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Evidence Evaluation Relating to the Public Disclosure of the Community Design on the Internet

Ocena dowodów dotyczących publicznego ujawnienia wzoru wspólnotowego w Internecie

ABSTRACT

The issue of public disclosure of the design is regulated in Article 7 of Council Regulation (EC) no. 6/2002 of 12 December 2001 on Community designs. Pursuant to this provision, a design shall be deemed to have been made available to the public if it has been published following registration or otherwise, or exhibited, used in trade or otherwise disclosed, except cases where these events could not reasonably have become known in the normal course of business to the circles specialized in the sector concerned, operating within the Community. The design is made available to the public in a situation where these events could be known in the course of normal professional activity in an environment specialized in a given sector, operating within the Community. The list of methods of public disclosure contained in Article 7 of Council Regulation (EC) no. 6/2002 is not a closed catalog. Disclosure of the earlier design on the Internet causes difficulties in assessing whether it meets the conditions required for public access, i.e. whether the design could reasonably have become known in the normal course of business to the circles specialized in the sector concerned. Moreover, the disclosure of the design on the Internet generates problems of evidence related to proving the precise date of its disclosure to the public. The article analyzes the jurisprudence of the European Union Intellectual Property Office (EUIPO) and European jurisprudence in recent years. In particular, attention was paid to the issues of evidence necessary to recognize that the Community design was made available on the Internet. The article concerns a topic that is current both among representatives of the doctrine and in jurisprudence (Polish and European). It has theoretical and practical significance, because the issue of evidence submitted by the parties on the fact that an industrial design is made available to the public is very often a problem at the stage of court proceedings.

Keywords: Community design; disclosure; Internet; evidence; EUIPO

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INTRODUCTION

The issue of public disclosure of a Community design is regulated in Article 7 of Council Regulation (EC) no. 6/2002 of 12 December 2001 on Community designs.[1] Pursuant to this provision, a design shall be deemed to have been made available to the public if it has been published following registration or otherwise, or exhibited, used in trade or otherwise disclosed, except cases where these events could not reasonably have become known in the normal course of business to the circles specialized in the sector concerned, operating within the Community. The design is made available to the public in a situation where these events could be known in the course of normal professional activity in an environment specialized in a given sector, operating within the Community.

The list of public disclosure methods contained in Article 7 of Regulation 6/2002 is not exhaustive. The regulation does not require that the design is commercialized for the purpose of making it available to the public. In the situation that designs or prototypes have been disclosed in such a way that these events could become sufficiently known in the normal course of business to the specialized industry circles in the European Union (EU), they should be taken into account when assessing novelty and individual character. The methods of disseminating the design, which will result in the loss of its novelty and individual character[2] as a result of its public disclosure, include, among others, making a drawing or model publicly available through its publication, by publishing its registration, presenting at an exhibition, using in trade or making it available in any other way.[3]

Disclosure of the earlier design on the Internet causes difficulties in assessing whether this disclosure meets the conditions required for making the design available to the public, i.e. whether the design could have reached the knowledge of people professionally involved in the field of the design concerns. Moreover, disclosing the design on the Internet generates problems of evidence related to proving the precise date of its disclosure to the public.[4]

The issue of public disclosure of a Community design is very important and deserves an in-depth analysis. This follows from the fact that, pursuant to Article 5 of Regulation 6/2002, a Community design shall be deemed new if no identical design has previously been made available to the public. The condition of novelty

[1] OJ L 3, 5.01.2002, pp. 1–24, hereinafter: Regulation 6/2002.

[2] C.B. Christiansen, *Art. 7 CDR Commentary*, [in:] *Community Design Regulation: A Commentary*, ed. G.N. Hasselblatt, München 2015, p. 119.

[3] M. Poźniak-Niedzielska, *Zdolność rejestrowa wspólnotowego wzoru przemysłowego*, [in:] *Europejskie prawo wzorów przemysłowych*, Warszawa 2016, p. 43.

[4] A. Tischner, *Komentarz do art. 103 p.w.p.*, [in:] *Prawo własności przemysłowej. Komentarz*, ed. P. Kostański Warszawa 2014, p. 691.

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is directly connected to the institution of public disclosure, since public disclosure of a Community design results in the loss of its novelty.

The legislator has provided exceptions under which the disclosure of a Community design shall not result in the loss of novelty of that design. They are listed in Article 7 (2) and (3) of Regulation 6/2002. The disclosure of a design does not invalidate its novelty in the following situations:

- disclosure of the design to a third party who has been obliged to maintain confidentiality,
- disclosure of the design during "grace period" by the designer, his/her successor in title, a third party with the consent of the holder or as a result of abuse against the designer or his/her successor in title.[5]

The essential purpose of this article is to consider in which cases it should be regarded that disclosure on the Internet meets the conditions for public disclosure of a design. Consideration was given to the issue of in which cases it should be considered that a given design could reach the knowledge of professionals working in the field covered by the design. The author analyzed the evidence problems related to the determination of the precise date of public disclosure of the design. The attention was paid, i.a., to sharing the design on Facebook and Instagram in order to determine what requirements are necessary to make the design available on the Internet in order for it to be considered as sharing within the meaning of Article 7 of Regulation 6/2002.

The basic method used in the article is a critical analysis of the literature of the subject and a method of deduction and inference. The study analyzes jurisprudence practice of the European Union Intellectual Property Office (EUIPO) and the case law of the EU courts in recent years. In particular, attention was paid to the evidentiary issues necessary for the recognition of making available the Community design on the Internet.

