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The Protection of Unregistered Designs in EU Law

Abstract. It is significant that two forms of protection exist because some sectors of industry produce a large number of designs for products which are on the market for a very short time. Protection without registration formalities and fees is an advantage. However, there are sectors of industry which value the advantages of registration. These sectors value the possibility of longer term protection more than the shorter term protection provided by an unregistered Community design. One of the important benefits is that unregistered Community design protection does not require any documents, but the owners have to prove the exclusive right belongs to them. Another significant advantage is that an unregistered Community design can be changed to a registered design during the twelve- month grace period from the disclosure.

Keywords: unregistered Community design, short term products, protection, industrial design, novelty, individual character

Introduction

Industrial design can be the most important factor determining the attractiveness of a given product, which is why it is so important to ensure its protection. Industrial design fulfils the function of advertising goods by using the external appearance of the product. Industrial designs are designed to make an entrepreneur recognizable in the market (Poźniak-Niedzielska, 2007). The interesting and original appearance of a product also creates consumers' interest. The essence of industrial design is

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to make the product look more attractive. Nowadays, it is difficult to imagine the functioning of industry without industrial design (Sieńczyło-Chlabicz, 2008). Council Regulation (EC) No 6/2002 and Directive 98/71/EC have harmonized design protection in the Community. Regulation 6/2002/EC provides a protection model for both the registered and unregistered Community designs. According to art. 1 point 2 of the Regulation 6/2002/EC, the Community design may be protected as a registered or unregistered design. Both the registered and the unregistered Community designs are protected in the territory of all EU Member States. Many factors have influenced the introduction of an unregistered Community design. The main factor is the quick turnover of products in some sectors of industry, such as fashion, toys or cars, which produce short-term products (Tischner, 2006). Another factor is the increasing demand for individual products, which incentivizes manufacturers to start giving products an original and unique look (du Vall, Kasprzycki, Ożegalska-Trybalska, Stanisławska-Kloc & Tischner, 2011). These factors have triggered the need to create a system ensuring protection without the need for long-term, complicated and costly registration.

1. The Establishment of the Institution of Unregistered Community Design

Already in the Green Paper on the legal protection of industrial design, the European Commission has recognized that not all industries develop in the same way, which is caused by various factors. Some develop more dynamically than others and are focused on much more frequent changes. It was acknowledged that there is no uniform rule for all market categories. Unregistered Community design was an idea to introduce certain solutions only to test them before they were registered. There was reflection on how to find a solution to a scenario in which a given design is placed on the market before its registration and as a result, loses the requirement of novelty. In the case of the disclosure of a given product to be tested in the market, the product is not protected. In connection with this situation, the European Commission proposed introducing short-term protection for products that have not been registered. The European Commission suggested that the protection period for an unregistered design should last 3 years. The beginning of the protection period starts on the date it was revealed. The European Commission has also proposed introducing a “period of grace”, which is 12 months, and it is calculated from the disclosure of the design (Green Paper, 1991). It consists of the fact that, despite the disclosure of the design, within 12 months of its disclosure, it is possible to submit a given design and conduct the registration process. It is assumed that an unregistered Community design should provide the same scope of protection as the registered design. However, the issue of protection granted for

an unregistered design is different because it concerns the protection of the product only against copying (Brancusi, 2012). Before the adoption of Regulation 6/2002/EC, the system for the protection of unregistered designs was not followed in the EU Member States, other than the United Kingdom. The prototype for this form of protection applies to British law under the CDPA (Copyright, Designs and Patents Act, 1988) which was enacted in 1989. It can be concluded that the unregistered design right (UDR) in the UK system was an inspiration for the institution of an unregistered design in European law (Sieńczyło-Chlabicz, 2008). However, it needs to be emphasized that there are fundamental differences between the solutions adopted by these institutions. The basic feature of the British system is its similarity to copyright law. Protection begins with the creation of the design, not the filing date in case of a registered Community design or the first public release in the case of an unregistered Community design (Poźniak-Niedzielska & Sieńczyło-Chlabicz, 2016). The UK unregistered design right is a hybrid right, which links copyright and design laws elements. The requirement of protection under the UK design law is “originality”, contrary to novelty or individual character. The UK Unregistered Design Right is used very often as a protection measure and has a substantial impact, even more than the UK registered right (Derclaye, 2013). Apart from the United Kingdom, no other national legal system provides unregistered design rights. There are no current proposals to introduce such a right in the future on the national level. However, it does not mean that unregistered Community design does not provide an attractive protection.

