

# PROTECTION OF DRAWINGS AND PATTERNS BY ADMINISTRATIVE LAW MEANS IN INTELLECTUAL PROPERTY LAW

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## **Abstract**

*According to the relevant Romanian legislation, i.e. Law no. 129/1992 on the protection of drawings and patterns and Government Decision no. 211/2008 for the approval of the Regulation enforcing Law no. 129/1992, rights over drawings or patterns may also be protected via administrative law.*

*Administrative law means ensure the recognition of the right during the procedure of registering the drawings and patterns and of issuing the drawing or pattern registration certificate, which, as mentioned above, represents the protection title granted by OSIM for registered drawings and patterns.*

*This category of means includes the opposition and challenge, which may be filed with the administrative authority ensuring the protection of drawings and patterns, i.e. the State Office for Inventions and Trademarks.*

**Keywords:** *drawings or patterns, administrative law, opposition, challenge, opposition examination commission, drawings and patterns examination commission*

## **1. Introduction**

The scope covered by the topic of the proposed study is how drawings and patterns can be protected by administrative law means also, which is relevant in the national law. Thus, through a short but concise study the author tries to identify the main drawings and patterns protection methods in terms of administrative law (opposition and challenge), i.e. those means of protection that account for the protection title granted by OSIM for drawings and patterns registered. The importance of this study is to identify these means of protection and to detail them, and the goal is to identify as clearly as possible these means and to show their importance. The author responds to objectives set by explaining and substantially detailing research topic and discussion about it. Romanian legislation regulates this protection, i.e. Law no. 129/1992 on the protection of drawings and patterns and Government Decision no. 211/2008 for the approval of the Regulation enforcing Law no. 129/1992.

## **2. Content**

### **2.1. Preliminary matters**

According to the relevant Romanian legislation, i.e. Law no. 129/1992 on the protection of drawings and patterns and Government Decision no. 211/2008 for the approval

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of the Regulation enforcing Law no. 129/1992, rights over drawings or patterns may also be protected via administrative law<sup>1</sup>.

Administrative law means ensure the recognition of the right during the procedure of registering the drawings and patterns and of issuing the drawing or pattern registration certificate, which, as mentioned above, represents the protection title granted by OSIM for registered drawings and patterns.

This category of means includes the *opposition* and *challenge*, which may be filed with the administrative authority ensuring the protection of drawings and patterns, i.e. the State Office for Inventions and Trademarks.

## 2. Opposition

Art. 21 of the Special Law on the protection of drawings and patterns in the version adopted in 1992, provided that any interested person could make written *objections* to OSIM on industrial drawing or patterns registration within 3 months from the date of its publication in the Official Industrial Property Bulletin – Drawings or Patterns Section.

Though not specifically mentioned in the law, the interested third parties who could object in writing, included: the holder of a prior drawing or pattern, the applicant of a request for industrial drawing or pattern having precedence over the published application, the holder of another industrial property right, the holder of a copyright or any other interested person<sup>2</sup>.

In the analysis of the law in its version adopted in 1992, we see that the opposition was not provided as an administrative or jurisdictional administrative mean in the procedure for registering the industrial drawing or pattern.

Concurrently, we find that the resolution of written objections (remarks) was not made in a specific procedure, and finally a decision be adopted, instead the objections were taken into account when considering the merits of the application for registration of the industrial drawing or pattern. Also, the authors of written objections did not have parties to the proceedings, nor a fee for submission was levied.

Objections were not genuine means of appeal, but if reasoned, the result obtained was similar to that obtained by exercising the means of appeal. The review of objections was made by the commission examining the application for drawing or pattern registration<sup>3</sup>.

With the adoption of Law no. 585/2002 amending and supplementing Law no. 129/1992 on the protection of industrial drawings and patterns, written objections procedure was abandoned and *the opposition proceedings were adopted*, whose settlement lies within the powers of opposition reviewing Commission.