"TRADITIONAL" WAYS TO MAKE A DESIGN AVAILABLE TO THE PUBLIC

All published applications of the Community design are deemed to have been filed in accordance with the regulation contained in Article 7 of Regulation 6/2002, if they could become sufficiently known in the course of the normal use of business to circles specialized in a given industry operating in the Community. The methods

[5] K. Szczepanowska-Kozłowska, *Zdolność rejestracyjna wzoru w prawie Unii Europejskiej*, "Przegląd Prawa Handlowego" 2005, no. 3, p. 49.

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of publishing the design include, i.a., making a drawing or model publicly available by publishing it and by publishing its registration.[6]

In contrast, unpublished Community design applications can be accessed only with the consent of the applicant. Documents held by the competent authorities, to which access is required for inspection and which have not previously been published, cannot become sufficiently known in the normal course of business to the circles specialized in a given industry operating in the Community.

Publication of design in patent magazines and trade mark newsletters in the EU should be considered as made available to the public within the meaning of Article 7 of Regulation 6/2002.

In particular, disclosure of design in the trade press destroys its novelty, as it allows to assume that on the date of publication of the journal, this form of public disclosure could be read by specialists from a given industry. In the judgement of the EU General Court of 17 May 2018 in case *Basil BV v. EUIPO*[7] as proof of demonstrating that the earlier design was made available to the public, one of the catalogs was indicated, in which an illustration of a bicycle basket was presented. The evidence of an earlier disclosure of the design may be the company's brochure, catalog,[8] press clippings and advertisements that present a given design.[9]

One of the proofs that the design has been made available to the public is its publication in the bulletin of any industrial property office around the world. The only exception is a publication that could not become sufficiently known to specialists in a given industry in the EU. The Board of Appeal indicated that where the applicant has submitted evidence of publication, the design is deemed to have been disclosed. Taking into account the globalization of the markets, it is up to the design's owner to submit factual circumstances, arguments or evidence proving that such publication of an earlier design could not become sufficiently known to the circles specialized in a given industry operating in the EU.[10]

It is irrelevant whether the earlier design is included in a trademark, invention, utility model, if it can be considered a design within the meaning of Article 3 of Regulation 6/2002. EUIPO practice requires that, in addition to specifying

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[6] M. Poźniak-Niedzielska, *Ochrona wzorów przemysłowych w prawie europejskim*, "Europejski Przegląd Sądowy" 2007, no. 1, p. 5.

[7] Judgement of the EU General Court of 17 May 2018 in case *Basil BV v. EUIPO*, T-760/16, ECLI:EU:T:2018:277, point 6.

[8] Judgement of the Court of 21 September 2017 in case *Easy Sanitary Solutions BV and EUIPO v. Group Nivelles*, C-361/15 P and C-405/15 P, ECLI:EU:C:2017:720, point 4.

[9] Judgement of the EU General Court of 22 June 2010 in case *Shenzhen Taiden Industrial Co. Ltd v. EUIPO*, T-153/08, ECLI:EU:T:2010:248, point 4.

[10] Decision of EUIPO of 8 March 2019 in case *Imperial Sp. z o.o. Sp.K v. Dariusz Król*, ICD 11157. Similarly: decision of EUIPO of 27 October 2009 in case *Bell & Ross B.V. v. Klockgrossisten i Norden ab*, R-1267/2008-3, point 35; decision of EUIPO of 7 July 2008 in case *Normanplast przeciwko Castrol Ltd.*, R-1516/2007-3, point 9.

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the application date and registration date on the certificate, the publication date should also be specified, based on evidence that the design has been released to the public. To determine the relevant date for the disclosure of the design on the Internet, the EUIPO Guidelines[11] recommend using the website archiving services instead of search services.[12] In the situation that the date of the upload of a file to the platform is not available, the relevant date could be proven by showing the date of downloading a file by a user.[13] The display of the design at international fairs and exhibitions anywhere in the world is sufficient for it to be considered that the design may have become sufficiently known in the ordinary course of business to the circles specialized in a given industry operating in the Community. Evidence of such disclosure may be brochures showing the design, websites on which the design has been made available, and photographs showing the design.

The design is made available to the public by presenting it at fairs, shows and exhibitions.[14] An important issue with this method of disclosure is where the exhibition took place (within or outside the EU) and what scope the exhibition had – global or local.[15] In the case *Wanzl Metallwarenfabrik GmbH v. Wireland S.A. Wyroby Gospodarstwa Domowego*,[16] the basis for the application for a declaration of invalidity of the Community design was its prior public disclosure at an exhibition in Düsseldorf.

In the case *Crocs, Inc. v. Holey Soles Holdings Ltd*.,[17] the owner of the design presented the Crocs footwear at the sailing exhibition in Fort Lauderdale (Florida, United States) from 31 October to 3 November 2002. As it is the largest event of its kind in the world, the Board of Appeal concluded that the design could become sufficiently known in the normal course of business to the specialized circles operating in the EU.

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[11] *Guidelines for Examination of Registered Community Designs. European Union Intellectual Property Office (EUIPO). Examination of Applications for Registered Community Designs*, 1.10.2018, https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/law_and_practice/designs_practice_manual/WP_Designs_2018/examination_of_applications_for_registered_community_designs_en.pdf [access: 12.09.2021].

[12] A. Przytuła, *Komentarz do art. 103 p.w.p.*, [in:] *Prawa własności przemysłowej. Komentarz*, ed. M. Kondrat, LEX/el. 2021.

