Dr Lavinia Brancusi

Dissonance within Harmonization of the EU IP rules of public order and morality – Lessons from design and trademark law

The principle expressed in the EU design and trade mark law that the legal system should not grant monopoly rights to items contrary to public policy or morality sounds prima facie quite reasonable. More vague and arbitrary looks the interpretation of the law and its results, due to an unavoidable reference to subjective values (and moral norms) accepted by a given society. An analysis of the EU case-law to date reveals the following major problems.

The main legislative concern was to avoid that an official register (the EUIPO or a national one) would contain publications of a design/trademark of an 'improper' character as such, but not to eliminate its exploitation on a market. This may be always possible in an unregistered form, unless barred by specific legislation (e.g. Hungarian penal law prohibits use of Soviet or Nazi symbols).

These legal provisions may affect the unitary character of IP protection as there are cases of symbols/objects registered by a national authority but denied by the EUIPO. Inconsistencies result not only from an unclear model of a relevant addressee (i.e. 'general public showing an average level of tolerance and sensitivity') but primarily from difficulties (or perhaps an impossibility?) to identify standards and values shared by all Member States. On the other hand recitals of design or trademark directives explicitly refused to make these provisions a tacit means of harmonizing national concepts of public policy or morality.

A difficult query, emerging mutatis mutandis after the US judgment in 'The Slunts' case, is whether the principle of 'freedom of expression' can be still counterbalanced with other conflicting values (national security, nondiscrimination, morality), as indicated by Art. 10 (2) ECHR or Art. 10 TFUE. However analyzing the refusal of registration as a possible breech of freedom of expression does not seem a safe and reasonable way to follow. It is neither justified, as long an undertaking may legally use the contested item in trade, nor it is an effective tool of reconciling different antagonizing societal interests, as long as such rulings would inevitably conduct to arbitrariness.

These concerns urge in fact a choice. Should IP provisions of public order become an open instrument of the EU harmonization, featuring a clear (and perhaps minimal) set of values, and uncontestable from the perspective of freedom of speech ? Or should this be left to the jurisprudence to find ad hoc solutions of balancing conflicting interests, which may conduct to haphazard results and perhaps evolve into a meaningless practice.