) Las conferencias, discursos, lecciones, memorias, comentarios y obras de la misma naturaleza, tanto en la forma oral como en sus versiones escritas o grabadas; 3) Las obras dramáticas, dramático-musicales y teatrales en general, así como las coreográficas y las pantomímicas, cuyo desarrollo sea fijado por escrito o en otra forma; 4) Las composiciones musicales, con o sin texto; 5) Las adaptaciones radiales o

According to the Copyright Guide issued by the National Council of Culture and Arts (2017), a body linked to the Chilean government, copyright does not protect ideas, either facts or data. It is noteworthy that this exclusion does not appear to be traced to specific provisions of Law No. 17,336, however.

In addition, it is highlighted the mention to typography in this Guide, in the following terms: “to use a painting, sculpture, print, typography, poster, photograph or any other work with a fixed image, contact CREAIMAGEN⁴², the managing entity collective that governs the rights of painters, sculptors, photographers, graphic designers, etc.” (CONSEJO NACIONAL DE LA CULTURA Y LAS ARTES, 2017, p. 67).

The importance of the passage in question lies not in the description of the administrative procedure, but in the fact that it places types in the domain of copyright, which the legislation does not do. If the author's authorization is necessary for the legal use of types, it is deduced that they are works that are susceptible to protection, otherwise, consent would not be discussed.

In light of the above, there are concrete indications that the Chilean system allows for the cumulation of rights. It remains to be researched what kind of cumulation we are talking about: whether absolute or relative; judging by the criterion of dissociation of the form inscribed in the copyright law, it is a case of partial cumulation system.

4.3 Uruguay

televisuales de cualquiera producción literaria, las obras originalmente producidas por la radio o la televisión, así como los libretos y guiones correspondientes; 6) Los periódicos, revistas u otras publicaciones de la misma naturaleza; 7) Las fotografías, los grabados y las litografías; 8) Las obras cinematográficas; 9) Los proyectos, bocetos y maquetas arquitectónicas y los sistemas de elaboración de mapas; 10) Las esferas geográficas o armilares, así como los trabajos plásticos relativos a la geografía, topografía o a cualquiera otra ciencia, y en general los materiales audiovisuales; 11) Las pinturas, dibujos, ilustraciones y otros similares; 12) Las esculturas y obras de las artes figurativas análogas, aunque estén aplicadas a la industria, siempre que su valor artístico pueda ser considerado con separación del carácter industrial del objeto al que se encuentren incorporadas. 13) Los bocetos escenográficos y las respectivas escenografías cuando su autor sea el bocetista; 14) Las adaptaciones, traducciones y otras transformaciones, cuando hayan sido autorizadas por el autor de la obra originaria si ésta no pertenece al patrimonio cultural común; 15) Los videogramas y diaporamas, y 16) Los programas computacionales, cualquiera sea el modo o forma de expresión, como programa fuente o programa objeto, e incluso la documentación preparatoria, su descripción técnica y manuales de uso. 17) Las compilaciones de datos o de otros materiales, en forma legible por máquina o en otra forma, que por razones de la selección o disposición de sus contenidos, constituyan creaciones de carácter intelectual. Esta protección no abarca los datos o materiales en sí mismos, y se entiende sin perjuicio de cualquier derecho de autor que subsista respecto de los datos o materiales contenidos en la compilación; 18) Los dibujos o modelos textiles (CHILE, 1970). It is clarified in due course that “the law marks a wide list of works specially protected by copyright. However, this list is not exhaustive, as there may be literary, artistic or scientific works outside that list and may also be subject to protection” (CONSEJO NACIONAL DE LA CULTURA Y LAS ARTES, 2017, p. 23).

⁴² For information, see: <https://www.creaimagen.cl/>.

In Uruguay, patents and industrial designs are regulated by Law No. 17,164⁴³, of 1999. Specifically regarding the latter, Article 86 governs: “industrial creations of an ornamental nature which, incorporated or applied to an industrial or handcrafted product, are considered patentable industrial designs, give it a special appearance”⁴⁴ (URUGUAY, 1999).

According to Uruguayan law, the protection afforded to industrial design does not exclude or affect that obtained under other intellectual property protection regimes (Article 87). The legislator, of course, aware of the bordering zone between neighboring rights, chose to give permission for cumulation, to the detriment of the adoption of the system of separation of rights.

