Dilemma about Protection of GUI Design Patents and Resolution Thereof

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I. Controversies arising from the judgment of *Kingsoft v. Mengjia*

It is generally believed that a "new design" protected by a design patent is not a "design" existing independently from a product, but the "design of a product's appearance". The "product" herein refers to any "article" [1] manufactured by an industrial method. Although the "design" as stipulated in Article 2.4 of the current China's Patent Law includes the "new design of a partial product", the inherent idea that the design is the "design of a product" still prevails. The Supreme Court also established the judging rule that "a design shall be based on a product and cannot exist independently from the product". [2]

This rule also applies to the protection of graphical user interface (GUI) designs. The China's Patent Law protects aesthetic and user-friendly GUIs as design patents, but the Guidelines for Patent Examination still adhere to the principle that GUI designs cannot be separated from products. The Guidelines for Patent Examination (2010) clearly stipulate that "the pattern shown when the product is electrified is ineligible for patent protection for design", the Guidelines for Patent Examination (2021) still emphasize that GUIs are the design gist of "products", and the current Guidelines for Patent Examination (2023) remain unchanged in this regard. Thus, in *Qihoo v. Jiangmin*, the first GUI design patent infringement case in China, the Beijing Intellectual Property Court held that the patent in suit is related to a design used for computer products, and the accused act is the provision of software to users by the defendant. Since software and computers are not products of identical or similar categories, the accused act does not constitute infringement. [3] Although the judgment of this case completely abides by the principle that GUI designs cannot be separated from products, it is undoubted that the judgment leads to disappointment among patentees in the GUI field. According to the judging rule established in this case, the patentee has no way but enjoins manufacturers of electronic devices such as mobile phones or computers from pre-installing software with particular GUIs. Thus, infringers can surely evade legal risks by providing no pre-installed software, but allow users to download particular software released on the Internet, and the value of the design patents owned by GUI designers is greatly reduced. Therefore, in *Kingsoft v. Mengjia*, the Shanghai Intellectual Property Court intended to make a breakthrough in legal interpretation, stating in the first-instance judgment that the defendant's act of developing and providing software for people to download the plaintiff's design patent. In May 2023, the Shanghai High Court upheld the first-instance judgment. [4]

In *Kingsoft v. Mengjia*, the first-instance court attributed the presence of the infringing GUI on mobile phones to three types of independent subjects with no intent of complicity. The first type is the providers of mobile phone hardware and operating systems, and the second type is the users installing and operating to activate the accused GUI; however, the acts of the above two types of subjects do not constitute infringement. The third type is the provider of the accused software, namely, the defendant. Although it does not directly manufacture or sell the mobile phones, the infringing GUI has been embedded in the accused software through a programming language. During the process of using the accused software to present the appearance of the accused mobile phones, the accused software plays an irreplaceable substantive role, the act of providing the soft-

ware is "equivalent to manufacturing the most crucial and essential part of the mobile phone product comprising the accused GUI", and the act of listing and promoting the software for users to download and for making profit is "equivalent to an offer for sale and sale of the most crucial and essential part of the mobile phone product comprising the accused GUI" and is conducted for production and business purposes, thereby constituting infringement. Similar to the first-instance court in terms of judgment logic, the second-instance court held that the appellant (the defendant in the first instance) developed and provided software for users to download, which would surely lead to the presentation of the accused GUI on mobile phones and therefore the exploitation of the patent in suit. There is a legal causal relationship between the appellant's act and infringement damages, so the appellant should be liable for infringement.

In the judgment of *Kingsoft v. Mengjia*, the act of providing software for people to download is directly regarded as an infringement of a design patent, which actually violates the long-standing principle in China that design protection should be limited to products. Some scholars raised an objection, stating that the key to problem resolution only lies in law revision, and on the premise of maintaining the substantial stability of current rules, the best approach is to set forth special rules for application for and protection of GUI-related patents with reference to the practices in Japan and South Korea. [5] For instance, the concept of a "graphic image" is added to the definition of design in Article 2(1) of the Japanese Design Act (2019). Article 2(2)(iii) thereof definitely specifies that "working" of a design in this Act includes (1) creating and propagating the graphic image itself; and (2) providing, exporting or importing, etc. a recording medium (including "computer program") that has recorded the graphic image or a device incorporating the graphic image.