[13] *Common Comunication: Criteria for Assessing Disclosure of Designs on the Internet*, April 2020, https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/News/cp10/CP10_en.pdf [access: 12.09.2021], p. 4.

[14] A. Tischner, *Przesłanki zdolności rejestrowej wzorów przemysłowych*, [in:] *System Prawa Prywatnego*, vol. 14B: *Prawo własności przemysłowej*, ed. R. Skubisz, Warszawa 2012, pp. 78–79; M. Poźniak-Niedzielska, *Ochrona wzorów przemysłowych*…, p. 5.

[15] J. Sieńczyło-Chlabicz, *Utrata nowości i indywidualnego charakteru wzoru wspólnotowego wskutek jego publicznego ujawnienia*, "Europejski Przegląd Sądowy" 2010, no. 4, p. 15.

[16] Decision of EUIPO of 28 November 2008 in case *Wanzl Metallwarenfabrik GmbH v. Wireland S.A. Wyroby Gospodarstwa Domowego*, ICD 000005064.

[17] Decision of EUIPO of 26 March 2010 in case *Crocs, Inc. v. Holey Soles Holdings Ltd.*, R 9/2008-3.

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In "commercial use" there is no requirement that the design is actually sold, an offer to sell is sufficient to recognize the release to the public. Moreover, as with other types of prior communication to the public, it does not matter whether the design is first used in trade inside or outside the EU.[18] A different provision has been made for an unregistered design whose first communication to the public must take place within the territory of the EU.[19]

MAKING THE DESIGN AVAILABLE TO THE PUBLIC AS A RESULT OF ITS DISCLOSURE ON THE INTERNET

Disclosure of an earlier design on the Internet causes difficulties in assessing whether this disclosure meets the conditions required for making the design available to the public, i.e. whether the design could have reached the knowledge of people professionally involved in the field of the design concerns. Moreover, disclosing the design on the Internet generates problems of evidence related to proving the precise date of its disclosure to the public.[20]

The Internet is a publicly available and searchable source of prior disclosure of an earlier design. It should be considered that the disclosure of the Community design on the Internet meets the requirement that the design becomes sufficiently known in the normal course of business to the circles specialized in a given industry operating in the EU. However, in the case of disclosure of the design on the Internet, it may be difficult to determine the date of first publication of the design. The date indexes provided by most websites and the timestamp information offered by some web pages showing the history of changes and modifications are mostly accepted by the EUIPO as proof of the date of its publication. Similarly, dates of screenshots and dates provided by online archive services should be also considered.[21]

DISCLOSURE OF THE COMMUNITY DESIGN OUTSIDE THE EU

There is some controversy as to whether disclosure of a Community design outside the EU should be regarded as disclosure within the meaning of Article 7 of Regulation 6/2002. Doubts stem from the wording of Article 7 of Regulation 6/2002 since the EU legislature has indicated that these events could reasonably

[18] *Ibidem*.
[19] C.B. Christiansen, *op. cit.*, p. 121.
[20] A. Tischner, *Komentarz do art. 103…*, p. 691.
[21] *Guidelines for Examination of Registered Community Designs…*, p. 28.

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have become known in the normal course of business to the circles specialized in the sector concerned, operating within the EU.

The disclosure of the design outside the territory of the EU is considered to be a disclosure that meets the requirement of reaching the knowledge of the circles specialized in a given industry in a situation where the publication of the design was made in one of the economically important countries for the EU, e.g., the United States, Japan, Korea, Australia, China, Taiwan, Singapore, depending on the sector specialized in a given industry. The place of publication is an important aspect and largely influencec the assessment of whether a given design could become sufficiently known in the ordinary course of business to circles specialized in a given industry operating in the EU.[22]

In the judgement of 21 May 2015 in the case *Senz Technologies BV v. EUIP*O,[23] the EU General Court emphasized that the presumption provided in Article 7 (1) of Regulation 6/2002 shall apply regardless of the place where the circumstances giving rise to the disclosure of the design occurred. This is because it does not follow from the first sentence of that provision that the circumstances giving up the making available to the public of a Community design must take place within the territory of the EU.[24]

The place where the design is disclosed is not so important, the key issue is the possibility for professionals in the relevant industry to familiarize themselves with the design.[25] That statement was confirmed by the Court in its judgement of 13 February 2014 in the case *H. Gautzsch Großhandel GmbH & Co. KG v. Münchener Boulevard Möbel Joseph Duna GmbH*, pointing out that it was more important than the place where the design was made available whether persons in the specialized communities of the sector concerned could reasonably have acquired knowledge of events which took place outside the EU. This should be determined on a case-by-case basis.[26]

That opinion was also confirmed by the EU General Court in *Promarc Technics s.c. Tomasz Pokrywa, Rafał Natorski v. EUIPO* case. It was pointed out that the publication of US patent descriptions of an earlier design in a patent database, which can be consulted without restriction of access on the website of the United States Patent and Trademark Office (USPTO), becomes entirely accessible to specialized

[22] C.B. Christiansen, *op. cit.*, p. 120.

[23] Judgement of the EU General Court of 21 May 2015 in case *Senz Technologies BV v. EUIPO*, T-22/13 and T-23/13, EU:T:2015:310.

[24] Judgement of the Court of 13 February 2014 in case *H. Gautzsch Großhandel GmbH & Co. KG v. Münchener Boulevard Möbel Joseph Duna GmbH*, C 479/12, EU:C:2014:75, point 33.

