



Industrial designs in the era of change – revolution, evolution or stagnation?

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Abstract. The article analyzes the amendments in Polish and European design law that have been just proposed by EU and Polish legislator. The registration proceedings of EU designs held before the EUIPO differs from the registration of designs proceeded by the Polish Patent Office (and by other national patent offices too). Due to the different scope of protection of Community designs and national designs the EU legislator wanted to introduce the harmonization within the procedural rules too. Polish legislator wants to change design law too. Consequently, EU legislator and Polish legislator have just proposed some amendments in design law. This study presents only examples proposed by EU and Polish legislator. They could be treated as revolution, evolution or stagnation. The basic research method for this article was analysis of EU and Polish design law (that is in force and proposed by EU and Polish legislator) and Polish and European practice of design law.

Keywords: design, multiple application, harmonization and unification of design law.

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INTRODUCTION

Since 1918, the industrial design law in Poland has been amended many times. The entry into force of the Act of 30th of June, 2000 - Industrial Property Law (hereinafter as Polish IPL Act) was a new stage in shaping the legal protection of industrial designs. The Polish legislator does not want to regulate the protection of industrial designs in a separate legal act. Consequently, a single act regulating the protection of other immaterial goods (not only of the industrial designs) have been adopted. The Polish IPL Act which entered into force on the 22nd of August, 2001, was also the fulfillment of the obligations concerning the accession of Poland to the EU. The legal regulations included in the IPL was consistent with the provisions of the EU Directive 98/71/EC of the European Parliament and of the Council of 13th of October 1998 on the legal protection of designs (hereinafter as

directive 98/71). However, the EU directive did not concern the harmonization of the registration proceedings held before IP offices of the EU Member States. Therefore, for many years of the validity of European industrial design law (Directive 98/71 and Regulation 6/2002) - regarding the registration and protection of industrial designs - different practices have been in force in individual EU Member States. Thus the EU legislator wanted to introduce the harmonization within the procedural rules too. This resulted in the Proposal for a Directive of the European Parliament and of the Council on legal protection of designs (recast) (hereinafter as proposal for a EU Directive on legal protection of designs). This study presents some examples of amendments proposed by the Polish and EU legislators. Sometimes, they may indicate a significant evolution of the approach to design protection. However, there are also some proposals of changes that show that the legislator is somewhat conservative. There are also some amendments of law that should be classified as a revolution for the industrial design protection system in national level.

ENTRY INTO FORCE OF THE IPL ACT - EVOLUTION OF POLISH DESIGN LAW

The analysis of Polish legal acts being in force in the period from the independence of Republic of Poland to the adoption of the currently applicable IPL Act shows that the design as a subject of industrial property rights protection has evolved. Both in the Act of 1924 on the Protection of Inventions, Designs and Trademarks (Article 79) and in the Regulation of 1963 on Decorative Design (hereinafter as Polish Regulation on Decorative Designs), only designs intended for aesthetic purposes used to be protected. IPL Act has introduced a new definition of an industrial design. It is a definition consistent with the definition included in Directive 98/71. Since the 22nd of August, 2001 - the date of entry into force of the IPL Act - it is possible to register various types of products, including which are not intended for aesthetic purposes. Comparing with designs previously registered by the Polish Patent Office it was a significant change. Despite the above, the registration proceedings of EU designs held before the EU agency - the EU Intellectual Property Office in Alicante (EUIPO) - differs from the registration of designs by the Polish Patent Office and other national IP offices.

PROPOSAL FOR AN EU DIRECTIVE ON LEGAL PROTECTION OF DESIGNS - INTRODUCTION OF REVOLUTIONARY CHANGES IN REGISTRATION PROCEEDINGS OF DESIGNS HELD BY NATIONAL IP OFFICES

