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Economic and Moral Rights of the Deceased Designer in the Czech Republic

The Notion of Design

The results of human creation, science or business activities may differ. It may be a work of art, the invention of a new technical solution, design or creation of a logo which is to be used to describe certain products. All these “*fruits of the human spirit*” have a significant economic value² and the law provides the protection for such intangible goods via intellectual property rights.

In daily speech, we meet with the following statements: “*The product is a success, it was well-designed*”; “*it is not very well designed*”; “*that feature gives the product a special design*”. The word “*design*” is used to describe the external appearance of items which are produced industrially³ (furniture, textiles, automobiles, jewellery, clocks etc.) and for the appearance of products that are used to promote products, services or entities (brochures, logos, websites, pictogram, packaging, labels etc.)

The word design originates from the Latin word “*signum*”, which means “*character or footprint*”. The meaning of the verb “*designare*” in Latin was “*designation*” or “*border*”⁴. The English word “*design*” as a noun indicates “*shape*”, and as a verb it is used as “*to plan*”. In both meanings a certain form (appearance, shape, contour) is given to the non-corporeal idea⁵.

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² See PARK, W.G., GINARTE, J.C. *Intellectual Property Rights and Economic Growth. Contemporary Economic Policy* 3/1997. p. 52; MASKUS, K. E. *Intellectual property rights in the global economy*. Washington: Peterson Institute, 2000. p. 3, 33 ff.

³ KUPETZ, A. (eds.) *Industrial Design*. Basel: Birkhäuser, 2006. p. 6.

⁴ MONÖ, R. *Design for Product Understanding*. Stockholm: Liber, 1997. p. 11.

⁵ ASHBY, M., JOHNSON, K. *Materials and Design. The Art and Science of Material Selection in Product Design*. 3rd ed. Oxford: Butterworth-Heinemann, 2014. p. 12.

When analysing the context in which we use the term “*design*”, we may come to the conclusion that the noun or verb “*design*” is used for the evaluation of aspects of objects which we are able to be perceived visually⁶. For example no one will use the sentence: “*The symphony is of an interesting design*”. Design is characterized by being perceived through eyesight⁷.

We can also see that the term design is used when evaluating the aesthetic site of utilitarian objects. Prof. William describes the unique nature of the design as follows:

*“On a smaller scale, product designers seek to blend the technical with the aesthetic, combining practical utility with emotional delight. Think of Wedgwood china, Tiffany glass, Chippendale furniture – these were first made and bought to fulfil a functional purpose, but survive and are treasured today as much for their appeal as objects of beauty”*⁸.

The combination of aesthetics and functionality is something that is crucial to the design. Without this mingling of art and technology, without the beauty embodied in objects of everyday use, we would not be speaking about design as a special category but only about applied art. But the design is created because it affects the visual senses of people (customers or business partners); who, precisely because of aesthetic features of a given product, are interested to buy the item. The last essential character of the design is therefore the quality of creative activity of the designer. The design is being created intentionally and the designer combines “*aesthetic*” and “*functional*” features⁹.

⁶ WILLIAM, L. (eds.) *Universal Principles of Design*. Gloucester. MA (USA): Rockport Publishers, Inc., 2003. p. 14.

⁷ See SUTHERSANEN, U. *Design law: European Union and United States of America*. 2nd ed. London: Thomson Reuters, 2010. p. 95. WILLIAM, L. *op. cit. Ibid.*

⁸ WILLIAM, L. *op. cit. Ibid.*

⁹ “*Good design involves two fundamental elements: the product must perform its function and it should be pleasant to look at... The significance of limiting protection to the visual appearance of products is that aesthetic considerations are in principle capable of being relevant only when the designer is developing a product’s visual appearance. Most of the time the designer will be concerned with both elements of good design: functionality and eye appeal. In some cases functionality will be the dominant preoccupation of the designer. The need to make a product that works will be uppermost in the designer’s mind and will largely determine the appearance of the product. As long as functionality is not the only relevant factor, the design is in principle eligible for protection. It is only when aesthetic considerations are completely irrelevant that the*

Possible Forms of the Design Protection; Design as the Object of Private Rights

The design may be protected by various intellectual property rights of different nature. First there is the liability-based (*inter partes*) regime which includes protection by the unfair competition¹⁰. But usually the design is protected under the umbrella of the absolute rights (*erga omnes*), which covers author's rights¹¹ and protection guaranteed by *sui generis* registered or unregistered designs rights¹².