Among the non-protectable creations, designs that imply realizations of works of fine art are discriminated (article 89, F), leading to the belief that the system is not guided by the absolute cumulation of rights, considering the legal provision (similar, as seen, to article 98 of the corresponding Brazilian law).

In addition, designs devoid of new and original character are excluded from patent protection, those that satisfy technical requirements, those that do not have a concrete shape, those that consist of a mere change in the colors of known designs and which are contrary to public order or morality.

Montaño (2013) explains that the current provisions of Uruguayan industrial property legislation are harmonized with Mercosur Decision 16/98, even though the ratification of the instrument itself has not been arranged. According to the author, the express reference to the possibility of cumulative protection is one of the legislative innovations.

In terms of copyright, Law No. 9,739⁴⁵, enacted in 1937, contains, under intellectual, scientific or artistic production (article 5), “works of drawing and crafts” and “models or creations that have artistic value in matters clothing, furniture, decoration, ornamentation, ornaments or precious objects, whenever they are not covered by the current legislation on industrial property”⁴⁶ (URUGUAY, 1937).

⁴³ For information, see: <https://legislativo.parlamento.gub.uy/temporales/leytemp9185157.htm>.

⁴⁴ Artículo 86.— Consideranse diseños industriales patentables a las creaciones originales de carácter ornamental que incorporadas o aplicadas a un producto industrial o artesanal, le otorgan una apariencia especial. Ese carácter ornamental puede derivarse, entre otros, de la forma, la línea, el contorno, la configuración, el color y la textura o el material (URUGUAY, 1999).

⁴⁵ For information, see: <https://legislativo.parlamento.gub.uy/temporales/leytemp2714509.htm>.

⁴⁶ Artículo 5º. A los efectos de esta ley, la producción intelectual, científica o artística comprende: Composiciones musicales con o sin palabras, impresas o en discos, cilindros, alambres o películas, siguiendo cualquier procedimiento de impresión, grabación o perforación o cualquier otro medio de reproducción o ejecución: Cartas, atlas y mapas geográficos; Escritos de toda naturaleza; Folletos; Fotografías; Ilustraciones; Libros; Consultas profesionales y escritos forenses; Obras teatrales, de cualquier naturaleza o extensión, con o sin música; Obras plásticas relativas a la ciencia o a la enseñanza; Obras de cine mudo, hablado o musicalizado; Obras de dibujo y

Now, if the copyright law limits its protection to works not accepted by industrial property, and this does not exclude the protection obtained in the former, what is the hierarchy between the rules, if any? At first, a partial cumulation system seems to be in force, depending on the merit of the work (Article 5 mentions models or creations that have artistic value).

Montaño (2018) states that the revision of the Uruguayan Copyright Law, by sanction of Law nº 17.616, in 2003, added computer programs to the list of protected works. In doing so, however, the legislator simply transcribed the wording of Article 5 of the 1937 law, which had been abandoned over the years. In spite of the legislative revision carried out in the industrial property regime, that of copyright has retreated understandings.

“In this way, as long as there is no regulatory change to rectify this situation, we have to affirm that (...) in Uruguay it is not possible to combine protection when it comes to works protected by copyright and other possible industrial property” (MONTAÑO, 2013, p. 121-122). At least, that's what happens with industrial designs.

4.4 Discussion

Based on the data obtained from the analysis of the legislation, it is possible to propose some interpretations (Chart 1). It makes sense to start the reflection by asking if the laws expressly mention the cumulation of copyright with the registration of industrial design. It appears that Brazil is the only one of the four nations that has not incorporated this type of provision into legislation. Chile and Uruguay have provisions expressed in the respective laws – even if, as with Law No. 9,739 in Uruguay, in the (contradictory) sense of separation.

Argentina, through Decree-Law No. 6,673, authorizes the cumulation regime. Regarding Law nº 11.723, although it is not expressly foreseen the cumulation with registration of industrial design, models and works of art applied to industry are recognized in the list of protectable creations, establishing complementarity between the norms.

trabajos manuales; Documentos u obras científicas y técnicas; Obras de arquitectura; Obras de pintura; Obras de Escultura; Fórmulas de las ciencias exactas, físicas o naturales, siempre que no estuvieren amparadas por leyes especiales; Televisión; Textos y aparatos de enseñanza; Grabados; Litografía; Obras coreográficas cuyo arreglo o disposición escénica "mise en scène" esté determinada en forma escrita o por otro procedimiento; Títulos originales de obras literarias, teatrales o musicales, cuando los mismos constituyen una creación; Pantomimas; Pseudónimos literarios; Planos y otras producciones gráficas o estadigráficas, cualesquiera sea el método de impresión; Modelos o creaciones que tengan una valor artístico en materia de vestuario, mobiliario, decorado, ornamentación, tocado, galas u objetos preciosos, siempre que no estuvieren amparados por la legislación vigente sobre propiedad industrial; Y, en fin toda producción del dominio de la inteligência (URUGUAY, 1937).