[25] J. Sieńczyło-Chlabicz, *Utrata nowości…*, pp. 20–21.

[26] Judgement of the Court of 13 February 2014 in case *H. Gautzsch Großhandel GmbH & Co. KG v. Münchener Boulevard Möbel Joseph Duna GmbH*, C 479/12, EU:C:2014:755, point 34.

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industry environments, including those operating in the EU.[27] This opinion was also emphasized among the representatives of the doctrine, i.a. by M. Trzebiatowski.[28]

It should be highlighted that the settled case law of the EU Court is reflected in the EUIPO case law. In *Crocs, v. Inc. Holey Soles Holdings Ltd.* case,[29] the owner of the design presented the Crocs shoes at a sailing exhibition in Fort Lauderdale (Florida, United States). Since this is the largest event of its kind in the world, the EUIPO Board of Appeal considered that the design could have become sufficiently well-known during the normal course of the case to the circles specialized in the EU.

The indicated problem raises a number of doubts, and considering this issue on the basis of disclosure on the Internet causes further controversy. The Internet has a worldwide reach and it is not possible to indicate its territorial scope. In the case of the Internet, according to the EUIPO Guidelines, the accessibility and popularity of a website should be taken into account.[30] When looking at the accessibility of the EU industry's specialized communities, it is important to consider whether it is likely that these communities may have become aware of the website content. It is more likely that popular sales portals, such as Allegro, eBay, AliExpress, become known to circles specialized in the sector concerned. In each case, it is important to consider whether the sector concerned may have become known a design presented on a particular website.

ANALYZING THE TERMS "CIRCLES SPECIALIZED" AND "SECTOR CONCERNED"

Pursuant to Article 7 of Regulation 6/2002, the design is considered to be made available to the public if these events could become known in the normal course of business to the circles specialized in the sector concerned, operating within the Community. The EU legislature did not specify how the concepts of "circles specialized", "sector concerned" and "normal course of business" should be correctly understood.

P. Maier and M. Schlötelburg argue that the terms "circles specialized" and "sector concerned" should be referred to the sector of the product industry in which the design is included. For example, when the design refers to the furniture industry, then only

[27] Judgement of the EU General Court of 15 October 2015 in case *Promarc Technics s.c. Tomasz Pokrywa, Rafał Natorski v. EUIPO*, T-251/14, ECLI:EU:T:2015:780, points 22–23.

[28] M. Trzebiatowski, *Dowód na publiczne udostępnienie wzoru przemysłowego wykluczające jego nowość lub indywidualny charakter – uwagi na tle wyroku Sądu z 27.02.2020 r., T-159/19, Bog-Fran sp. z o.o. sp.k. przeciwko Urzędowi Unii Europejskiej ds. Własności Intelektualnej*, "Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej" 2020, no. 4, p. 86.

[29] Decision of EUIPO of 26 March 2010 in case *Crocs, Inc. v. Holey Soles Holdings Ltd.*, R 9/2008-3.

[30] *Common Comunication: Criteria for Assessing Disclosure*..., p. 30.

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the knowledge of professionals in the furniture industry can be taken into account. It should also be taken into account that a given design may be used in more than one product. In such situations, the concepts indicated should be interpreted more broadly. The environment specialized, in this case, will be each of the environments specific to the product sector in which the design (in the form of an ornament) could be used.[31]

A. Tischner shared the opinion of representatives of foreign doctrine that the question of the possibility of a single design in the production of several products from different sectors makes it difficult to determine the sector specific to a given design. The author pointed out that this is an important issue, given that proper clarification of which industry is involved can be crucial for the assessment of the case. What is more, the problem arises from the fact that, in accordance with Article 36 of Regulation 6/2002 contains the rule that the indication of the product class in the application does not affect the scope of the right to register a Community design. Doubts may arise as to whether the state of knowledge of the sector will be sufficient to assess the novelty and earlier disclosure of the design, since the design may also be included in other types of products that come from other industries. A. Tischner points out that the representatives of the doctrine accept the solution that the relevant sector may be any of the industries, actually relevant to the objects covered by design protection.[32]

However, the broad understanding of those concepts cannot be regarded as a fully correct solution. Where a design can be applied to more than one product, the market could consequently be monopolized. For example, a design placed on wallpaper at a later time could be placed, e.g., on a T-shirt. Assuming that both the sector responsible for wallpaper and T-shirts should be regarded as a specialized sector, there would be a situation where the patent office could invalidate both the design on the wallpaper and the T-shirt.[33] Such a solution does not appear to have been the legislature's premise.

As circles specialized in the sector concerned we understand professionals in the field of industrial designs. This group includes, in particular, designers or sellers of products from the sector concerned. They can also be people from the advertising or marketing department. The concept of specialized environments in a given sector should therefore be applied to the industry in which the industrial design was concluded or applied can be classified.[34]

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[31] P. Maier, M. Schlötelburg, *Manual on the European Community Design*, Köln 2003, pp. 9–10.

[32] A. Tischner, *Komentarz do art. 7*, [in:] A. Tischner, W. Jarosiński, B. Widła, *Komentarz do rozporządzenia nr 6/2002 w sprawie wzorów wspólnotowych*, LEX/el. 2012.

[33] D. Musker, *Art. 7 CDR Commentary*, [in:] *Concise European Trade Mark and Design Law*, eds. Ch. Gielen, V. von Bomhard, Alphen aan den Rijn 2001, p. 371.

