



Intellectual Property Overlaps

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Feedback last year

- Did not mention all possible overlaps, especially
 - software protection
 - breeding rights
 - protection of trade secrets
- Too many different problem areas
- Overarching solution
- Most important point: What is the actual problem when there is cumulative protection?



What do I mean by “Overlap”?

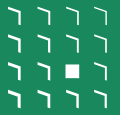




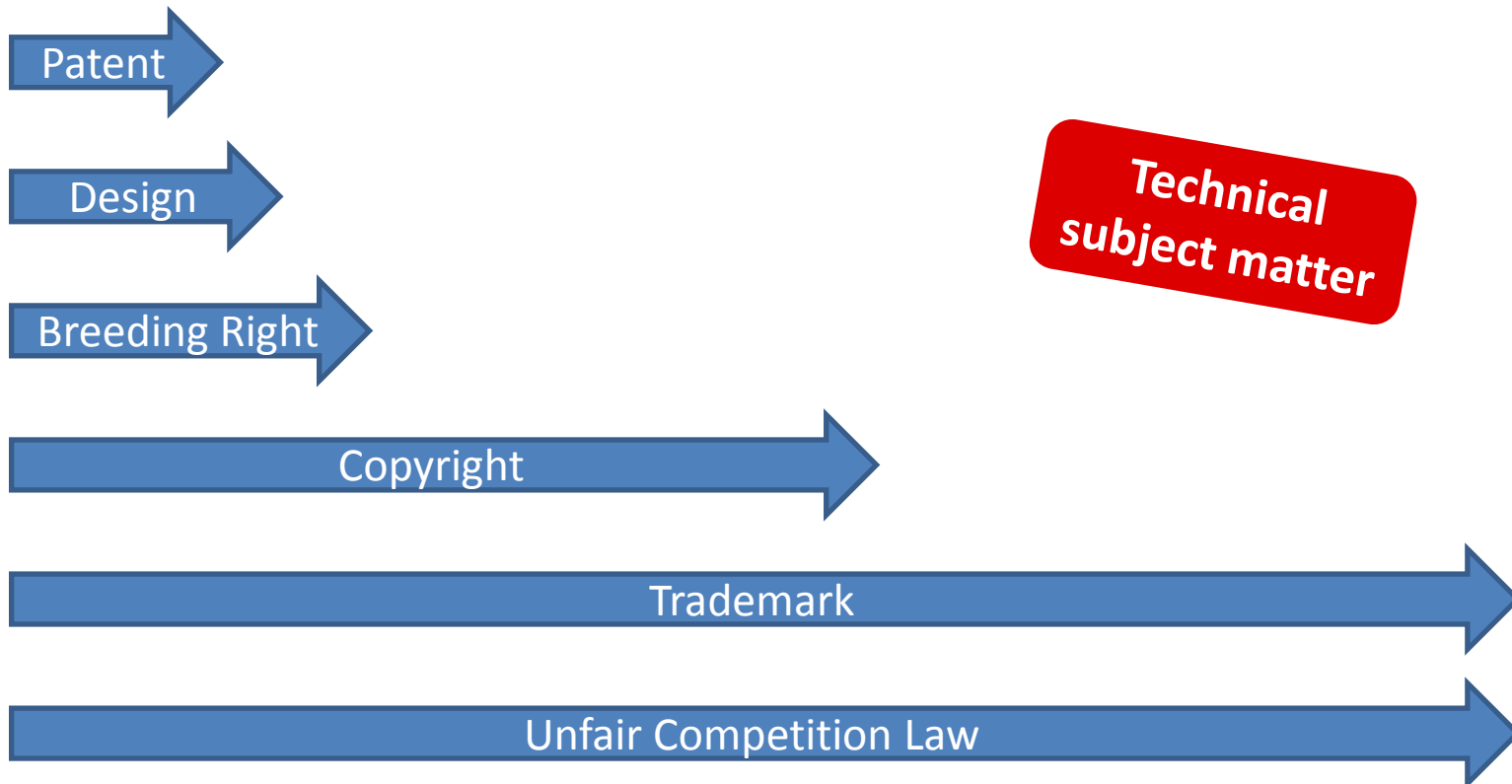
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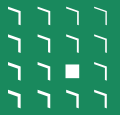
Definition: One intangible good can be protected by more than one IPR or by one IPR and Unfair Competition Law.

Focus on overlaps that can artificially extend the effect of one IPR.