According to the doctrinal interpretation¹³ of the Art. 489 and 496 of the New Civil Code¹⁴, the design is not considered to be the “*incorporeal*

features of the design are solely dictated by the need to achieve a technical solution”. See Decision of the Board of Appeal of the OHIM in the case *Lindner Recyclingtech GmbH v Franssons Verkstäder AB* (R-690/2007-3) [online; 9.1.2015]. Available at: <https://oami.europa.eu/eSearchCLW/#advanced>

¹⁰ The protection of the design through unfair competition law is enabled in the Czech law by the general clause of the unfair competition stipulated by the Art. 2976 par. 1 of the New Civil Code or by the special unfair competition claim called “*likelihood of confusion*” (Art. 2981 of the New Civil Code). Although the unfair competition is mentioned in the Art. 10bis of the Paris Convention, the unfair competition is not considered as an intellectual property right because it gives rise only to a relative property rights (See VOJČÍK, P. *Právo duševného vlastnictva*. Plzeň: Aleš Čeněk, 2012. p. 36; VYPARINA, S. *Súťažné právo a priemyselné práva I*, Duševné vlastnictvo 1/1997, p. 23; KOUKAL, P. *Souběh autorskoprávní a nekalosoutěžní ochrany*. Rigorózní práce. Masarykova univerzita, 2005. p. 29). In the New Civil Code the unfair competition protection is subsumed under the tort law (obligations arising from unlawful acts).

¹¹ In this paper, it is not necessary to refer to generally known difference between the common-law copyright system and the continental system of author's rights protection. Concerning the terminology used in this paper the term “*copyright*” will be used for the legal regulation in an objective sense (i.e. regulation contained in laws; especially copyright laws, copyright act, copyrighted work etc.), while in the case of rights in the subjective sense we will speak about rights of the author – economic and moral author's rights.

¹² SUTHERSANEN, U. *op. cit.* p. 18 ff.; HOWE, M. *Russell-Clarke and Howe on Industrial Designs*. London: Thomson Reuters, 2010. p. 1-3; EICHMANN, H. In *Eichmann/Falckenstein. Geschmacksmustergesetz – Kommentar*. 4th ed. München: Verlag C.H.Beck, 2010. p. 32 ff; KOUKAL, P. *Právní ochrana designu – průmyslové vzory, autorská díla*. Praha: Wolters Kluwer, 2012. p. 21-23.

¹³ See TELEČEK, I., TĚGL, P. In *Melzer/Těgl. Občanský zákoník – velký komentář. Svazek III. § 419-654*. Praha: Leges, 2014. p. 146; KOUKAL, P. In LAVICKÝ, P. (eds.) *Občanský zákoník I. Obecná část (§ 1-654). Komentář*. Praha: C.H.Beck, 2014. p. 1730.

¹⁴ The New Civil Code of the Czech Republic (“NCC”) was enacted by the Act No. 89/2012 Coll. and is effective since the 1st January 2014 (former Czech

thing in the legal sense” (*nehmotná věc v právním smyslu*), because it is the outcome of the human creative activity. Creations such as works of art, inventions, technical inventions etc. are considered to be intangible goods (*nehmotné statky*) and are treated as special objects of private rights, but they are not things in the legal sense (Art. 489 of the NCC) and, in particular, they are not objects of *rights in rem*¹⁵.

On the other hand, economic rights relating to such creations are defined as things in the legal sense. Therefore rights of registered or unregistered design are considered to be incorporeal things [Art. 496 (2) of the NCC] and also objects of the property in the larger sense (Art. 1011 of the NCC). However, there is one exception from this general rule. Neither economic rights of the author nor moral rights are considered to be incorporeal things in the legal sense; firstly because they are not transferrable to other subjects *inter vivos*, and secondly because they are not eligible for assets valuation¹⁶.

Czech (and Slovak as well) theory of intellectual property¹⁷ distinguishes not only between intangible goods and related intellectual property rights but also between intangible goods (*corpus mysticum*) and tangible objects (*corpus mechanicum*) in which intangible goods are incorporated. Intangible goods exist independently from their carriers, and rights which are associated with intangible goods are not lapsing

civil law was regulated by the Civil Code enacted by the Act No. 40/1964 Coll.) The NCC replaced both the old Civil Code and the Commercial Code No. 513/1991 Coll. which regulated the legal status and actions of entrepreneurs, trading companies and businesses, commercial obligations and agreements, as well as other business-related relations. The NCC also abolished the Law on the family (Act No. 97/1963 Coll.) and the family law is now incorporated in the text of the NCC as well. The recodification of the civil law in the Czech Republic also encompasses the law No. 90/2012 Coll., On Business Companies, known as the Business Corporations Act, and law No. 91/2012 Coll., On International Private Law.