[34] K. Wernicka, *Czy opis patentowy ujawnia wzór wspólnotowy? Glosa do wyroku S(PI) z dnia 15 października 2015 r., T-251/14*, "Glosa" 2016, no. 2, p. 62.

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When analyzing the issue of public disclosure of a Community design, it is important to take into account an earlier state of the art depends on the specificity of the industry and the specific product category, which directly affect the range of knowledge of professionals operating in the field. In the case of a pattern of clothing with ethnic ornament, disclosures from Pacific island countries should be taken into account and, in the case of technical designs, a database of Asian offices. This solution prevents any disclosure in any exotic place in the world from automatically invalidating an industrial design.[35]

In *Crocs, Inc. v. Holey Soles Holdings Ltd.* case,[36] the owner of the design presented the Crocs footwear in the "Bulletin" of 8 February 2005, but acknowledged that the design had previously been published on the website www.crocs.com before 28 May 2003. However, the owner underlined that such disclosure on the website did not destroy the novelty of the design because it has not been able to get to the knowledge of the circles specialized in the industry operating in the Community.

The appellant pointed out that the website was not popular at the time, it only functioned as information for people "who could find out about the footwear from people who had already bought them" and was not used as a selling portal. The websites which are considered a source of inspiration for developing new designs are those of famous footwear companies such as Nike and Adidas, while Crocs Inc. was not yet recognized as a footwear manufacturer. The Board of Appeal did not share the applicant's view and pointed out that it should have been considered that the design had been made available to the public within the meaning of Article 7 (1) of Regulation 6/2002.

The EUIPO Board of Appeal claimed that the Internet is an important information source and is used by footwear designers as well as in other fields as a source of advertising for their designs. The Board of Appeal emphasized that the Crocs website was already an active website on that date and had been set up to act as a sales portal for footwear. Consequently, publishing a design on a website is tantamount to disclosing it to the public, as it may have reached the knowledge of the circles specialized in a given industry operating in the Community. Information disclosed on the Internet is believed to be part of the state and is considered publicly available from the date of publication of the information.[37]

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[35] L. Brancusi, *Publiczne ujawnienie, zorientowany użytkownik oraz swoboda twórcza na przykładzie wzoru kartonowego elementu strukturalnego. Glosa do wyroku S(PI) z dnia 15 października 2015 r., T-251/14*, LEX/el. 2015.

[36] Decision of EUIPO of 26 March 2010 in case *Crocs, Inc. v. Holey Soles Holdings Ltd.*, R 9/2008-3.

[37] *Ibidem*.

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PROVING THE PRECISE DATE OF DISCLOSURE COMMUNITY DESIGN TO THE PUBLIC

Determining the precise date on which the information was published on the Internet is extremely important.[38]

According to the EUIPO Guidelines information disclosed on the Internet or in online databases is considered publicly available from the date of its publication. Websites often contain very relevant information, and some information may only be available on the Internet, including online publications on design registrations by IP offices.[39]

The Internet is a source where it may be difficult to determine the actual date of publication of information. The reason is that the websites can be easily updated, however, most of them do not provide an archive of previously viewed material or display records that would allow you to know exactly what was published and when. According to the Guidelines provided by EUIPO, the date of the online disclosure will be considered credible, in particular, when: 1) the website provides timestamp information relating to the history of modifications applied to a file or web page (e.g., as available for Wikipedia or as automatically appended to content, e.g. forum messages and blogs); 2) indexing dates are given to the web page by search engines;[40] 3) a screenshot of a web page provides a date. Information on updating the website is available in the website archiving services.[41]

EU Court and EUIPO considered the issue of proof of prior disclosure of the Community design by date. In accordance with EUIPO Guidelines, the date of disclosure on the Internet will be considered reliable, in particular, when the website contains information about the timestamp regarding the history of changes applied to a file or website, the dates of indexing are given to the website by search engines, a screenshot of the website contains a specific date, information on the updating of the website is available in online archiving services.[42]

As is apparent from the EUIPO Guidelines, evidence from the Internet is required to date it in order to be able to recognize that the evidence in question fulfills the requirements of Article 7 of Regulation 6/2002. It has been pointed out that all customer reviews relating to printouts from Amazon's website are dated earlier than the date on which the contested design was publicly disclosed. This

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[38] E. Wojcieszko-Głuszko, *Komentarz do art. 103 p.w.p.*, [in:] *Prawo własności przemysłowej. Komentarz*, ed. J. Sieńczyło-Chlabicz, Legalis 2020, point 12.

[39] *Guidelines for Examination of Registered Community Designs…*, p. 28.

[40] Decision of EUIPO of 11 August 2016 in case *Netlon France v. Euro Castor Green Sarl*, R 754/2014-3, point 18.

[41] Decision of EUIPO of 2 July 2015 in case *S.C. Intermark s.r.l. v. Red Bull GmbH*, R 25/2014-3.

[42] *Guidelines for Examination of Registered Community Designs…*, p. 28.

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confirms that the contested design was available before the date of application for the contested design.[43]

The issue of the date has been raised in *4-Shisha GmbH v. Nextro GmbH* case.[44] The EUIPO Board of Appeal considered the probative value of screenshots from popular social websites such as Facebook and Instagram. In the opinion of the Board of Appeal, the screenshots cannot be convincing evidence of the disclosure of the design because it is not possible to establish precisely where and under what circumstances the images shown in the screenshots were made public for the first time. First, it is uncertain whether the screenshots were taken from Facebook (website or application) or from other Internet sources. Second, no web links (URLs or hyperlinks) or any origin address indicating the source of the disclosure of this pattern on the Internet were attached to the screenshots.