Is it true that law revision is the only way to resolve such a practical dilemma? Is it really hard to investigate the liabilities of software providers and obtain reasonable results under the current legal framework in China? This article is going to study and compare judicial practices at home and abroad and delve into feasible methods to resolve the issues in relation to GUI design protection under the current legal framework in China.

II. Interpretation methods in foreign countries and difficulties in application thereof in China

1. European Union (EU): Designs, which are separated from products, can be protected

The Court of Justice of the EU (CJEU) deems that the protection of Community designs can be separated from products. Such a conclusion was drawn by the CJEU on the grounds that the definition of "product" in the EU design laws has always included intangible "graphical symbols". [6] It is apparent that the EU laws do not require design products to be tangible. Thus, in the EU, GUIs generated with the help of software (computer programs), namely "graphical symbols", also belong to "products", the design of which can be protected. [7] In *Nintendo v. BigBen* [8], the CJEU has chosen the "abstract" view of design protection, holding that design protection covers the digital conversion from three-dimensional products to two-dimensional graphic images regardless of whether or not a tangible product is manufactured. [9] According to such an interpretation method, even if a software provider does not provide tangible products, but only provides software with GUI for users to enable them to combine GUI with tangible products to form a patented design product, a GUI design infringement occurs.

However, the above provisions of the Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs were set forth under special legislative background. German scholars participating in the above legislation opined that designs and trademarks are somewhat similar as they both function to communicate with consumers in the market. The difference between the two fields of law lies in the fact that the trademark must indicate commercial origin in order to function as such, whereas the design is not meant to convey any message beyond its own appearance, has the value of symbol and allows consumers to choose (consume) between products, the functions of which are completely interreplacable. [10] Following this thought, the value of symbols protected by EU design regulations does not necessarily be conveyed via tangible carriers. Thus, it is not difficult to understand why the "products" in the above Council Regulation can comprise "graphical symbols". Furthermore, in order to adapt to technological progresses, the EU is managing to adjust design protection rules at the leg-

islative level to clarify GUI-related issues. [11] In the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Regulation (EC) No 6/2002 on Community designs and repealing Commission Regulation (EC) No 2246/2002, the definition of "product" is amended in Article 3(2) to "any industrial or handicraft item other than computer programs, regardless of whether it is embodied in a physical object or materialises in a digital form", and Article 19(2)(d) clarifies that the act of "creating, downloading, copying and sharing or distributing to others any medium or software recording the design for the purpose of enabling a product referred to in point (a) to be made" constitutes infringement. [12]

In contrast, the current laws in China still adhere to the conventional idea that designs are inseparable from products. Although there is a view that for GUI design patents with weak association between designs and products, the scope of design patents should not be restricted by the category of products. [13] During the discussions about the fourth revision of the Patent Law, some people insisted that the introduction of the partial design system should expand the protection of GUI designs. [14] The latest Guidelines for Patent Examination (2023) further downplay the relationship between GUI partial design patent applications and products, for example, the views of a GUI partial design may not show the products to which the GUI is applied, and the product name is only required to include "electronic device". However, even though the GUI partial design system has been established, it is not right to say that China never emphasizes the role of products in delimiting the scope of protection of designs. [15] Otherwise, there may occur chaos in the design system, copyright system and trademark system, as worried by British scholars. [16] Hence, the EU's interpretation methods cannot be easily applied to China's judicial practice.

2. U.S.: Software belongs to products

In the U.S. law, the definition of "article" does not include such intangible items as EU's "graphical symbols". In contrast, Chapter 1504.01(a) of the Manual of Patent Examining Procedure (MPEP) stipulates that if an application claims a computer-generated icon shown on a computer screen, monitor, other display panel, or a portion thereof, the claim complies with the "article of manufacture" requirement of 35 U.S.C. 171. [17]