¹⁵ KOUKAL, P. *op. cit.* p. 1729. TÉGL, P. In *Melzer/Tégl. Občanský zákoník – velký komentář. Svazek III. § 419-654*. Praha: Leges, 2014. p. 200.

¹⁶ Art. 17 (5) of the Law No. 151/1997 Coll., On Valuation of Property and on the Amendment of Certain Acts (Property Valuation Act), as amended, stipulates: “Economic rights of an author and performing artists, being not transferable right, shall not be valued”. Moral basis of author’s rights is reflected in the fact that economic rights have no economic value. This rule applies even in the case of the transfer of economic rights on the basis of hereditary succession. See TELEČEK, I., TŮMA, P. *Autorský zákon – komentář*. Praha: 2007, C.H.Beck. p. 316.

¹⁷ TELEČEK, I. *Tvůrčí práva duševního vlastnictví*. Brno: Doplněk, 1994. p. 42. VOJČÍK, P. *op.cit.* p. 37.

with the destruction of corporeal objects. The provision of Art. 9 (2) of the Czech Copyright Act directly provides: “*the destruction of things, through which the work is expressed, does not terminate the author’s rights to the work*”. Similarly, the distinction between intangible good and the corporeal object is reflected by the law No. 207/2000 Coll., On the Legal Protection of Industrial Designs (“*Industrial Designs Act*”). The industrial design is an intangible shape of all possible corporeal products in which the ideal shape is embodied¹⁸.

The distinction between the intangible goods and corporeal objects is applicable to all objects of intellectual property. All intangible goods, arising from the intellectual or economic activity, exist independently on their material expression¹⁹.

Author’s Rights as the Subject Matter of the Inheritance Succession

When analysing the intellectual protection of the design in the context of the inheritance succession we will focus only on the issue of (i) author’s rights (*práva autorská*) and (ii) industrial design rights (*práva k průmyslovým vzorům*). Industrial design rights will be analysed only from the national perspective, i.e. the subject of our analysis will cover only national industrial designs which are registered by the Industrial Property Office in Prague, and we will leave out registered or unregistered Community designs protection²⁰.

In the context of the inheritance succession, we will especially focus on the distinction between moral rights and economic rights of the author/designer; as well as on proprietary rights relating to the corporeal objects in which works of art/designs are embodied.

¹⁸ Art 10 of the Industrial Designs Act provides: “... *the product in which the design is incorporated or to which it is applied...*” The German terminology is more consistent in this respect. As intangible asset (*Immateriälgut*) is considered the “*pattern*” as the appearance of the product [“*Muster*”: Art 1 (1) of the *Geschmacksmustergesetz*], but the form of protection is called “*taste pattern*” [“*Geschmacksmuster*”: Art 1 (5) of the *Geschmacksmustergesetz*]. See EICHMANN, H. In *Eichmann/Falckenstein. Geschmacksmustergesetz – Kommentar*. 4th ed. München: Verlag C.H.Beck, 2010. p. 73-74.

¹⁹ BOHÁČEK, M., JAKL, L. *Právo duševního vlastnictví*. Praha: Nakladatelství Oeconomica, 2002. p. 18 ff. TELEC, I. *Tvůrčí práva duševního vlastnictví*. Brno: Doplněk, 1994. p. 22.

²⁰ Issue of Community designs as objects of the inheritance succession is set forth by Articles 27, 29 and 34 of the Community Designs regulation No. 6/2002/EC. This is a topic that goes beyond the scope of this paper, therefore, will not be subjected to the legal analysis.

General characteristics of the inheritance succession in the New Civil Code

Before looking at the inheritance succession of author's rights and industrial design rights, it is necessary to provide very short description of the inheritance law set forth by the provisions of the New Civil Code.

The new civil-law legislation has brought significant changes which also have consequences on the inheritance of intellectual property rights. Inheritance law in the Czech Republic is based on the principle of universal succession. Upon the decedent's death²¹ all private economic rights, which are not associated just with the deceased person and which are not subject to the special form of succession (i.e. singular succession), are transferred to heirs.