In the course of the case, it has not been proved that the extracts were distorted, therefore the Board of Appeal considered them to be reliable evidence of disclosure of the earlier design within the meaning of Article 7 (1) of Regulation 6/2002.

A similar position was presented by the EUIPO Board of Appeal with regard to screenshots from the Instagram application. In the opinion of the Board of Appeal, the images shown in those screenshots are also insufficient to prove public disclosure, for the same reasons as were set for the screenshots from the Facebook application. In this case, it is also unclear where and under what circumstances the images shown in the screenshots were made publicly available and whether they come from the Instagram application. The position of the EUIPO Board of Appeal in this case should be shared, as the EU General Court, considering the issues of evidence referred to the fact that the Community design was made available to the public, i.a. pointed out that the disclosure of the earlier design cannot be proved by means of assumptions and presumptions, as it must be based on specific and objective evidence that confirms the actual disclosure of the earlier design on the market. According to the EU General Court, in order to assess the probative value of a document, the probability and truthfulness of the information it contains must be verified. It should be taken into account, in particular, the origin of the document, the circumstances of its preparation, and it should be considered whether it is credible.[45]

The screenshot from the website itself, without being linked to other evidence that the design has been made available to the public within the meaning of Arti-

[43] Decision of EUIPO of 1 June 2018 in case *GIMEX Melamine Plus GmbH v. Creative Products Limited*, R 1577/2016-3, point 21.

[44] Decision of EUIPO of 11 December 2019 in case *4-Shisha GmbH v. Nextro GmbH*, R 311/2019-3.

[45] Judgement of the EU General Court of 17 May 2018 in case *Basil BV v. EUIPO*, T-760/16, ECLI:EU:T:2018:277, point 42; judgement of the EU General Court of 27 February 2018 in case *Claus Gramberg v. EUIPO*, T-166/15, ECLI:EU:T:2018:100, points 23–25; judgement of the EU General Court of 9 March 2012 in case *Coverpla v. EUIPO*, T-450/08, ECLI:EU:T:2012:117, points 24–26.

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cle 7 of Regulation 6/2002 is not sufficient evidence to conclude that the design has been made available to the public. This will only be a guess and presumption that the design has been made available, and not a proof that it was made available.[46]

The EUIPO Board of Appeal in *GIMEX Melamine Plus GmbH v. Creative Products Limited* case found that the content of websites (e.g. inserting or replacing photos) could be partially modified at different points in time without having to change the dates on the website. The information on the amazon.com website also does not indicate whether the design was actually available on the date indicated. On this basis, the EUIPO Board of Appeal found that there was no reliable and objective evidence that the design had been disclosed at the date indicated.[47] It is emphasized among the representatives of the doctrine that evidence of prior disclosure should clearly document the date on which the disclosure took place.[48]

The EUIPO Board of Appeal pointed out that although, according to the case law, the disclosure of the earlier design cannot be proved by means of probabilities or assumptions,[49] in the present case, the content of the information on the earlier design on five different websites was indicated as evidence of the earlier design being disclosed. On this basis, the Board of Appeal indicated that, despite the hypothetical possibility of introducing changes to the website (e.g. changing a photo), the evidence that the design was made available on as many as five websites should be considered reasonable and credible.[50]

The EUIPO Board of Appeal pointed out that in the case only the reliability of the attached printouts from the website as evidence was challenged, however, it had not been proven that the information contained therein is false, e.g. by sending printouts from the actual website or printouts from the online archive which show "real" data.

Interested parties search the Internet to find the object of interest. For this purpose, they choose both the websites of their country of origin and also other websites. It has been emphasized in European jurisprudence that when assessing the availability of a Community design to the public on the Internet, it should be taken into account such aspects as accessibility[51] and the ability to search the website.[52]

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[46] Decision of EUIPO of 7 December 2015 in case *Navima Calzados, S.L. v. Vizgar Shoes, S.L.*, R 1887/2014-3, point 6.

[47] Decision of EUIPO of 1 June 2018 in case *GIMEX Melamine Plus GmbH v. Creative Products Limited*, R 1577/2016-3, point 11.

[48] J. Sieńczyło-Chlabicz, *Unieważnienie i wygaśnięcie prawa z rejestracji wzoru przemysłowego*, Warszawa 2013, p. 147.

[49] Judgement of the EU General Court of 17 May 2018 in case *Basil BV v. EUIPO*, T-760/16, ECLI:EU:T:2018:277, point 42.

[50] Judgement of the EU General Court of 14 July 2016 in case *Thun 1794 a.s. v. EUIPO*, T 420/15, ECLI EU:T:2016:410, point 27.

[51] Decision of EUIPO of 1 June 2018 in case *GIMEX Melamine Plus GmbH v. Creative Products Limited*, R 1577/2016-3, point 7.

[52] *Guidelines for Examination of Registered Community Designs…*, pp. 28–29.

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However, the restriction of access to the site (e.g., by password) does not prevent a design from being publicly disclosed.[53] Deciding in this regard may be the purpose of the website on which the industrial design was posted.[54]

VERIFICATION OF TRUTHFULNESS AND CREDIBILITY OF THE EVIDENCE

The evidence that should be considered as evidence of the earlier disclosure of the design to the public is a contentious issue. One of the controversial pieces of evidence are printouts of screenshots from a website.