Regarding whether GUI design patents protect tangible items only, the U.S. District Court for the Northern District of California broadly interpreted the "article of manufacture" in a case, demonstrating the views of the U.S. courts in this regard. In 2015, Microsoft sued Corel Inc. for patent infringement, which relates to four GUI design patents seeking to protect a "display screen". The defendant argued that the accused software did not belong to a physical display screen claimed by the patent in suit and therefore had not applied the patented design to any article of manufacture. The plaintiff stated that an "article of manufacture" has a "broad meaning", wherein an "article" is just "a particular thing", whereas "manufacture" means "the conversion of raw materials by the hand, or by machinery, into articles suitable for the use of man". Thus, software belongs to an "article of manufacture". The district court agreed with the plaintiff, holding that software is "a thing made by hand or machine" and thus can be an "article of manufacture". [18]

The interpretation of the U.S. court may have a direct impact on the requirements for patent application, and such a conclusion also has made U. S. scholars astonished. Some scholars made comments as follows: before this case, the question of whether a GUI design is, in fact, a "design for an article of manufacture" has never actually been decided by a court. According to the view of the USPTO, the article of manufacture defined in the GUI patent as claimed by Microsoft in the above case is the display screen, not software. The phrase "article of manufacture" in the design patent statutory subject matter provision has long been understood to be synonymous with the term "manufacture" in the utility patent subject matter provision, which the courts have clearly decided that only tangible items can be "manufactures". [19] It can be seen that a consensus on the above interpretation of the U.S. court has not been reached in the U.S. academic community beforehand, and such interpretation is not under careful argumentation.

Some Chinese scholars opine that the scope of patented design products should not be restricted to tangible items. [20] Nevertheless, since China is not a case law country, it is impossible for Chinese courts to interpret software as a product. If software is rigidly interpreted as a product, it will not only lead to problems related to the category of "software products" in design patent application practice, but also render the accused screen hardly similar to the "software products" protected by GUI patents. In summary, interpreting software as a product does not resolve the dilemma about protection of GUI designs, but triggers more issues and controversies instead.

3. Japan: Provision of software specifically used for manufacturing infringing products is deemed as indirect infringement

Prior to the revision of the current Japanese Design Act (2019), the issues related to the liabilities of particular GUI software providers can be solved by interpreting "indirect infringement". The Japanese academic community believes that the act of downloading and installing computer software with GUI belongs to the manufacture of design products. [21] Article 38 of the Japanese Design Act (2015) is very likely to result in the determination of direct infringement as indirect infringement, [22] that is to say, the act of producing, selling, renting and providing via telecommunication lines computer programs with particular GUI specifically used for manufacturing design products can constitute indirect infringement.

However, the China's Patent Law provides no definite legal basis for determining the provision of computer programs specifically used for manufacturing design products as indirect infringement, as stipulated in the Japanese Design Act (2015), thereby rendering it difficult to further evaluate the act of software providers from the perspective of indirect infringement. Of course, Article 21 of the Interpretation (II) of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Disputes over Patent Infringement (hereinafter referred to as the Interpretation (II)) also sets forth the provision on contributory infringement. Therefore, some people opine that "where a subject abets or helps end-users to download and install software (for manufacturing patented design products), the illegality of its act can be evaluated from the perspective of indirect infringement when certain requirements are met". "Since the act of providing software with GUI is presented on a certain type of 'electronic devices' for sure, such an act shall constitute 'special-purpose' contributory infringement under the Interpretation (II)." [23] However, it is deemed that in the light of the provisions on contributory infringement of Article 21 of the Interpretation (II), the accused software can hardly be interpreted as tangible items (products) like "materials, equipment, components and intermediates" specifically used for exploiting design patents. Moreover, since there is no intent of complicity in committing infringement between software providers and users, it is quite far-fetching to interpret such an act as contributory infringement.

In summary, under the current legal framework in China, "protecting designs that are separated from products" and "regarding software as products" both violate the legal provisions. There is no definite legal basis in Chinese law for regarding computer software specifically used for manufacturing design products as indirect infringement, which is different from Japanese law. Certain controversies and difficulties stay with the interpretation method adopted in *Kingsoft v. Mengjia*, for directly regarding the provision of computer software as the act of "manufacturing design products", and the interpretation method for investigating the liabilities of software providers due to contributory infringement or adduced infringement. Under such circumstances, is there any other feasible interpretation method worthy of trying and applying by Chinese courts?