Due to the need to deepen the processes of harmonization of industrial design law, a proposal for an EU Directive on legal protection of designs has been created (Proposal for a directive of the European Parliament and of the Council on the legal protection of designs (recast) (proposal of 28/11/2022 COM(2022) 667 final 2022/0392 (COD)). It has been recognized that the current system of design protection requires modernization and further harmonization. The European Parliament "stressed the need for revision of the now 20-year-old design protection system" (Report on an intellectual property action plan, para 32). Along with the work on EU Directive on legal protection of designs, the works were executed simultaneously on the Proposal of new regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 6/2002 on Community designs and repealing Commission Regulation (EC) 2246/2002 (proposal of 28/11/2022 COM (2022) 666 final 2022/0391 (COD) (hereinafter as Proposal for an EU Regulation on Community designs). The EU legislator explains the need to change existing regulations by the fact that "The industrial design protection system in Europe is over twenty years old" and "the Regulation (...) was only amended once, in 2006, to give effect to the EU's accession to the Hague International Registration System (Justification for the proposal for the EU Regulation on Community designs, p. 1).

PROPOSAL FOR A NEW INDUSTRIAL PROPERTY LAW ACT IN POLAND

During the work on legal acts regulating the protection of industrial designs in the EU, legislative work was executed in Poland on the Proposal for an act on industrial property law of 25th of April, 2022 (hereinafter as Proposal for a new Polish IPL Act). Referring to the justification of a new act the legislator indicated the need to introduce new regulations because the formation of the industrial design registration procedure is intended to improve the design registration process and thus speed it up (Justification for the proposal for a new Polish IPL Act, p. 28.)

The legal regulations actually being in force in Poland are only partly coincide with the EU regulation. The registration proceedings for Community designs held before the EUIPO (EUIPO is the EU agency dealing with the protection of intellectual property) is not the same as the proceedings held before the Polish Patent Office. Directive 98/71 obliged EU Member States to introduce common provisions with regard to the registration of designs. However, proposal of a new directive on the legal protection of designs is intended to make changes in the above-mentioned proceedings.

EXAMINATION OF DESIGNS - "NEW" AND "OLD" EU DIRECTIVE ON LEGAL PROTECTION OF DESIGNS

There is one fundamental difference in proceedings between EUIPO and Polish Patent Office: Polish Patent Office may not grant protection to an industrial design due to the obvious lack of requirements (novelty and individual character) for the protection of the design. Issuing a decision on the lack of grounds for granting protection to an industrial design, the Polish Patent Office examines the requirements that is the novelty and the individual character in this respect. The difference in the design application procedure held by the Polish Patent Office and held by EUIPO is related to the fact that under Directive 98/71 the EU legislator did not interfere with the scope of the examination.

Meanwhile, in the light of the provisions of the proposed directive, the EU legislator has introduced regulations aimed at harmonizing legal provisions relating to the registration procedure for industrial designs in order to eliminate differences between individual countries (also in the scope presented). Referring to the justification of proposal of a new directive, "(...) In accordance with the Art. 29 of the proposal of directive IP national offices where the registration of industrial designs is held should limit the examination of the design application only "(...) to the absence of the substantive grounds for non-registrability referred to in Art. 13".

Only two issues could be subject to examination by national IP offices. Firstly, each product to be protected as registered design must be compatible with the meaning of Art. 2 point 3. Secondly, offices will have to check whether the design is not contrary to public policy or to accepted principles of morality within the meaning of Art. 8. As the EU legislator states it was intended to ensure "(...) that the costs and burden for applicants related to the procedure for obtaining a registered design are as low as possible, as is the case with the EUIPO examination" (Justification for the proposal for the EU Regulation on Community designs, p. 10).

SUBSTANTIVE EXAMINATION

Elements indicated in the proposed art. 29 of the proposal for an EU Directive on legal protection of designs have so far been subject to verification by national offices dealing with the protection of industrial property. However, some national IP offices execute research to an even greater extent. If the provisions of the proposed directive did not change, many national laws regulating the process of registering designs, including the Polish law, would have to be rearranged. With regard to Polish regulations, both the current IPL Act and the draft of the new IPL Act will require amendments.

In Directive 98/71, the EU legislator did not interfere with the scope of the examination conducted by national offices granting exclusive rights to the designs. Amongst the Member States of EU, only a small group of countries has legal regulations on the substantive examination of designs applied (in terms of whether the

submitted product is novel and has an individual character). Such regulations exist only in few countries. These countries include: Poland, Slovakia, the Czech Republic, Romania, Finland and Hungary.