Under the inheritance succession, only economic rights²² are transferred. Personal and moral rights of the deceased upon his death cease to exist. An exception, however, are personal and moral rights which have been recognized as a debt or applied at the court [Art. 1475 (2) of the NCC].

The New Civil Code expanded the number of inheritance titles. While under the old Civil Code it was possible to inherit only from the law (*zákon*) or from will (*závěť*) of the testator, under the new civil-law legislation it is possible to inherit estate also from the contract of inheritance (*dědická smlouva*; Art. 1476 of the NCC). Concerning the relevance of inheritance titles, the New Civil Code generally prefers the testamentary succession to the intestate succession²³, but the combination of hereditary titles is possible as well.

The New Civil Code has also brought advanced possibilities for dealing with the right to succession in subjective sense. Before the death

²¹ The inheritance law is based on the old principle of “*delace*” and the succession is acquired upon to the testator's death (Art 1479 NCC). See DOBEŠOVÁ, L. In HURDÍK, J. (eds.) *Občanské právo hmotné – Obecná část. Absolutní majetková práva*. Plzeň: Aleš Čeněk, 2013. p. 276.

²² In the context of the New Civil Code as “*economic*” or “*property*” rights are considered not only absolute economic rights (for example the ownership, liens, servility, patents, registered industrial designs or trademarks), but also the relative economic rights such as obligations (*pohledávky*). See MELZER, F., TÉGL, P., TELEČEK, I. In *Melzer/Tégl. Občanský zákoník – velký komentář. Svazek I. § 1-117*. Praha: Leges, 2013. p. 186.

²³ DOBEŠOVÁ, L. *op. cit.* p. 283.

of the testator the law gives to the potential heir the option to waive the inheritance right (Art. 1484 of the NCC). After the death of the deceased the heir has the option to reject the heritage (Art. 1485 of the NCC) or he can dispose of the heritage (Art. 1490, 1714 of the NCC).

The New Civil Code brought more limits on the right of the necessary heirs²⁴ to their compulsory part of the estate and expanded testamentary freedom (autonomy of the will) of the decedent. New legislation also reduced the scope of the necessary share. In the case of a minor child the necessary share is $\frac{3}{4}$ of the intestate share and in the case of adult $\frac{1}{4}$ of intestate share. The autonomy of the will of the testator was strengthened also by the fact that the testator may lay down conditions (*podmínky*; Art 1561 ff. NCC), stipulate for the legal burdens (*odkaz*; Art. 1594 ff. of the NCC) or order a command (*příkaz*; 1569 ff. of the NCC) to the heir/heirs. He may also appoint an alternate heir (*náhradnictví*; Art. 1507 of the NCC) or successor in the title (*svěřenské nástupnictví*; Art. 1512 ff. of the NCC).

For further analysis of the inheritance succession of author's rights and industrial design rights, it is necessary to underline that only the economic rights shall pass to heirs. Moral rights are not transferred to the heirs upon rules of universal inheritance succession and the *post-mortem* protection of moral interests of the deceased author/designer is entrusted to persons other than heirs (also called “*close persons to the deceased*”; see below).

Author's rights as the subject matter of inheritance succession

The Czech copyright law is traditionally based on a personhood approach, which emphasizes the personal folder of author's rights²⁵. The moral rights of an author are considered the foundation of the author's protection, since the author's work is the result of the artist's creative activity [Art. 2 (1) of the Czech Copyright Act] and is the manifestation of the author's personality²⁶.

²⁴ As necessary heirs they are regarded children of the decedent or his grandchildren [Art 1643 (1) of the NCC].

²⁵ TELEČEK, I. TŮMA, P. *Autorský zákon – komentář*. Praha: Nakladatelství C.H.Beck, 2007. p. 5, 146.

²⁶ Like other manifestations of a personal nature (Art 87 of the NCC) such as personal diaries, personal correspondence or signature. See TŮMA, P. In LAVICKÝ, P. (eds.) *Občanský zákoník I. Obecná část (§1-654)*. Praha: Nakladatelství C.H.Beck, 2014. p. 504.