2. Requirements for Protection of Unregistered Community Design

Requirements for protection for an unregistered design do not differ from those provided for registered designs (Brancusi, 2012). Designs should be new and have an individual character. The condition for granting protection to an unregistered design is to make it publicly available. Unregistered Community design is protected for three years from that moment. The scope of protection of an unregistered design is reduced to the protection against copying the design. There are sectors of industry in which such protection is sufficient, including the fashion industry or the toy industry. For these sectors, it is more important that the protection of the design is ensured from the date it is made available without the need for registration formalities, rather than a longer period of protection and a wider scope of protection, as in the case of a registered design. Some sectors of industry definitely appreciate the short protection only against copying, rather than the protection resulting from the registered design.

The protection conditions of both designs are the same, so the design must be new and have an individual character. The doctrine indicates that the introduction of the protection of an unregistered Community design has been caused by the desire

to facilitate protection in industrial sectors that create designs functioning in the market for a short time. The protection in the form of an unregistered Community design is mainly used by entrepreneurs introducing a characteristic type of products to the market – short-term products. These include products in the field of fashion or toys. The protection in the form of an unregistered Community design is used by entrepreneurs to ensure protection of the designs that they have implemented, which will probably not be on the market for a long time.

2.1. Novelty

The requirement of novelty must be met by both registered and unregistered design. What is more, the requirement of novelty must be met when applying for protection at both national and community level (Kępiński, 2010). According to the art. 5 of the Regulation, a design is considered to be new if no identical design has been made available to the public, in the case of an unregistered Community design, before the date that the design in question has been made available to the public. In order to determine whether this condition is met, it is necessary to make a comparison between the design and the previous similar design. In the case of unregistered designs, the assessment should be made at the date of the first reveal of the design.

Designs that differ only in immaterial details are treated as identical. It is simple when designs are completely identical, but understanding the notion of “immaterial details” can be complicated. According to Hasselblatt (2015, p. 74) there is no practical relevance whether a design is literally identical or presumed to be identical to a prior design because in both cases the requirement of novelty is not fulfilled. Consequently, the distinction between immaterial and non-immaterial differences is not relevant.

Contrary to patent law, the requirement of novelty in the Regulation 6/2002/EC is relative. The requirement of novelty in industrial designs should be quite flexible, and it depends on the sector of industry in which the design exists (Tischner, 2006). What makes this matter difficult is that the term “new” is not geographically limited. It is only indicated that those events that make a design available to the public are not recognized if they could not have become known to the circles specialised in the sector concerned and operating within the Community. According to art. 7 point 1 of the Regulation 6/2002/EC if a design is disclosed to a third person under explicit or implicit conditions of confidentiality, then it has not officially been made available to the public (Bulling, Langohrig & Hellwig, 2004). In doctrine, there is controversy surrounding the issue of prior public availability of the design. The doctrine indicates that a design can not be considered new if it was previously made available to the public and could have become known in the normal course of business to the circles specialised in the sector concerned, operating within the Community. The issue of early disclosure of a design and the loss of its novelty as a result of

public disclosure were also considered in the Judgment of the Court, *H. Gautzsch Großhandel GmbH & Co. KG v Münchener Boulevard Möbel Joseph Duna GmbH*, 2014). In connection with the consideration of the novelty of the design, the Court was asked to consider the concept of the circles specialised in the concerned sector, operating within the Community. Advocate General Melchior Wathelet in the opinion (*Opinion of Advocate General Wathelet, H. Gautzsch Großhandel GmbH & Co. KG v Münchener Boulevard Möbel Joseph Duna GmbH*, 2013) pointed out that a design can be sufficiently known by fellow industry members operating in the European Union; for example, this can occur if drawings of the design are provided to traders operating in a given industry.

The Court of Justice also took into account the scale of disclosure of a given design in the environment; they considered whether a design that was presented to only one company can be considered to be publicly available. The Court of Justice has put forward the following argument. Although the design has been disclosed to third parties without an explicit or implicit condition of confidentiality, it can not become known to environments specialized in a given industry operating in the European Union during the ordinary course of business if it has only been disclosed to one company belonging to these specialized environments.

In the doctrine, there is also controversy regarding the phrase “irrelevant differences”, which plays a key role in the determination of whether a given industrial design meets the requirement of novelty. The concept of “irrelevant differences” has not been defined by any EU legislator. The doctrine indicates that the assessment of this concept should be carried out separately in each case of testing the novelty of a given industrial design. Due to the fact that the concept of “irrelevant differences” has not been defined and has different interpretations, this issue has been the subject of many analyses of European courts.