Substantive examination of designs was executed when the Polish Regulation on Decorative Designs was in force. According to §6 section 1 of the Regulation the certificate of registration of the design may be validly obtained only for a new ornamental design. Initially, the legal regulations that came into force with the entry into force of the IPL Act of 2000 did not provide for the examination of the requirements at the stage of the application procedure. The Act of 29th of June, 2007 amending the IPL Act has introduced some amendments in Art. 110 section 3 of the IPL. According to the Art. 110 section 3 of the IPL Polish Patent Office may issue a decision refusing to grant the right to register an industrial design if the form of the product or its part clearly does not have the requirements of novelty and individual character or the product does not obviously meet the requirements referred to in art. 102 section 3. The amendment has entered into force from 1st November, 2007. The legislator did not explain this amendment. The legislator didn't precise what it means to say that an industrial design is "obviously" not new and does not possess individual character. In order to verify whether the form of the product (or its part) does not clearly meet the attribute of novelty or individual character, the examination held by the Office may in practice be limited not only to the life experience of the expert examining the case, but also may be carried out based on researches in various registers or even through website consultations. It is also difficult to say that the design clearly does not meet the requirements when the decision in question is granted many months after a design has been made public (an increasingly frequent example in the practice of patent attorneys filing applications for industrial designs using the grace period). If the design clearly does not possess requirements like novelty or individual character, the notification in question should be issued earlier - at the stage of formal and legal verification of the application or shortly after the above-mentioned examination. This argument is justified bearing in mind that decisions on granting protection could be issued up to 1 month from the date of filing the application.

There is no data on the number of decisions refusing to grant protection for an industrial design on the basis of Art. 110 section 3 IPL. The report of Polish Patent Office for 2022 shows 31 decisions issued in 2021 refusing to grant registration rights. However, it is not known how many of above-mentioned decisions were issued on the basis of Art. 110 section 3 IPL.

The wording of this provision also raises some interpretation doubts, which has been pointed out in the Polish literature. A literal interpretation of the analyzed provision - as indicated in the doctrine - cannot be made. It was decided that a literal interpretation of this provision leads to the conclusion that if the subject of the application does not obviously meet the requirements for registrability relating to novelty or individual character, it is only at the discretion of the Patent Office whether the registration right will be granted to the applicant or not. As indicated, the term "may" establishes the right of the Patent Office to reject an application whose subject matter does not meet the statutory conditions (Szewc & Niewęglowski, 2017, p. 176).

In the scope of the application of this provision, an opinion appeared in the doctrine, according to which it was postulated to move away from examining the general impression caused by designs "through the eyes" of an informed user, in favor of verifying the requirement of individual character by everyone, even a person with little knowledge of design issues. However, the number of hypothetical reference points should not be multiplied. Under Polish IPL Act, there are already three kind of persons that help assess different requirements of various immaterial goods. The average consumer is used in trademark law to help to assess the likelihood of confusion. To exam inventive step of invention it is used a reference point in the form of an expert in a given field of technology from which the technical solution submitted for patent protection comes. In relation to designs, the informed user is used.

"OBVIOUSNESS" OF LACK OF SOME REQUIREMENTS - AN ASSESSMENT "A LA POLONAISE"

In connection with the amendment to the IPL Act made by the Act amending the IPL Act of 29th of June, 2007 (date of entry into force: 1st of November, 2007), the wording of Art. 110 section 3, which led to the introduction of the possibility of refusing to grant protection to a design that clearly does not meet the requirements of novelty and individual character or the product does not obviously meet the requirements of Art. 102 section 3 IPL.

The introduction of the possibility of not granting protection to an industrial design due to the lack of the required requirements (including the lack of novelty) was a return to the solutions from before the entry into force of the IPL Act. Under Polish Regulation on Decorative Designs a substantive examination had to be executed, because, as stated in § 6 section 1 the certificate for registration a design may be validly obtained only for a new ornamental design.