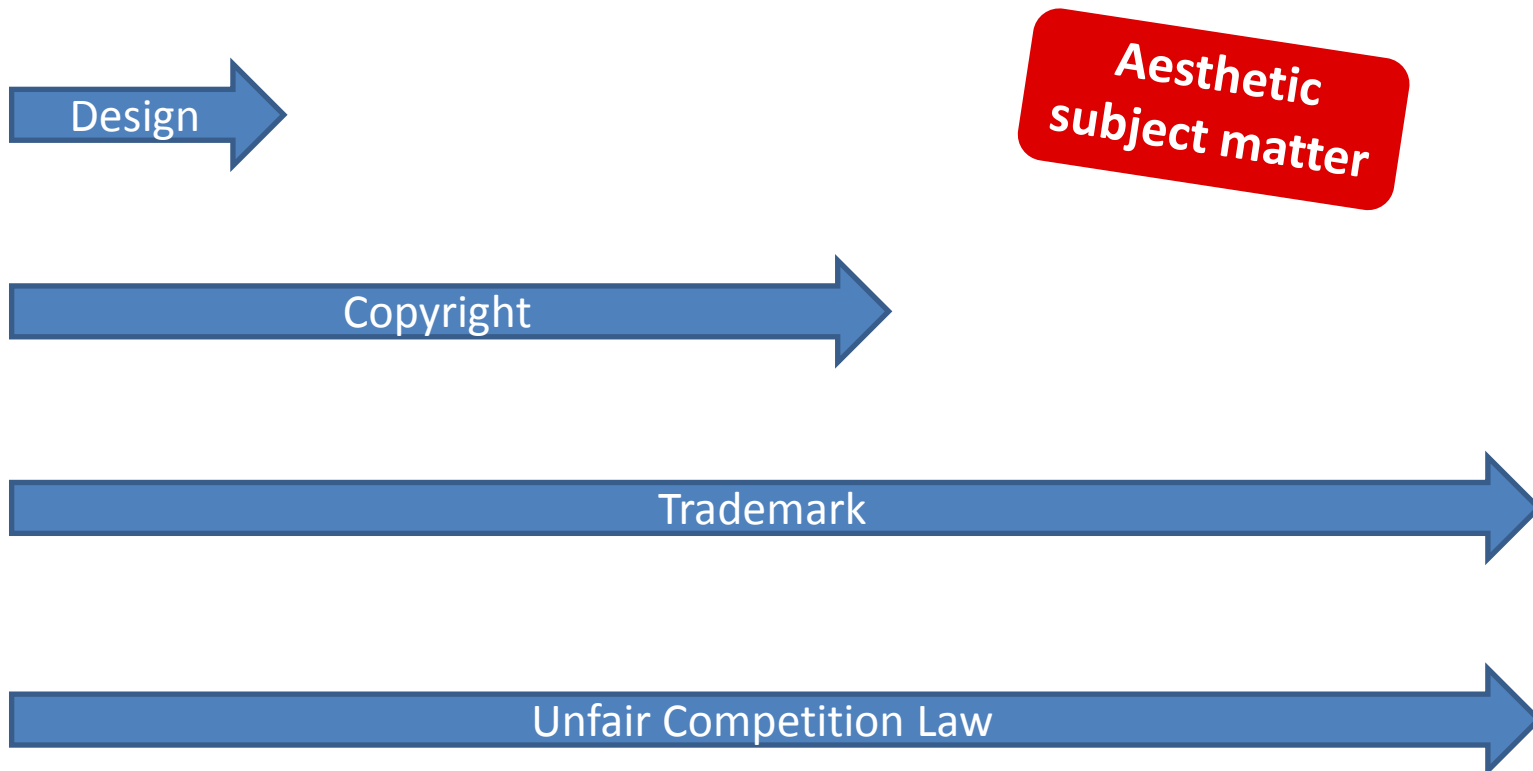


Possible Overlaps





Possible Overlaps





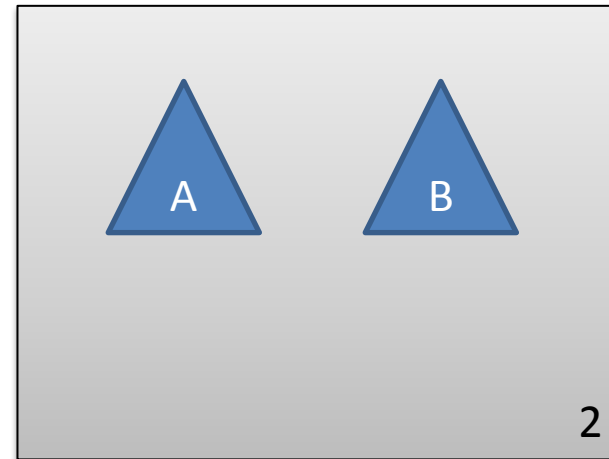
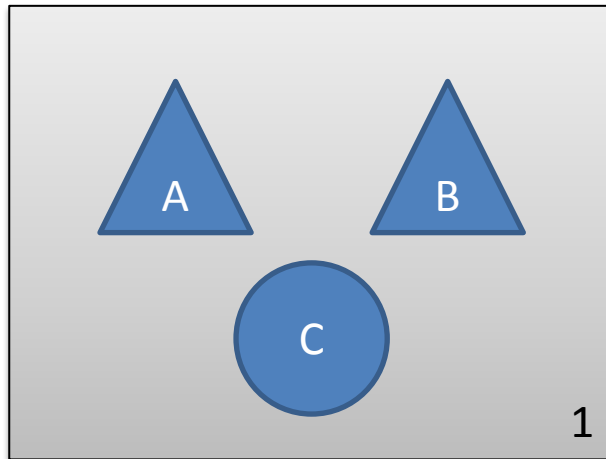
Possible Overlaps

2 ways to extend the effect of IP protection:

- Longer protection of intangible goods
 - Design/Copyright
 - Design/Trademark
 - Patent/Breeding Right
- Legal Uncertainty
 - Patent/Trademark
 - Patent and Design/Unfair Competition Law



Possible Overlaps



Article 3 Trademark Directive

1. The following shall not be registered or, if registered, shall be liable to be declared invalid:

[...]

(e) signs which consist exclusively of:

[...]

(ii) the shape of goods which is necessary to obtain a technical result



Why are Overlaps a “Problem”?