III. Explore a new interpretation method: the authorized manufacture of infringing products constitutes direct infringement

It is deemed that providing computer software with GUI by a software provider to end users is equivalent to "authorizing" the end users to combine GUI with electronic devices with screens, such as mobile phones, which is the act of "permitted manufacture" of patented design products. Such an unauthorized "permitted manufacture" act may constitute direct infringement of the "manufacturing rights" enjoyed by GUI design patentees. A detailed interpretation is made as follows:

1. The user's act of installing and operating software should be deemed as "manufacture"

The premise for applying the abovementioned interpretation method is to interpret the user's act of installing and operating software as the "manufacture" of patented products. However, there is still controversy over such an interpretation method in China. Some Chinese scholars insist that since the combination of GUI with hardware is essentially the use of GUI, interpreting the act of combining GUI with hardware as the "manufacture of design products" does not tally with reality. [24] Even in *Kingsoft v. Mengjia*, the court deemed that the user's installation of software and use of the product (mobile phone) with infringing GUI shall be deemed as the use of GUI.

Nevertheless, some scholars pointed out that in *Kingsoft v. Mengjia*, the end users' installation of software com-

prising a graphic image on mobile phones can only be comprehended from the perspective of "manufacture". Regarding devices comprising graphic image designs, the "manufacture" does not mean the manufacture of terminal devices, but the combination of "graphic images" with "devices". An act of installation of software comprising a graphic image design on devices is typically an act of combination. [25] This article agrees with such an interpretation on the grounds that the interpretation of the user's installation of software with GUI on hardware as the "manufacture" does not violate the legal provisions. The "right to manufacture" enjoyed by the patentee is in essence the embodiment or implementation of the patented technical solution or design in a tangible product. In a GUI design patent infringement dispute, a user tends to install and run the accused software to render the software interface to appear on the display screen, in such a way that the user turns its computer (a product with a display screen) into a computer with a specific GUI. Therefore, the installation of software by the user is actually the creation of a product with a specific design as depicted in the patent, aligning with the interpretation of the "manufacture" under the patent law.

Indeed, interpreting the user's installation of software as "manufacture" has several drawbacks. If the end user installs software with GUI for production and business purposes, the end user commits infringement. [26] This article holds that under normal circumstances, dealers providing software specialized for industrial production will meanwhile provide users with installation services, and end users rarely install software themselves for production and business purposes. Even though the end users may commit infringement, the patent holders actually have no motivation to sue the end users because the damages are obviously limited in a lawsuit against a single end user over the "infringement of the right to manufacture". For this reason, the patent holder will mainly sue a software provider.

2. The "right to manufacture" is interpreted as the exclusive right to "authorize others to manufacture a patented product"

This interpretation method has been embodied in the previous judgment issued by the Shanghai Intellectual Property Court. In *Fisher Co. v. Shanghai Oriental Teaching Aids Co. and Shanghai Yaxun Intelligent Robot Technology Co.* (briefly known as the Huiyu Toy case), [27] a copyright infringement case, the plaintiff asserted that a finished product constructed from building blocks is a model work, and the defendant "plagiarized" the plaintiff's building blocks and instruction and provide them to end users. The court eventually decided that the defendant infringed the plaintiff's right to copy the model work. The court interpreted, in its judgment, the right to copy as the right that "can prohibit others from authorizing a third party to copy the plaintiff's work without permission", thereby concluding that the infringer's act of permitting end users to copy (build) the model work infringed the plaintiff's right to copy. If such a judgment reasoning is followed to investigate the infringement liabilities of the software provider in *Kingsoft v. Mengjia*, then the user may deem that he is authorized to download and install the software and therefore conduct the "manufacture of the design product comprising GUI" as long as the software provider publishes the software with the particular GUI on a platform for users to download. The software provider should be able to foresee that a huge number of users will conduct the manufacture, which means he actually authorizes the users to combine the software having the particular GUI with their mobile phones, in such a way that the combined product falls under the scope of protection of the design patent. Therefore, we can draw the conclusion that the provision of software by the software provider infringes the patentee's exclusive right to authorize others to manufacture design products.