New wording of Art. 110 section 3 IPL (under a proposal of new IPL Act) still raises interpretation doubts. Firstly, it is not clear how to understand that a design clearly does not have any novelty or individual character. It is not known (there are no guidelines from the Polish Patent Office in this respect, no implementing provisions to the IPL Act or other regulations contained in the IPL Act itself) whether, for the purpose of this verification, the expert assessing the submitted design subjects the design to examination in the appropriate registers or whether the decision is made based on websites' records. The decision could be also based on the life experience of the expert issuing the decision - the expert decides, based on his own experience, whether or not the design is novel and has the individual character.

THE PROPOSAL FOR NEW INDUSTRIAL PROPERTY LAW ACT AND THE CRITERION OF "OBVIOUS LACK" OF REQUIREMENTS

The Polish legislator, amending Art. 110 section 3 of IPL by the Act of 29th of June, 2007, has left the possibility of issuing a decision because of the obvious lack of novelty of the design. The legislator did not indicate in the justification for the draft act the reasons for introducing such a change. Therefore, the reason for introducing this "break" from the pure process of registering industrial designs is not known. Despite criticism of the above-mentioned provision, and in particular the way in which the term "obvious lack of the requirement of novelty and individual character" is understood, the legislator introduced in the proposal of new IPL Act of 25th of April, 2022 such a method of the examination to other immaterial goods too. Regarding to utility models, the draft of new IPL Act introduces the possibility of a rather controversial solution - obtaining an exclusive right without verifying whether the subject of the application meets the requirement of novelty to a - so-called - small patent. The legal provision regulating the possibility of granting protection to a utility model by the Polish Patent Office was based on the construction of the provision of Art. 110 section 3 IPL relating to industrial designs. Similarly to the case of industrial designs, it was indicated that the right to register a design may be refused if the design clearly does not meet the criteria required for its protection (Article 121(1)(1) of the draft of IPL Act). In the justification of the proposal for a new Polish IPL Act it was indicated (in relation to changes in the field of utility models) that the introduction into the Polish legal system of a solution allowing for much faster processing of applications will favor an increased number of IP rights (Justification for the proposal for a new Polish IPL Act, p. 22). It is not clear why the legislator cares about the number of applications and ignores the issue of their quality and effectiveness in protecting the basic interests of entrepreneurs. Although it was indicated in the justification that substantive verification of utility model applications will still be carried out to some extent by the Patent Office (Justification for the proposal for a new Polish IPL Act, p. 25), this only applies to cases where the utility model clearly does not meet the requirements. With respect to utility models - similarly to industrial designs - the concept of "obvious lack" has not been further defined. Therefore, it is not known how the expert examining the case will assess whether a utility model deserves protection or whether the applied for design clearly does not meet the

conditions referred to in Art. 111 or obstacles referred to in Art. 28, art. 29 section 1 or art. 112 (Article 121(1)(2) of the proposal for a new Polish IPL Act).

According to the proposal for a new Polish IPL Act of 25th of April, 2022, the Polish legislator also intends to introduce similar provisions in relation to the topography of integrated circuits. The provision of the proposed Art. 137 section 1 provides for the possibility for the Polish Patent Office to issue a decision refusing to grant an exclusive right to the topography of an integrated circuit if the submitted topography because of the obvious lack of the conditions referred to in Art. 130-132. This is a fundamental change compared to the currently applicable IPL Act. Therefore, the statement included in the justification of the draft IPL Act of 25th of April, 2022, the provisions on the topography of integrated circuits are, in principle, transferred to the new Act in an almost unchanged form is not correct. The legislator states that the changes introduced are of an editorial and linguistic nature so as to adapt this category of exclusive rights to the entire proposed act (Justification for the proposal for a new Polish IPL Act, p. 27).

The possibility of not granting protection due to obvious lack of requirements is proposed by Polish legislator in proceedings concerning industrial designs, utility models and topographies of integrated circuits. It is interesting why a similar amendment is not provided for trademarks. The proceedings of granting trademark protection by Polish Patent Office have just changed significantly in recent years. The examination of likelihood of confusion has not been discontinued in the meaning before the introduction of above-mentioned amendments. The application procedure held by Polish Patent Office coincides with the procedure held before EUIPO. However, contrary to EU practice, the Patent Office of the Republic of Poland does not inform the owners of rights (whose signs are already covered by exclusive rights) about applications for similar or identical signs. Only applicants of a given sign are informed by Polish Patent Office.