Pure German monism²⁷ was typical for the Czech Copyright Act of 1965²⁸, however, in the new Copyright Act, 2000 (Act No. 121/2000 Coll.) was modified into the form of quasidualistic system²⁹, Czech copyright law regulates personal rights (*osobnostní práva*) and economic rights (*majetková práva*) of the author, like the French *Code de la propriété intellectuelle* but with several monistic elements taken from the German *Urhebergesetz*³⁰.

Moral rights (Art. 11 of the Czech Copyright Act) include all the traditional moral rights as they are known to most European continental jurisdictions³¹: The right to the recognition of authorship (*právo osobovat si autorství*), the law on the first publication of the work (*právo rozhodnout o zveřejnění svého díla*) and the right to the protection of integrity of the work (*právo na nedotknutelnost díla*). Moral rights are non-transferable, the author may not waive them and upon the death of the author moral rights expire [Art. 11 (4) of the Czech Copyright Act].

The New Civil Code expressly provides [Art. 1475 (2) of the NCC] that moral rights in general are not subject to inheritance succession, unless claims arising from the breach of moral rights have been recognized by the debtor or applied at a court. Therefore, the claims that arise from the breach of an author's rights may be considered inheritance assets, for example, the right to compensation for damages, the right

²⁷ See STERLING, J.A.L. *World Copyright Law*. 3rd ed. London: Sweet & Maxwell, 2008. p. 59 ff, 403. DIETZ, A., PEUKERT, A. In Loewenheim, U. (eds). *Handbuch des Urheberrechts*. 2. ed. München: Verlag C.H.Beck, 2010. p. 207. SCHACK, H. *Urheber – und Urhebervertragsrecht*. 6. ed. Tübingen: Mohr Siebeck, 2013. p. 174.

²⁸ TELEČ, I. *Některé základní a obecné otázky nového českého autorského práva*. 1. část. "Bulletin advokacie" 2/2001. p. 25 ff.

²⁹ TELEČ, I. TŮMA, P. *Autorský zákon – komentář*. Praha: Nakladatelství C.H.Beck, 2007. p. 311.

³⁰ Principles of dualistic concept of author's rights have not been implemented into the question of the transferability of economic rights *inter vivos*. The Art 26 of the Czech Copyright Act thus regulates that transfer of economic rights *inter vivos* is prohibited. Disposition of economic rights is possible only on the basis of constitutive transfer (i.e. granting a license). TELEČ, I. *Ibid*.

³¹ STERLING, J.A.L. *op.cit.* p. 395 ff. BARUDI, M. *Autor und Werk – eine prägende Beziehung*. Tübingen: Mohr Siebeck, 2012. p. 62. STROEMHOLM, S. *Droit Moral: The International and Comparative Scene from a Scandinavian Viewpoint*. *International Review of Industrial Property* 1/1983. p. 2 ff. DAVIES, G., *The Convergence of Copyright and Authors' Rights – Reality or Chimera?* "International Review of Industrial Property and Copyright Law" 6/1995. p. 965.

to provide unjust enrichment or the right to receive reasonable monetary compensation³².

After the death of the author the Czech Copyright Act stipulates [Art. 11 (5)] that moral interests of the author and certain post-mortal rights may be protected by “*close persons to the author*” (*osoby blízké*)³³, collecting societies (*kolektivní správce*) or associations of authors (*právnícká osoba sdružující autory*). This right is a non-proprietary right of personhood nature, which is not passed to heirs on the basis of inheritance succession³⁴.

The duration of this right is unlimited and it covers the protection of authorship of the deceased person and the protection of the integrity of the work (the work may not be used in a manner that reduces the value of copyrighted work). When applying to *post-mortem* protection, “*close persons*” can pursue only certain claims: They are entitled to request an injunction or the elimination of the infringement. However, they cannot, for example, claim monetary compensation for non-material damage³⁵.

Due to the analogous interpretation based on the similarity with protection of personality (Art. 82 of the NCC)³⁶, subject can apply the *post-mortem* protection regardless of whether it was caused by an unauthorized action carried out during the life of the author or after his death. However, all conditions for the application of individual copyright claims must be satisfied (Art. 40 of the Czech Copyright Act)³⁷.

Due to the fact that Czech Copyright Act has not been fully built on traditional dualism of author’s rights, economic rights are non-transferable *inter vivos* [Art. 26 (1) of the Czech Copyright Act]³⁸. On contrary,

³² VOJČÍK, P. *Dedenie v oblasti duševného vlastníctva*. In JAKL, L. (eds.) *Nový občanský zákoník a práva k duševnímu vlastníctví*. Praha: Metropolitan Universtiy Prague Press, 2014. p. 80.