It is mentioned that pure copies and forms that are obviously taken from prior designs may not be considered new. Additionally, designs differing only in size or colour schemes do not fulfil the requirement of novelty. In the case of an unregistered design, the date that should be taken into account when considering its novelty is the date that the design was first made available to the public (*Bulling, Langohrig & Hellwig*, 2004). The protection of an unregistered Community design depends on where it was first made available to the public. The creation of the right to design protection is possible only if the disclosure took place in the territory of the European Union (*Poźniak-Niedzielska M.*, 2007).

2.2. Individual Character

According to art. 6 of the Regulation 6/2002/EC, it is assumed that an unregistered Community design has an individual character if the overall impression created on an informed user differs from the impression created by a design that has already been publicly revealed.

The assessment as to whether a design has individual character should be based on whether the overall impression produced on an informed user viewing the design clearly differs from that produced on him by the existing design corpus, taking into consideration the nature of the product to which the design is applied or in which it is incorporated. The degree of freedom held by the designer when developing the design should also be analysed. In addition to the assessment of the overall impression produced on an informed user, the degree of freedom of the designer when developing the design also determines the individual character of the design (Szczepanowska-Kozłowska, 2005). There is a relationship between the originality of a design and the degree of freedom of the designer when developing the design. When a designer has a small margin of creative freedom, then small differences will be sufficient to establish the individual character of the design. Conversely, when the margin of creative freedom is large, greater differences will be required to recognize that the design has individual character (Tischner, 2006).

An informed user is a person who has knowledge not only about the specific product to be protected, but also about other designs of the same type. The term “informed user” does not refer to a designer or expert on designs. It refers to a user of a design who has a specific knowledge of the type and nature of the design in question (Sieńczyło-Chłabicz, 2008). It should be a person who has a level of knowledge sufficient to assess whether a given design has an individual character. The extent of the informed user’s knowledge determines the scope of design protection. Assuming that a professional is considered an informed user, it will be easier for him/her to notice the individual character of the given design, and consequently more designs will be protected. However, when a person without special knowledge of designs is considered an informed user, it will be more difficult to notice the individual character of the design. As a result, fewer designs will be protected (Wernicka, 2008). Additionally, it is important to consider what the phrase “user” means in the context of the phrase “informed user”. It seems that the legislator deliberately used this word because it is assumed that an informed user should be a person who often uses a product incorporating the design. This person should be a regular user and therefore has knowledge about the products’ designs of a given type. This is a very considered construction because people who often use a particular type of product constitute a group of people who have a broad knowledge of the product designs of the goods they use (Nowińska, Promińska & du Vall, 2015).

3. The Meaning of the Unregistered Community Design in Judgment of the Court in *Karen Millen Fashions v Dunnes Stores* case

In the fashion industry, there is a growing phenomenon referred to as fast fashion. Fashion companies are pressured to introduce new collections every

few months in order to stay relevant. Trends change quickly, and as a result, investments in the protection of rights from the registration of industrial designs are often unprofitable. The protection given by an unregistered Community design is appreciated by entrepreneurs to ensure protection of the short-lived designs they introduce because their appearance is determined mainly by fashion subject to dynamic changes or seasonal products (du Vall, Kasprzycki, Ozegalska-Trybalska, Stanisławska-Kloc & Tischner, 2011). It seems that initially the entrepreneurs were not convinced by the protection of an unregistered Community design. This opinion changed after the Judgment of the Court in the Karen Millen Fashions case against Dunnes Stores (Judgment of the Court, *Karen Millen Fashions Ltd v Dunnes Stores*, 2014). The case confirmed that the protection of the unregistered Community design is effective. Karen Millen designed a women's striped shirt in blue and brown and put it on the market. Dunnes Stores purchased these shirts, made copies and then put them on sale in their Irish stores. Karen Millen, the owner of an unregistered design, demanded a ban on the use of this design and compensation.

In this case, an important practical question appeared, which was answered by the Court of Justice of the European Union. The Court considered what evidence an owner of an unregistered Community design needs to provide in order to prove their property rights in court. In particular, who should show that the design has an individual character. This was an important issue because, in practice, proving that a design has an individual character is usually difficult. The court decided that the overall impression produced by the design on the informed user, within the meaning of art. 6 of Regulation 6/2002/EC, should be considered for any individual design which has previously been made available to the public or any combination of known design features from more than one such earlier design.