Opposition is a petition that actuates a research, namely an administrative control the outcome of which the two persons with competing interests are concerned with, namely, the person who formulated the opposition and the person who filed the application for registration of a drawing or pattern. Thus, we consider, among other authors<sup>4</sup>, that *"the opposition rather takes the form of a gracious intimation, which (atypically) is directed to a body of the consultative public administration."*

<sup>1</sup> See A. Postavaru, *Means of defending the rights over industrial drawings and patterns*, material presented at the Symposium "Counterfeiting and protection of trademarks, industrial drawings and patterns", Eforie Nord, May 19-20, 2006, C. Feraru, *Defending the rights on drawings and patterns*, paper presented at the Symposium "Community design protection", Tulcea, July 28-29, 2008.

<sup>2</sup> C. Solzaru, P. Ohan, On objection and challenge in the procedure for registering IDP in the context of Law no. 129/1992, in RRPI (Romanian Journal of Intellectual Property) no. 5-6/2000, p. 51.

<sup>3</sup> V. Ros, *Intellectual property law*, Global Lex Publishing House, Bucharest, 2002, p. 516.

<sup>4</sup> Cr. Clipa, *Jurisdictional and administrative bodies and procedures. Introduction to the study of public jurisdictionalised administration*, Hamangiu Publishing House, Bucharest, 2012, p. 26.

## 2.1. Filing the opposition

Pursuant to art. 21 par. (1) the relevant specific law, interested persons may submit written objections to the State Office for Inventions and Trademarks on application for registration of the drawing or pattern, within two months of its publication, for the reasons set out in art. 22 par. (3) in the examination procedure.

The term "interested person" means "any person who has a legitimate interest related to the drawing or pattern in question and whose interests may be affected by its registration<sup>5</sup>." "Interested person" may also be any natural or legal entity that owns an earlier right over a drawing or pattern<sup>6</sup>.

Regulation of opposition proceedings in drawings or patterns aims at preventing the occurrence of a potential conflict of rights between the ownership claimed and other rights that were previously recognized to another person.

The interest in opposition formulation coincides with interest justifying the exercise of the civil action<sup>7</sup> and must meet the requirements on the *legitimate, vested and present, personal and direct*<sup>8</sup> nature, and the conditions provided by art. 33 1<sup>st</sup> sentence of the New Code of Civil Procedure<sup>9</sup> according to which the interest must be *determined, legitimate, personal, vested and present*<sup>10</sup>.

In connection with those interest conditions identified by law, we observe that the new legislator of the New Code of Civil Procedure preferred the attribute "determined" instead of the traditional phrase "*positive and tangible interest*" which, as Professor Ion Deleanu assessed, "*considered it ambiguous, vague and useless.*" The new wording "*clearly and more rigorously calls for interest concreteness precisely to be expected judicial review*"<sup>11</sup>.

## 2.2. Grounds of the opposition

According to art. 22 par. (3) of Law no. 129/1992 on the protection of drawings and patterns, application for registration of a drawing or pattern shall be rejected or the registration will be cancelled for the following reasons:

- failure to meet the provisions relating to conditions which a drawing or pattern must meet to be registered, i.e. to constitute a drawing or pattern, as defined, is new and individual and also upon its disclosure;
- the object of the application falls within the provisions of art. 8 (the drawing or pattern is determined solely by a technical function) and art. 9 which stipulates that the drawings or patterns which conflict with public order or morality are excluded from protection;
- incorporates, without the proprietor's consent, a work protected by Law. 8/1996 on copyright and related rights, as amended and supplemented, or any other intellectual property right protected;

<sup>5</sup> Art. 2 letter p) of the Regulation for the implementation of Law no. 129/1992 on the protection of drawings and patterns.

<sup>6</sup> L. Badea *Third party opposition*, paper presented at the Symposium "Community design protection", Tulcea, July 28-29, 2008.

<sup>7</sup> V.M. Ciobanu, G. Boroi, T.C. Briciu, *Civil procedural law. Selective course. Multiple choice tests*, 5<sup>th</sup> edition, C.H. Beck Publishing House, Bucharest, 2011, p.4.