VARIETIES OF DESIGN AND MULTIPLE APPLICATION

Applying for a larger number of designs to EUIPO, you can file a so-called multiple application. Pursuant to the currently applicable Art. 37 of Regulation 6/2002, a multiple application may be filed only for designs classified in the same class (Sieńczyło-Chlabicz, 2016, p. 62-63). The proposal of new regulation (provisions of Art. 37 of amendment to Regulation 6/2002) abolishes this requirement that all designs in a multiple application must belong to the same class. This will allow you to register different designs regardless of the class in which the design is classified. Also in the draft of the new directive (Article 27 of the draft directive), the EU legislator provided for the need to introduce the possibility of registering designs as part of a multiple application. In the draft of an amendment to the IPL Act, Polish legislator has already introduced regulations regarding multiple application, thus prematurely implementing the provisions of new directive. In the draft of new IPL Act, Polish legislator - apart from introducing the possibility of submitting a multiple application - eliminated the possibility of submitting variants in one application.

The registration of designs in varieties has been known in the design protection system in Poland since the entry into force of the Industrial Property Law. Pursuant to the provisions of Art. 108 section 4 IPL, it is possible - within one application - to register a design in 10 variants. It is important that the submitted design variations share important common requirements. The ability to submit such a report constitutes a significant financial benefit for the submitter. Instead of submitting 10 applications, for which the applicant would have to pay 10 official fees per application, the applicant submits one application. The introduction of the institution of multiple notification into Polish legal provisions will not replace the solution provided for in Art. 108 section 4 IPL. It is therefore unclear why the legislator wants to eliminate this form of application. A multiple application is not the same as the application of design in varieties.

Under Regulation 6/2002 it is possible to file a multiple application to obtain the protection for Community designs. Filing a design application as part of a multiple application the amount of official fees in the EUIPO is reduced. When filing a multiple application the fee for one design – it is 350 EUR in accordance with Regulation

2245/2002 - is not multiplied by the number of designs submitted, but decreases depending on the number of designs submitted. However, a reduction in the above-mentioned fee is only possible concerning applications made for designs classified in one class according to the Locarno Classification. Apart from the economic benefits, the possibility of filing a multiple application facilitates the application. For example, instead of 8 separate applications submitted during the registration process, one application form is filled.

The proposal for regulation amending Regulation 6/2002 introduces significant changes in relation to the institution of multiple application. If new regulation came into force, the possibility of filing a multiple application would also be open to designs that cannot be classified in the same class. Filing an industrial design application as part of a multiple application (in the wording of the provisions drafted by the national legislator and the EU legislator) would cover various designs classified in different classes according to the Locarno classification. This is also a good solution for the applicant. Due to the fact that it is also an element of harmonization provided by the proposal of new directive, it will be applied uniformly in each Member State.

THE PRINCIPLE OF SPECIALIZATION IN POLISH INDUSTRIAL DESIGN LAW AND THE PROTECTION OF A COMMUNITY DESIGN

The specialty principle commonly applies to trademarks. The exclusive right to a registered trademark covers in principle only those goods and/or services for which the application has been filed. That is why the list of goods and services is so important among the documents included in the trademark's application documentation. With regard to industrial designs in the IPL Act (Article 105(5) IPL), the national legislator indicated that the right to register an industrial design is limited to products of the type for which the application was filed. A similar provision was in force under the Polish Regulation on Decorative Designs. Pursuant to the provision of § 7 of the above-mentioned regulation, the exclusive right to design is limited to objects of the type for which the application was filed. Even under the Polish Regulation on Decorative Designs, these regulations were criticized in the literature of the subject. Representatives of the doctrine pointed out that such legal regulations lead to the registration of the same designs by the Polish Patent Office as long as they are intended for items of a different type than those covered by the first application. Consequently, the right from registration is protected not only for items the same as those listed in the registration decision, but also for items of the same type as those listed in the decision.