The courts' interpretation of art. 6 of Regulation 6/2002/EC is that to prove the individual character of a design, the overall impression of the design must be different from the impression produced on an informed user by one or more earlier designs, either individually, or by a combination of features from multiple earlier designs. The Court emphasized that art. 6 of Regulation 6/2002/EC does not contain any information on how the overall impression must be produced. It means that art. 6 of Regulation 6/2002/EC should be interpreted as meaning that the assessment as to whether a design has an individual character must be conducted in relation to one or more specific and identified designs from among all the designs which have previously been made available to the public. It was mentioned that this interpretation is in keeping with the case law in which it has been held that the comparison between designs actually relates to the impression produced on an informed user by earlier identified designs².

2 See Judgment of the Court in *PepsiCo v Grupo Promer Mon Graphic*, C-281/10 P, EU:C:2011:679, par. 55, Judgment of the Court in *Neuman and Others v José Manuel Baena Grupo*, C-101/11 P and C-102/11 P, EU:C:2012:641, par. 54.

Another significant question is if an owner of an unregistered Community design only has to show what constitutes the individual character of the design or if the owner is obliged to prove that the design has individual character in accordance with art. 6 of Regulation 6/2002/EC. The Court found that the owner of the design should show the date of the first public release of the design. What is more, the Court found that the owner should only indicate what constitutes the individual character of that design and that the owner is not obliged

to prove that the design has an individual character. Without a doubt, this facilitates the demonstration that the design has an individual character. It is important for the owner of an unregistered Community design to identify the features of the design which gives it individual character because then it is known what is protected as a design.

As Advocate-General Wathelet explained in his opinion (Opinion of Advocate General Wathelet, *Karen Millen Fashions Ltd v Dunnes Stores*, 2014), the holder of the design must first of all prove the design's first public disclosure within the European Union, which must not have taken place more than three years earlier, otherwise the design will no longer be protected (Opinion of Advocate General Wathelet, *Karen Millen Fashions Ltd v Dunnes Stores*, 2014). Advocate-General Wathelet also claimed that Dunnes Stores' belief that the holder of the design must also prove that the design is new and has an individual character is not correct. As Advocate-General Wathelet explained, such an interpretation seems to be contrary to the objective pursued by the legislature. Advocate-General Wathelet emphasized that when the owner of an unregistered Community design has to prove the design's novelty and individual character, the holder of an unregistered Community design would be required to prove not only that the design is new and individual in character, but also that all the other requirements have been met, including the visibility required by art. 4(2) and the non-functional nature of the design referred to in art. 8 of Regulation 6/2002/EC. That is why the owner should only indicate what constitutes the individual character of that design. Undoubtedly, that makes unregistered Community design protection even more attractive.

4. Disclosure of the Unregistered Community Design in Judgment of the Court in *H. Gautzsch Großhandel GmbH & Co. KG v Münchener Boulevard Möbel Joseph Duna GmbH* case

When it comes to unregistered Community design the most famous case is *Karen Millen Fashions v Dunnes Stores*. However, another important issue was analysed in *H. Gautzsch Großhandel GmbH & Co. KG v Münchener Boulevard Möbel Joseph Duna GmbH* case (Judgment of the Court, *H. Gautzsch Großhandel GmbH & Co. KG v Münchener Boulevard Möbel Joseph Duna GmbH*, 2014).

MBM Joseph Duna produced and launched into market a canopied gazebo manufactured in Germany in 2004. Gautzsch Großhandel began marketing a gazebo called 'Athen' ('the "Athen" gazebo') manufactured in China in 2006. MBM Joseph Duna brought an action for infringement of an unregistered Community design against Gautzsch Großhandel.

MBM Joseph Duna claimed that the 'Athen' gazebo was a copy of its own design, which, in April and May 2005, appeared in its 'MBM-Neuheitenblätter' (new products leaflets), which had been distributed to the sector's largest furniture and garden furniture retailers, as well as to German furniture-purchasing associations.

Gautzsch Großhandel opposed the action, contending that the 'Athen' gazebo had been independently created and had been presented to European customers in March 2005.

In this case, the court analysed an important issue regarding who could be considered to be in as "the circles specialised in the sector concerned, operating within the Community" according to art. 7 of Regulation 6/2002/EC.