³³ Persons who are close to the deceased author are set forth by the Art. 22 of the NCC: “*A close person shall be defined as a relative in direct line, brother or sister and the spouse or registered partner; other persons in a family or other similar relation shall be considered close to each other if a detriment suffered by one of them is reasonably felt as own by the other. It is assumed that brother-in-law or persons who permanently live together are close to each other*”.

³⁴ TELEČ, I. TŮMA, P. *op. cit.* p. 158 ff.

³⁵ TELEČ, I. TŮMA, P. *op. cit.* p. 160.

³⁶ TŮMA, P. In LAVICKÝ, P. (eds.) *Občanský zákoník I. Obecná část (§1-654)*. Praha: Nakladatelství C.H.Beck, 2014. p. 491.

³⁷ TELEČ, I. TŮMA, P. *Ibid.*

³⁸ On the other hand, obligations that arise from license contracts the author may

Czech Copyright Act provides that after the death of the author the economic rights *mortis causa* shall pass to heirs [Art. 26 (2) of the Czech Copyright Act]. Economic rights of the author therefore are subject to inheritance succession and are part of the decedent's assets [Art. 1475 (2) of the NCC]. However, there are significant differences in comparison with other intellectual property rights. Due to the fact that economic rights of the author cannot be *inter vivos* transferred, they have no economic value³⁹. Therefore, economic rights of the author in succession proceedings stand at assets side but with a zero value⁴⁰.

Since the New Civil Code allows the testator to establish in his will a legal burden (Art. 1594 ff. of the NCC) or a command (Art. 1569 of the NCC), the testator may oblige heirs to provide an exclusive or non-exclusive licence to a beneficiary. On the other hand, heirs cannot be ordered by the legal burden/command to pass economic rights to the beneficiary, because economic rights of the author are not transferable. Regarding the autonomy of the will of the testator, as well as the dealing with the right of succession in a subjective sense, general rules mentioned above are applied in a full scope.

Inheritance of physical substrates of copyrighted works

Original pieces of copyrighted works (e.g. paintings, sculptures) are tangible goods and, within the meaning of Art. 446 paragraph 1 of the NCC, are considered to be movable corporeal things. In terms of inheritance succession they belong to assets of heritage.

Concerning tangible pieces of copyrighted works and setting the value of these assets in inheritance proceedings, they are valued upon general price either for purposes of determining the value of the estate or for the reward of a notary acting as court commissioner. However, this conclusion does not apply when heir becomes the owner both of the economic author's rights and tangible pieces of copyrighted works. The legal

assign. Czech Copyright Act explicitly lays down that non-transferability does not apply to obligations arising from the absolute economic rights of the author [Art. 26 (1) of the Czech Copyright Act]. Unlike absolute economic rights of the author such obligations are considered to be incorporeal things in legal sense. See TELEC, I. *op. cit.* p. 312. TÉGL, P., TELEC, I. In *Melzer/Tégl. Občanský zákoník – velký komentář. Svazek III. § 419-654*. Praha: Leges, 2014. p. 242. KOUKAL, P. In LAVICKÝ, P. (eds.) *Občanský zákoník I. Obecná část (§1-654)*. Praha: Nakladatelství C.H.Beck, 2014. p. 1756.

³⁹ See ft No. 16.

⁴⁰ TELEC, I., TŮMA, P. *op. cit.* p. 315. VOJČÍK, P. *op. cit.* p. 75.

doctrine⁴¹ favours the conclusion that tangible substrates of copyrighted works and economic rights relating to them are not separately counted into the value of the assets of the heritage, because these tangible goods serve only to indicate copyrighted work and related economic rights. This conclusion, however, does not apply if carriers of copyrighted work and economic rights of the author are not inherited to one person. For example when the testator through his will disposes economic author's rights to one person, but original pieces of copyrighted works are transferred into the possession of another heir or beneficiary.

Inheritance of relative rights (obligations)

In addition to absolute economic rights the subject matter of inheritance succession consists either of relative property rights, in particular (i) claims for royalties arising from license contracts (Art. 2366 of the NCC), (ii) rewards from the resale of the original piece of copyrighted work (*droit de suite*; Art. 24 of the Czech Copyright Act), (iii) rewards from the reproduction of copyrighted works for personal and internal use (Art. 25 of the Czech copyright Act) or (iv) claims arising from the violation of copyright (Art. 40 of the Czech copyright Act). If these obligations existed at the time of death of the deceased author, they shall pass to heirs under the basis of inheritance succession.