In *Claus Gramberg v. EUIPO*[55] case, the EU General Court considered the probative value of Wikipedia. The applicant included a picture entitled "VW Caddy Life (2004–2010)" found on the Wikipedia website. The EUIPO Board of Appeal, in the contested decision,[56] did not take into account, i.a., an attachment containing a printout from the website, indicating that the printouts from the screen of websites may be changed at any time and it is difficult to verify them. Printout from the website cannot automatically certify its content. The EU General Court did not share this argument, pointing out that the EUIPO Board of Appeal relied solely on the presumption that data and images placed online and only accessible via a computer could be altered at any time.

Consequently, sharing the opinion of the EU General Court, it should be assumed that the evidence submitted regarding the fact that the design has been made available to the public in advance must in each case be subject of separate assessment. In each case, the likelihood and truthfulness of the information contained in these documents should be verified. It should be taken into account, in particular, the origin of the document, the circumstances of its preparation, and then consider whether it is credible. In the *Coverpla v. EUIPO* case,[57] the EU General Court emphasized that some evidence may not be sufficient on its own to demonstrate disclosure of the earlier design, although in combination with other documents or information, it may constitute one element of the evidence of disclosure.

The EUIPO Board of Appeal stressed that in the case only the reliability of the attached printouts from the website as evidence was questioned, however, it had

[53] M. Trzebiatowski, *op. cit.*, p. 90.

[54] E. Wojcieszko-Głuszko, *op. cit.*, point 12.

[55] Judgement of the EU General Court of 27 February 2018 in case *Claus Gramberg v. EUIPO*, T-166/15, ECLI:EU:T:2018:100, point 89.

[56] Decision of EUIPO of 13 January 2015 in case *Sorouch Mahdavi Sabet v. Claus Gramberg*, R 460/2013-3.

[57] Judgement of the EU General Court of 9 March 2012 in case *Coverpla v. EUIPO*, T-450/08, ECLI:EU:T:2012:117, point 24.

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not been proven that the information contained therein is false, e.g. by sending printouts from the actual website or printouts from the online archive which show "real" data, so the evidence submitted should be considered credible all the more.

In the opinion of the EU General Court, the Board of Appeal was right that it is necessary to take into account, in particular, the origin of the document, the circumstances of its preparation and then consider whether the document is reliable.[58] The EU General Court rightly refused to take into account the value of Wikipedia due to the fact that it is an online encyclopedia, in which any Internet user can change information at any time, therefore it should be agreed that the illustration has a strictly limited evidentiary value.[59]

In *Sorouch Mahdavi Sabet v Claus Gramberg* case,[60] the Board of Appeal refused to take into account all the evidence submitted by the applicant. According to the Board of Appeal, the printouts from the screen of the website amazon.de should have been denied their probative force on the ground that they were not reliable and should be treated with skepticism.

The EU General Court did not share the position of the Board of Appeal, pointing out that even assuming that the content of the website could be changed at any time and that the content of the website was difficult to verify, the Board of Appeal did not take into account the issue indicated by the complainant that the complainant's sales offers contain an ASIN number immediately before the listing on the online sales website amazon.de. In the course of the case, the ASIN was found to be the only reference assigned to each item listed in the catalog that allows particular item to be identified on the Amazon online sales platform. Consequently, the argument of the Board of Appeal that the content of that website could be changed at any time cannot be upheld. According to the EU General Court, the EUIPO Board of Appeal wrongly refused to prove the probative value of the applicant's ASIN number, as it should not have argued that the information contained in the attachments relating to the cases in question, including their description, image and time of sale, could be changed at any time or subject to difficult verification.

The issue of the reliability of the ASIN number was analyzed in *GIMEX Melamine Plus GmbH v. Creative Products Limited* case. The printout of the amazon.com website, sent as an attachment in the present case, shows that the holder offered the reference ASIN number. It is a number that identifies a specific product. As stated by the EU General Court in a similar case concerning the disclosure of an earlier design (phone case) the ASIN number is a unique reference assigned to each

[58] *Ibidem*, point 26.

[59] Judgement of the EU General Court of 10 February 2010 in case *O2 (Germany) GmbH & Co. OHG v. EUIPO*, T-344/07, EU:T:2010:35, point 46.

[60] Decision of EUIPO of 13 January 2015 in case *Sorouch Mahdavi Sabet v. Claus Gramberg*, R 460/2013-3.

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item in the catalog that identifies that item on Amazon's online sales platform.[61] The ASIN has been created specifically to identify each product in the Amazon catalog.

In this case, the customer reviews of the product were also indicated as evidence of the earlier design provision. It is stated that all customer reviews of the printout from the Amazon website date earlier than the date of the contested design. This confirms that the contested design was available before the filing date of the opposed design.[62]

In *Coverpla v. EUIPO* case,[63] the EU General Court confirmed that disclosure of an earlier design cannot be proved by means of assumptions and presumptions, but has to be based on concrete and objective evidence which proves that the earlier design was actually disclosed on the market. Moreover, the evidence submitted by the appellant should be assessed in the light of other evidence.

The position of the EU Court should be shared. It is obvious that some evidence may not be sufficient on its own to demonstrate the disclosure of an earlier design, although, in combination with other documents or information, they may constitute one element of the evidence of disclosure. It should also be approved by the EU Court that in order to assess the probative value of a document, the probability and truthfulness of the information it contains must be verified. It should be taken into account, in particular, the origin of the document, the circumstances of its preparation, and then consider whether it is credible.