Paragraph 1 of art. 7 of that regulation provides that if a design has been exhibited, used in trade or otherwise disclosed, the design has been officially disclosed to the public, except where these events could have not reasonably been known in the normal course of business to the circles specialised in the sector concerned, operating within the Community.

The Court analysed if the art. 11(2) of Regulation 6/2002/EC should be interpreted in the normal course of business, a design could reasonably have become known to the circles specialised in the sector concerned if images of the design were distributed to traders. The Court also analysed if it is sufficient to make a design available to only one undertaking in the specialised circles.

The court emphasized that the answer to that question depends on the particular circumstances of each individual case. According to the Court, it is possible that an unregistered Community design may have become known in the normal course of business to the circles specialised in the sector concerned, operating within the European Union if images of the design were distributed to traders operating in that sector.

The court recognized that if a design has been disclosed to a single undertaking in the sector concerned within the European Union, the design could reasonably have become known in the normal course of business to the circles specialised in that sector. In some cases, it is possible that making a design available to only one undertaking may be sufficient for a design to be considered publicly available according to art. 7 of Regulation 6/2002/EC.

It seems that this opinion has been confirmed in the legal literature. A design is deemed to have been made available to the public within the Community if it has been published, exhibited, used in trade or otherwise disclosed that these events could reasonably have become known to the circles specialised in the sector

concerned, operating within the Community. Additionally, protection of unregistered Community design could also be created by a disclosure outside the territory of the Community if the circles specialised in the sector concerned could have known about the disclosure (Maier, Schlötelburg, 2003). This opinion is also confirmed by Stone (2012, p. 300). The author claims that art. 11(2) of Regulation 6/2002/EC purports to broaden the classification of publicly available. Consequently, according to art. 11(2) of Regulation 6/2002/EC, disclosure of the unregistered Community design could be any global disclosure that could reasonably have become known to the circles specialised in the sector concerned, operating within the Community. According to the author, this regulation is misleading because “any disclosure within the Community” can be differently interpreted in each case.

5. The Relationship Between Registered and Unregistered Designs

The protection resulting from unregistered Community design and registered Community design is not the same. Unregistered Community design only protects against copying and the protection period is different. An unregistered design is protected for 3 years, while a registered design can be protected for up to 25 years. The protection strategy should be individually selected to the needs of a specific entrepreneur, taking into account all the specificity of the sector in which the design exists. The essence of the institution of an unregistered Community design is the benefit of protection that does not require many formalities nor any fees. It seems that by providing protection for unregistered industrial designs, the market for short-lived products has had a chance to develop. Entrepreneurs are aware that the product they introduce will be protected even though it has not been registered.

There is no doubt that the protection resulting from an unregistered design is very attractive as it does not require registration nor any fees. In the case of products operating in the market for a short time it usually turns out to be sufficient. With the protection provided by an unregistered Community design, it is possible to submit this design for registration within 12 months. As a consequence, by using an unregistered Community design, an entrepreneur is able to check whether a product is successful and then consider registering it. It seems that the fashion industry is generally based on products with a short market life. It is also difficult to predict factors, such as tastes and trends, which increase the attractiveness of an unregistered Community design. It is desirable for entrepreneurs operating in this sector to use forms of protection that do not require excessively high fees and are easily available.

Industrial design plays an important role in branches of creative industry. The fashionable and aesthetic appearance of the product attracts customers' attention and is often a decisive element in their selection (du Vall, Kasprzycki, Ożegalska-Trybalska, Stanisławska-Kloc & Tischner, 2011). Industrial design is a creative

sector that consists of designing new and original products. The doctrine indicates that defining the nature of industrial design is very difficult because it is a combination of art and technology. Currently, they exist in every area of the economy, from the clothing and toy sectors to the electronics industry. Interesting, unique shapes and ornaments of products increase the customers' interest. Entrepreneurs are aware of the fact that industrial designs are an important element of their marketing strategy.

Conclusions

Industrial designs are currently developing rapidly, mainly because of the need for new and unusual designs in the market. In addition to the aesthetic issue that constitutes the main aspect of industrial design, the sector is often related to the functionality of the product. The important role of industrial design is to give technology an interesting look to enhance consumers' interest. In some sectors of industry, such as the fashion, toys or cars, it is necessary to protect a design for a shorter period than it is possible by registered community design. In sectors where changes are extremely dynamic as a consequence of fashion or trends, it is a sufficient solution. In addition, unregistered Community design protection does not require any payment and begins with the first public disclosure of the design.

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