The right to authorize and the right to prohibit are two sides of the exclusive right enjoyed by the intellectual property rights holders, including patent holders, and there is no exclusive right that can only prohibit, but not authorize, the use of a patent. [28] Therefore, we should be able to interpret the right to manufacture enjoyed by the patentee as the exclusive right to "authorize others to manufacture the patented product", based on which it can be determined that the software provider in the GUI design patent infringement dispute had directly infringed upon the patentee's right to manufacture. Such a legal interpretation is more effective as it can not only enable the plaintiff to investigate the infringement liabilities of the software provider without asserting the existence of induced infringement or contributory infringement, but also eliminate the reasoning fallacy in the judgement of *Kingsoft v. Mengjia*, in which the defendant's provision of software with GUI to users is directly deemed as the "manufacture of patented products".

However, under China's patent law, patent infringement occurs on the premise that an infringing act is performed "for production and business purposes". Suppose

the user does not commit infringement "for production and business purposes" like the situation in *Kingsoft v. Mengjia*, whether the above interpretation is tenable is still a controversial issue. And the controversary also exists in the Huiyu Toy case for the reason that the end users of the building blocks apparently can exempt themselves from infringement liabilities by making use of the fair use rule. But the jurisprudential basis underlying the Huiyu Toy case actually stems from the "authorized infringement" [29] in British Law, which is characterized by the fact that even though the authorized party does not commit infringement due to fair use rule, the authorization can separately constitute infringement as long as the authorized party has objectively completed the authorization and performed a relevant act, and the authorization has infringed upon the exclusive right of the right holder. [30] This is exactly why the "authorized infringement" differs from joint infringement and indirect infringement in intellectual property laws, and has special legal value and normative significance. Of course, such an interpretation method is not widely used by Chinese courts. As a result, in judicial practice in China, it is necessary for scholars and practitioners in China to reach a further consensus on the application conditions of the "authorized infringement" in a bid to bring it into full play in stopping intellectual property infringement.

IV. Conclusion

Kingsoft v. Mengjia is an epitome of the "hardware-software separation" dilemma about the protection of GUI design patents in China. The Shanghai Court drew a reasonable conclusion; however, the grounds for judgment have somewhat broken through the long-standing principle that design patents to be protected must be limited to products, which has triggered widespread discussions.

This article deems that the theory of "authorized infringement" is of positive significance in resolving the disputes in *Kingsoft v. Mengjia*, and can provide a new legal interpretation method while maintaining the stability of the current legal framework, thereby providing "support" and "correction" for the reasoning of the judgment in *Kingsoft v. Mengjia*: the word "support" means that the first and second instance courts' determination of the software provider's act as direct infringement (infringement of the right to manufacture) is worthy of recognition as it tactfully resolved the assumption of infringement liabilities between the software provider and end users; and the word "correction" means that the interpretation of the user's act of installing and operating software is corrected from "manufacture" to "authorized manufacture". Such an interpretation method can continue to maintain the principle that designs to be protected must be limited to products, while ensuring the stability of legal interpretation.

To sum up, for GUI design patent infringement disputes like *Kingsoft v. Mengjia*, where "software is separated from hardware", it is still feasible to find a solution by means of legal interpretation, instead of law revision. ■

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[2] The Civil Ruling No. Minshenzi 54/2012.

[3] The Civil Judgment No. Jing73minchu 276/2016.

[4] The Civil Judgement No. Huminzhong 281/2022.

[5] Wang Qian and Wen Tianji (2023). Boundary of protection of GUI designs under the Patent Law—Comments on *Kingsoft v. Mengjia*. *Intellectual Property, 9, 84*.

[6] Article 3(a) of the Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs stipulates that 'design' means the appearance of the whole or part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation; and Article 3(b) thereof stipulates that 'product' means any industrial or handicraft item, including *inter alia* parts intended to be assembled into a complex product, packaging, get-up, graphic symbols and typographic typefaces, but excluding computer programs.

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[25] See supra note 23.

Zhan Jingkang (2018). Analysis of design patent infringement case *Qihoo v. Jiangmin*—Comments on CNIPA Order No. 68. *Electronics Intellectual Property, 1, 57*.

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WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge Approved

From 13 to 24 May 2024, the World Intellectual Property Organization (WIPO) held a diplomatic conference on genetic resources and associated traditional knowledge in Geneva, Switzerland, successfully approving the Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge. The Treaty was approved after a 25-year negotiation.

Source: CNIPA