Some representatives of the doctrine are also critical in the context of the currently applicable act. Regarding the interpretation of provisions of Art. 105 section 5 IPL there have been some conflicting views in the doctrine. There have been opinions in the literature about the incorrect implementation of the directive (Tischner, 2010, p. 592-593). Some representatives of the doctrine were in favor of interpreting the provision contrary to the literal wording of Art. 105 section 5 IPL. There is also a suggestion to assume that protection extended to every product incorporating a given design (Szczepanowska-Kozłowska, 2010). The opposite concept appeared in the doctrine too. It allows the possibility of legally using a design in another class of products that is registered for (Nowińska et. al, 2007, p. 110).

The solution to this dichotomy is the draft of new directive. Through harmonization in this area, the EU legislator wants to standardize the regulations regarding the legal protection of designs in the whole EU. The draft directive proposes a solution analogous to that under Regulation 6/2002 (see Article 36 section 6). If the draft of new directive was adopted, each EU Member State would be obliged to implement into its internal legislation provisions according to which the indication of the product does not affect the scope of design protection (Article 25(3) sentence 1 of the proposal for an EU Directive on legal protection of designs). If such a provision of the proposed directive is maintained, the transposition of the provisions of the new directive should consist in repealing Art. 105 section 5 IPL. The proposal for a new Polish IPL Act eliminates the above-mentioned provision what should be treated as an evolution in Polish design law.

CONCLUSIONS

Many years after the entry into force of new legal regulations both EU and Polish legislation should be adapted to: contemporary market requirements, the development of new technologies, and changes postulated in case law or doctrine.

The draft of a new directive harmonizing the provisions in the field of legal protection of designs is - in many cases - a doctrinal response to the need to amend the Polish act regulating the protection of industrial designs, which - assuming that the directive in the wording in which it is the subject of consultations comes into force - will lead to introduce revolutionary changes in Polish industrial design law. An example of such a change is the absolute departure from any design examination in terms of whether the design has the requirements of novelty or individual character. If it were necessary to implement the Art. 29 of the proposal for an EU Directive on legal protection of designs, EU Member States would be obliged to limit their examination of the application "(...) to verifying the lack of substantive grounds for refusing registration, as referred to in Art. 13" of the proposal for an EU Directive on legal protection of designs. Concerning above-mentioned provision of Art. 110 section 3 IPL (as well as its equivalent in the proposal of a new IPL Act - Article 121(1)(1)) would have to be repealed.

The proposal of the Polish legislator - expressed in the proposal for new IPL Act - shows the evolution in the scope of changes introduced by the national legislator. An example is the introduction of the institution of multiple application, well-known in practice of EUIPO. However, it is not clear why Polish legislator, introducing a multiple application to the Polish Patent Office, has abolished the possibility of registering a design in varieties what is a revolutionary change. The necessity of introducing the multiple application into national regulations results from the Art. 27 of the proposal for an EU Directive on legal protection of designs.

Also with regard to the controversial provision of Art. 105 section 5 IPL - making the scope of design protection dependent of the type of product indicated in the application - the EU legislator in the Art. 25 section 3 of the Proposal for an EU Directive on legal protection of designs will force the Polish legislator to make changes in this respect. In no EU Member State - in accordance with the intention of the EU legislator expressed in the draft of the new directive (Article 25 section 3 of the Proposal for EU Directive on legal protection for designs) - the scope of design protection could not depend on what type of product, in relation to which the design will be incorporated, was indicated in the application documentation. The indication of the product will still remain an element of the application documentation, but this information will not affect the scope of design protection.

The changes introduced in Polish and EU law discussed in this study are only sample regulations. Both the EU legislator and the Polish legislator have designed other changes in the currently applicable regulations, which can also be classified as evolution, revolution or stagnation, respectively.

EDITOR'S NOTE

By the publication date of the journal issue, the Directive, presented in the text as a proposal, has already been in force since 23 November 2024, and work on the Polish project has been suspended.

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