In contrast to economic rights of the author, which are non-transferable, heirs may be ordered by the testator, by stipulating the legal burden or a command, to cede these obligations to a beneficiary⁴².

Industrial Designs as the Subject Matter of Inheritance Succession

Industrial designs are defined as the appearance of a product or its part (Art. 2 of the Industrial Designs Act). Similarly as copyrighted works [Art. 2 (1) of the Czech Copyright Act] the design is also a result of creative intellectual activity of the designer⁴³. As the design is the creation,

⁴¹ TELEČEK, I. *op. cit.* p. 320.

⁴² The legal burden is due within one year after the death of the testator [Art. 1624 (1) of the NCC]. If the heir does not satisfy the legal burden of the beneficiary, the beneficiary can claim the assignment of the receivable in a court [Art. 1621 (2) of the NCC].

⁴³ “[...] designer is a person having created the industrial design by his own creative activity, co-designer is a person, which has participated on the creative activity, during which the industrial design has been created” [Art. 2 (d) of the Industrial Designs Act]. See also KOUKAL, P. *Právní ochrana designu – průmyslové vzory, autorská díla*. Praha: Wolters Kluwer, 2012. p. 50.

it is not considered to be a thing in a legal sense, not even an incorporeal thing [Art. 496 (2) of the NCC]. Like the copyrighted work the design is a special object of moral and economic rights⁴⁴, but the design as an intangible good cannot be transferred to another person.

Although it is not expressly provided by the law, protection of industrial designs indirectly covers also moral rights of the designer, especially the right on the indication of the name of the designer in connection with his creation (*původcovské právo*)⁴⁵. Due to the fact that the Industrial Designs Act does not provide a special protection of the designer's personality, general rules on the protection of personality stipulated by the New Civil Code shall be applied (Art. 81 of the NCC)⁴⁶. During the life of the designer he protects his personal rights on his own and he is entitled to all personality protection claims⁴⁷, after his death the pursuing of moral interests is passed to persons who are “*close to the deceased person*” (*osoba blízká*, Art. 82 of the NCC). As far as the range of claims arising from the *post-mortem* protection, the only legal possibility is to (i) claim an injunction or (ii) the elimination of effects of the infringement⁴⁸.

Similarly to *post-mortem* protection of author's rights, the *post-mortem* protection of industrial designs is not a subject matter of inheritance succession. As a result, different persons then heirs (close persons to the deceased designer) are entitled to pursue claims arising from *post-mortem* protection.

⁴⁴ KOUKAL, P. In LAVICKÝ, P. (eds.) *Občanský zákoník I. Obecná část (§1-654)*. Praha: Nakladatelství C.H.Beck, 2014. p. 1730. TĚGL, P., TELEČEK, I. In *Melzer/Těgl. Občanský zákoník – velký komentář. Svazek III. § 419-654*. Praha: Leges, 2014. p. 246.

⁴⁵ Art. 35 [2d] of the Industrial Designs Act provides that “*the application of the industrial design shall furthermore contain [...]name and surname of the designer, or a declaration of applicant that the designer abandons his right to be mentioned*”.

⁴⁶ “*Post-mortem personality protection consists of e.g. the protection of certain aspects of a person's name, even after his death. In the area of the protection of creative expressions this is reflected in a legal possibility to ban unauthorised attribution of authorship and to the obligation of user to provide the name of the creator when using the creation*”. See TŮMA, P. In LAVICKÝ, P. (eds.) *Občanský zákoník I. Obecná část (§1-654)*. Praha: Nakladatelství C.H.Beck, 2014. p. 490.

⁴⁷ The individual shall be entitled in particular to demand that unlawful violation of his personality be abandoned, that consequences of this violation be removed (Art. 82 NCC) and that an adequate satisfaction be given to him (Art. 2956 of the NCC). See TŮMA, P. *op. cit.* p. 472, 475.

⁴⁸ TŮMA, P. *op. cit.* p. 489.

On the other hand, the subject matter of inheritance succession covers property rights arising from the registration of the industrial design. These rights are incorporeal things in the legal sense [Art. 446 (2) of the NCC] which are transferable *inter vivos*. Therefore, the assets of the heritage are valued by general price upon the date of death of the deceased designer.