The answer will not be found in Law but in Economics!

Why do we have IPRs?

Intangible goods are:

- non-rival
- non-excludable



Why are Overlaps a “Problem”?

IPRs enable people to create because they can avoid free riding behavior.

On the other hand IPRs create difficulties:

- Loss in economic welfare because of monopolistic structures
- Frustration of new generation creators because of strong protection



Why are Overlaps a “Problem”?

Conflict of two goals

Incentives to create



Wide distribution

Balance!



Why are Overlaps a “Problem”?

$$\textit{profit} = \textit{revenue} - \textit{costs}$$

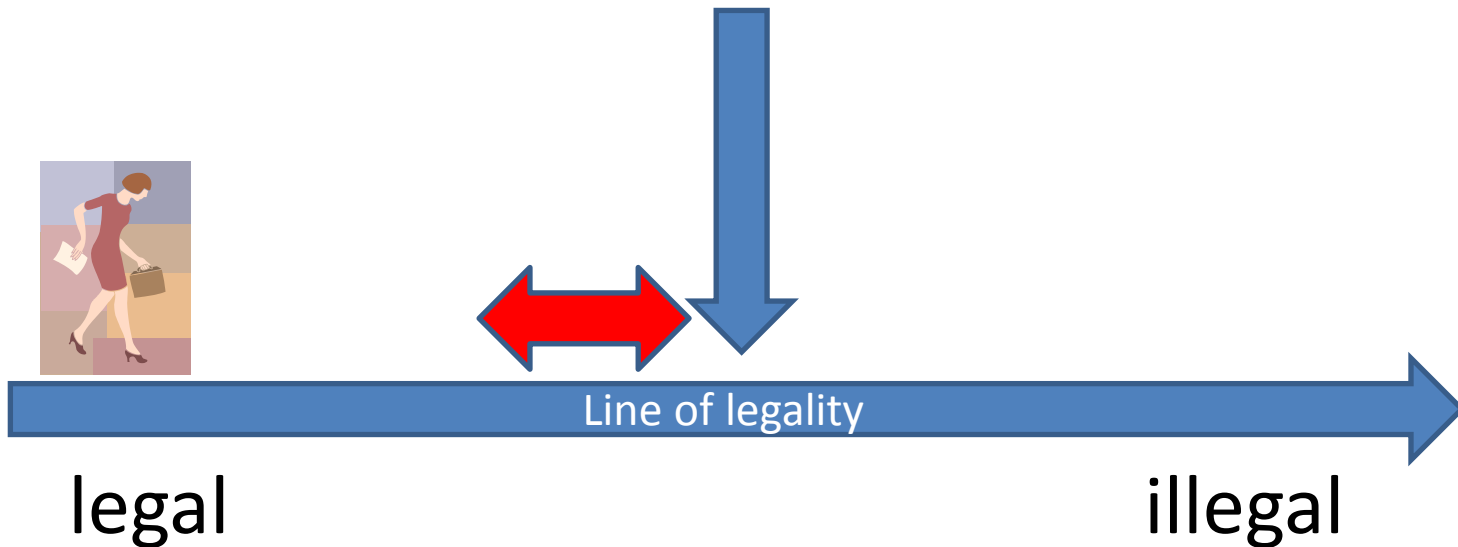
Possible costs caused by legal actions:

- Civil law
- Criminal Law

Possible costs make imitating activities less attractive!