CONCLUSIONS

Disclosure of the Community design on the Internet raises doubts as to whether the conditions are set out in Article 7 of Regulation 6/2002. The main problem is determining the date of publishing a given design on the website. The author shares the EU General Court's opinion that printouts from websites in many cases raise doubts as to their credibility and objectivity. There should be no situation where evidence is denied credibility simply because it comes from the Internet.

In each case, document should be analyzed and based on considering all circumstances of the case. It should be considered as to whether the evidence is independent or additional. According to the author, a screenshot as single evidence has very limited probative value, but it gains credibility when combined with other

[61] Judgement of the EU General Court of 27 February 2018 in case *Claus Gramberg v. EUIPO*, T-166/15, ECLI:EU:T:2018:100, points 45–46.

[62] Decision of EUIPO of 1 June 2018 in case *GIMEX Melamine Plus GmbH v. Creative Products Limited*, R 1577/2016-3, point 21.

[63] Judgement of the EU General Court of 9 March 2012 in case *Coverpla v. EUIPO*, T-450/08, ECLI:EU:T:2012:117, point 24.

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evidence, such as an invoice. Screenshots work well as supporting evidence as some credible evidence (such as invoices) does not include pictures of the product. In such a case, submission of the invoice showing the date, product name and price, supplemented by a screenshot, constitutes complete and reliable evidence of prior disclosure of the Community design on the Internet.

Another problem with online evidence is that the content of websites, such as inserting or replacing photos, can be partially modified at different times without having to change the dates on the website.Any evidence should be examined and analyzed in detail in the context of what kind of information it contains. This can be a seller's name, date, or, e.g., an ASIN number. Where the information contained in the evidence allows a specific object to be identified, it shall be regarded as reliable evidence.

In *Claus Gramberg v. EUIPO* case, concerning the phone case, the EU General Court emphasized the importance of the ASIN number. As the ASIN is a unique identifier assigned by the amazon.com sales portal and its partners to identify the product on this site, a screenshot of this number should be considered reliable evidence.

Regulation 6/2002 requires that the design should become known in the course of the normal use of business to circles specialized in a given industry, operating in the Community. It is reasonable to say that the requirement to make a design available in order to reach the knowledge of professionals in a given field operating in the EU does not mean that the action must take place within the EU. However, the assessment of the disclosure of a design outside the EU is controversial and should be considered separately in each situation. It is necessary to take into account, first of all, the territory of which country such disclosure occurred. This is important because some countries specialize in specific industries, which means that their achievements are observed by other countries. For example, the automotive industry is highly developed in Japan, the USA, and the technology industry in the USA (Silicon Valley) and China.

In the case of the Internet, it seems that reaching out to professionals is easier, even if the disclosure occurred through a foreign website. Specialized environments follow developments in countries specializing in particular a given field of industry, i.a. browsing websites.

The question of the public disclosure of a Community design raises a number of doubts, in particular in the case of online of disclosure of the design. Making the design available via the Internet portal generates problems related mainly to the determination of the exact date of such disclosure. The issue of the credibility of printouts from websites and the problem arising from the possibility of introducing changes to websites is also important. The analysis of online evidence should be carried out in a detailed and thorough manner, enabling its reliability to be examined.

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ABSTRAKT

Kwestia publicznego ujawnienia wzoru wspólnotowego została uregulowana w art. 7 rozporządzenia Rady (WE) nr 6/2002 z dnia 12 grudnia 2001 r. w sprawie wzorów wspólnotowych. Zgodnie z tym przepisem wzór uznaje się za udostępniony publicznie, jeżeli został opublikowany po zarejestrowaniu, wystawiony, wykorzystany w handlu, lub w inny sposób ujawniony, z wyjątkiem przypadków, gdy wydarzenia te nie mogły stać się dostatecznie znane podczas zwykłego toku prowadzenia spraw środowiskom wyspecjalizowanym w danej branży, działającym we Wspólnocie. Publiczne udostępnienie wzoru następuje w sytuacji, gdy zdarzenia te mogły być znane w toku prowadzenia normalnej działalności zawodowej w środowisku wyspecjalizowanym w danym sektorze, działającym we Wspólnocie. Wyliczenie sposobów publicznego ujawnienia zawarte w art. 7 rozporządzenia Rady (WE) nr 6/2002 nie stanowi katalogu zamkniętego. Ujawnienie wzoru wcześniejszego w Internecie powoduje trudności w ocenie, czy to udostępnienie spełnia przesłanki wymagane dla publicznego udostępnienia wzoru, tzn. czy wzór mógł dotrzeć do wiadomości osób zajmujących się zawodowo dziedziną, której wzór dotyczy. Ponadto ujawnienie wzoru w Internecie generuje problemy dowodowe związane z wykazaniem precyzyjnej daty jego publicznego udostępnienia. W artykule dokonano analizy praktyki orzeczniczej Urzędu Unii Europejskiej ds. Własności Intelektualnej (EUIPO) i orzecznictwa europejskiego z ostatnich lat. Zwrócono uwagę zwłaszcza na kwestie dowodowe konieczne dla uznania udostępnienia wzoru wspólnotowego w Internecie. Artykuł dotyczy tematu, który jest obecnie aktualny zarówno wśród przedstawicieli doktryny, jak i w orzecznictwie (polskim i europejskim). Ma on znaczenie teoretyczne i praktyczne, ponieważ kwestia dowodów zgłaszanych przez strony na okoliczność publicznego udostępnienia wzoru przemysłowego bardzo często stanowi problem na etapie postępowania sądowego.

Słowa kluczowe: wzór wspólnotowy; publiczne ujawnienie; Internet; dowody; EUIPO