Chart 1

	Brasil	Argentina	Chile	Uruguay
Does the industrial property law contain express provisions on the accumulation of copyrights with registration of industrial design?	No	Yes	Yes	Yes
Does the copyright law contain express provisions on the cumulation of copyright with industrial design registration?	No	No	Yes	Yes
Does the industrial property law mention works of applied art?	No	No	No	No
Does the copyright law mention works of applied art?	No	Yes	Yes	No
Does the industrial property law mention typography?	No	No	No	No
Does the copyright law mention typography?	No	No	No	No
How is the cumulation regime characterized?	Partial	Partial	Partial	Separation

Comparative analysis of Brazilian, Argentine, Chilean and Uruguayan legislation.

Source: prepared by the author.

In the case of explicit mention of “works of applied art”, it should be noted that industrial property laws fail to do so, perhaps, it is considered, to demarcate that they constitute a special, non-general protection regime. On the other hand, *a priori*, this terminology is more frequent in copyright laws – which is observed, moreover, in the Brazilian system's own retrospective, since Law No. 5988, followed by the current Law No. 9610, as it is known, expressly mentioned such creations under the role of art. 6th, XI⁴⁷.

As for typography, the legislation does not mention it either to make it grant protection or to prevent it. Of course, this inference is subordinate to the proposed analysis. Brazilian law, for instance, rejects the registration of isolated letters and numbers as a trademark; however, this is not the object of study. In this way, it is important to emphasize the specificity of the data currently analyzed, which refer to industrial design and copyright.

In general, regimes accept partial cumulation of rights, provided that the specific criteria of general and specific legislation are met. Here again, it is essential to have a perspective of the analysis, since each national system presents other possible readings on the issue of cumulative rights in the context of the intersections between other industrial property assets and artistic, literary and scientific property.

⁴⁷ Art. 6 The creations of the spirit, in any way externalized, are intellectual works, such as: XI – works of applied art, provided that their artistic value can be dissociated from the industrial character of the object to which they are superimposed (BRASIL, 1973).

5 Conclusions

National laws adopt different interpretations of the issue of cumulation of rights, including with regard to the overlapping of copyrights with industrial design. The lack of harmonization at the international level means that protection of types has to be claimed country by country, according to local criteria and conditions. Added to these difficulties is the information gap in the literature and jurisprudence regarding the protection of typography and the controversies surrounding the protection of works of applied art.

In Argentina, there is a partial cumulation system, with characteristics that are peculiar to it. Although double protection by copyright and industrial design is allowed, the law obliges the holder to choose, before courts, which of the two protections he will enforce to defend his rights. That is, it is not possible to shelter in both at the same time.

In Chile, double protection is also allowed, which is inferred from the express provisions contained in both copyright and industrial property laws. The cumulation, however, is not absolute, judging by norms that translate what the doctrine called “criterion of dissociation of form”, leading to believe that not all works of applied art receive protection in the copyright realm, excluding those that are associated with functionalities.

In Uruguay, although double protection is accepted, uncertainties as to the effective application of laws prevail, since legislative revisions have reversed consolidated understandings and created contradictions in normative complementarity. The industrial property law provides for the combination of industrial designs with copyright, but these ended up being forbidden to objects protected by it.

Neither Argentine nor Chilean nor Uruguayan laws mention typography as a protected object, although neither do they expressly prohibit its protection. This is a genre of work of applied art to which the laws reserve silence. It is deduced that, if typographies fit the definitions of each diploma and there is no prohibition they are likely to obtain the respective right.

From everything that has been exposed, we expected to have demonstrated the complexity of the legislative arrangements and how costly it is, for those not initiated in the legal field, to understand how to protect their intellectual creation. The types, as works of applied art, have a multipurpose nature, which makes it difficult to characterize their protection. This also results in the need to deepen research, still incipient, in this area of studies.

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