Why are Overlaps a “Problem”?



Other result when using Behavioral Economics?



Why are Overlaps a “Problem”?

Prospect Theory

- People are
 - risk-averse when it comes to possible wins
 - risk-seeking when it comes to possible losses
- People are also *loss-averse* and tend to favor the status quo



Solution

Imitation *as such* is not unfair.

Only the *way* of imitation or the *market behavior* after imitation can be unfair.

Theory of interdependency:

- Individual character
- Imitation
- Unfair behavior

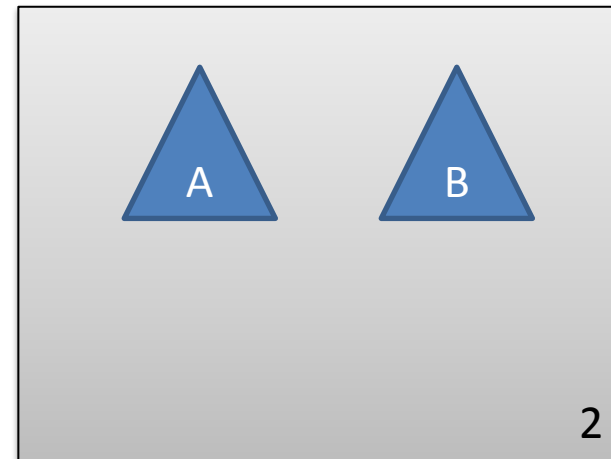
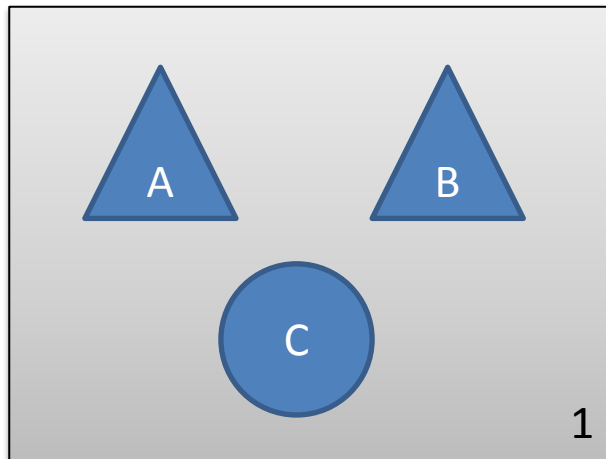
$$a + b + c \geq x$$

$$(a + b) * c \geq x$$



Solution

How to avoid legal uncertainty when registering hybrid shapes as shape marks?



Use Disclaimers!



Solution

What about attractive design?

Article 3 Trademark Directive

1. The following shall not be registered or, if registered, shall be liable to be declared invalid:

[...]

(e) signs which consist exclusively of:

[...]

(iii) the shape which gives substantial value to the goods



Solution

Provision has not been used because of the rigorous consequences.

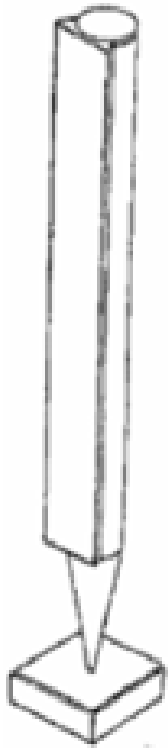
Applicable when consumers see the value of the product *only* in its aesthetic appeal.

Max Planck Institute: Delete the provision and solve the problem by using strict requirements to prove distinctive character.



Solution

General Court, Bang & Olufsen II (6 October 2011)



- » Rational of the provision is to prevent the granting of a monopoly on shapes that give substantial value to the goods
- » Provision applicable if the design is very important for the consumer's choice
- » the fact that the shape is considered to give substantial value to the goods does not preclude other characteristics of the goods, such as the technical qualities, from also conferring considerable value on the goods



Thank you
for your
attention!