In case of a design which has not been yet made available to the public (i.e. which was kept in secret), the subject matter of the inheritance succession is the right to file the application of the industrial design. The Industrial Designs Act expressly states that “*the right to design has the designer or his successor in title*” [Art. 12 (1) of the Industrial Designs Act]. The successor in title may be represented by one of the heirs or all of them, depending on the outcome of the inheritance proceedings. The right to file the application of the industrial design shall be valued by general price upon the date of death of the deceased designer.

In a very similar manner, the subject matter of the inheritance succession may comprise of the application of the industrial design which also represents an economic right for protection⁴⁹.

Similarly to obligations arising from the copyright protection, the abovementioned industrial designs rights which are transferable, may be subject to legal burden or a command. Also, the autonomy of the will of the testator or the freedom of the heir to waive the inheritance right or dispose of the heritage is not limited.

Conclusion

Although it might seem that the law relating to inheritance of economic author’s rights, *post-mortem* author’s protection and industrial

⁴⁹ Conclusion, that the application of the design is an asset and therefore is the subject matter of hereditary succession, comes from the decision of the European Court of Human Rights in the case *Anheuser Busch v. Portugal* [Application No. 73049/01 (11 January 2007)]. In the paragraph 78 of this decision the ECHR held that “[...] when it filed its application for registration, the applicant company was entitled to expect that it would be examined under the applicable legislation if it satisfied the other relevant substantive and procedural conditions. The applicant company therefore owned a set of proprietary rights—linked to its application for the registration of a trade mark—that were recognised under Portuguese law, even though they could be revoked under certain conditions [such as a successful third-party challenge]. This suffices to make Article 1 of Protocol No 1 applicable in the instant case and to make it unnecessary for the Court to examine whether the applicant company could claim to have had a ‘legitimate expectation’”.

design rights is not uniform and it raises a number of legal issues, the situation in the Czech legal practice is different. The author of this article is unaware of any litigation in the Czech Republic, which would deal with an important point of law in the field of intellectual property rights and the law of succession⁵⁰.

As mentioned above, the *post-mortem* protection may belong to other persons (persons close to the deceased) than heirs. In some cases this leads to collision of interests between these two groups of people. An example was the story of wine labels which ended amicably and was not brought to the court. The graphic designer in his will passed to his mistress the economic author's rights to a series of wine labels, some of which included her naked figure. The relatives of the designer (spouse and adult children) deemed that the work was being used in a manner that reduces the value of it [Art. 11 (5) of the Czech Copyright Act]. Arguments, from the deceased's mistress, that the work cannot be used in a defamatory way if it was designed in certain manner by the author himself were not accepted by the close persons, and the labels were eventually withdrawn from the market. A certain tension between close persons and heirs may therefore exist; however, for legal practice this represents a minor problem.

In the area of inheritance of industrial design rights, we encounter notaries that acting as court commissioners, in some cases, fail to cover the application for registration of the probate estate of the design. If this happens, inheritance proceedings, which usually stretches until the Industrial Property Office grants the registration of an industrial design, must be renegotiated and the court must decide who the owner of the design is.

For practising lawyers it is usually no problem to distinguish between the physical substrate of the copyrighted work and related economic author's rights. Notaries acting as court commissioners in the inheritance proceedings commonly conclude that (i) tangible assets of the heritage comprises of certain physical objects, (ii) intangible assets of the estate cover economic rights of the author with a zero-valued price and (iii) assets including amounts collected from license agreements are valued by the amount set by the court expert.

⁵⁰ In the Czech Republic we of course meet with lawsuits regarding inheritance after a certain author, but the key question in these cases usually is the authenticity or validity of the will, not the question of *post-mortem* protection or similar issues.

Abstract

In this paper the author deals with the inheritance of intellectual property rights related to design. Firstly the author defines the concept of design and subsequently describes intellectual property regimes under which the design is protected. Within provisions of the new inheritance law (i. e. the New Civil Code of the Czech Republic) the author deals with the issue of the succession in the field of author's rights and industrial designs protection. The author emphasizes that it is necessary to distinguish the inheritance of property rights to material objects from inheriting of intellectual property rights. Further, the author focuses on the difference between inheritance succession of economic rights and *post-mortem* protection of deceased's interests.

Keywords: economic rights, moral rights, inheritance law, universal succession, post mortem protection.