<sup>8</sup> See High Court of Cassation and Justice, civil and intellectual property department, civil decision no. 3315 of April 24, 2007 in RRDPI (Romanian Journal of Intellectual Property Law) no. 3/2007, page 178, in the selection and processing of M. Tabarca, High Court of Cassation and Justice, civil and intellectual property department, decision no. 2776 of March 10, 2009, in O. Spineanu Matei, *Intellectual Property (4). Court Practice 2010*, Hamangiu Publishing House, Bucharest, 2010, p 289.

<sup>9</sup> Republished in the OG. no. 545 of August 3, 2012.

<sup>10</sup> For details, see M. Tabarca, *Civil procedural law, General Theory*, Vol. I, Universul Juridic Publishing House, Bucharest, 2013, pp. 236-239, as well as comments from the case.

<sup>11</sup> I. Deleanu, *New code of civil procedure. Comments by articles*, Volume I, Universul Juridic Publishing House, Bucharest, 2013, p 82.

- constitutes an improper use of any of the items mentioned in the list contained in art. 6 ter of Paris Convention for the Protection of Industrial Property, as revised at Stockholm on July 14, 1967, to which Romania adhered by the Decree. no. 1.177/1968 or misuse of emblems and blazons other than those mentioned in art. 6 ter of the Convention;

- applicant has not demonstrated that it is entitled to the registration of the drawing or pattern for the purposes of art. 3, which refers to drawings or patterns created independently or as a result of creative mission contracts or by employees in their duties;

- the drawing or pattern conflicts with a prior drawing or pattern which has been subject to public disclosure after the date of filing the application for registration or after the priority date if priority is claimed, and which is protected from a date prior to the registration of a community drawing or pattern or by an application of registration of a community drawing or pattern, or by registering a drawing or pattern in Romania or by an application for obtaining protection in Romania;

- drawing or pattern uses a hallmark that provides the holder of that mark with the right to prohibit such use.

Opposition procedure is not regulated in any specific laws of the Member States of the European Union. Thus, given that Regulation no. 6/2002 on community drawings or patterns does not provide the opposition procedure either, the relevant legislation in France, Italy and the UK does not provide this procedure. The application for registration of the drawing or pattern is examined only by reference to the formal conditions.

### 2.3. Opposition content

The opposition shall be filed in writing and, according to art. 23 of the Regulations for the implementation of the Law no. 129/1992 on the protection of drawings and patterns should contain:

- directions on the drawing or pattern against which such application is made, and the file number, the name of the applicant and Official Industrial Property Bulletin – Drawing or Pattern Section in which that publication was made;

- directions of prior drawing or pattern or earlier right, which the opposition is based on, for each drawing or pattern;

- documents indicated in the notice of opposition must have legal date and be published before legal filing;

- the notice of opposition should also state precisely the opposing drawing or pattern (page and position in the opposable matter); every notice of opposition and acts in support thereof shall be submitted in two copies, one for the Opposition Examining Commission and one for the applicant;

- mentions on the quality and interest of the person formulating the opposition;

- the grounds underlying the opposition;

- name and address or registered office of the authorized representative, if appropriate.

Matters submitted in support of the opposition should be publicly accessible, taking into account the date when they were deposited in places where the public could take notice of, to be submitted in original or certified copy<sup>12</sup>.

If OSIM finds that the opposition does not satisfy the requirements of paragraph (3) above, it requires the person who filed the opposition that within 15 days it remedy the deficiencies. If they are not remedied within the time limit, OSIM shall settle the opposition only under existing documents.

<sup>12</sup> Art. 23 par. (3) of the Regulations for the implementation of Law no. 129/1992 on the protection of drawings and patterns.

## 2.4. Addressing the opposition

The opposition shall not be considered if the above provisions are not all met and the legal fee is not paid<sup>13</sup>.

Opposition shall be settled within 3 months of its submission by the Opposition Examining Commission consisting of a chairman and 2 members appointed by the chairman, and a legally qualified examiner in the Drawing and Pattern Division and the application examiner.

The examiner of the application, who is OSIM expert with basic responsibility of examining the applications for registration of drawings and patterns<sup>14</sup>, communicates the objection to the applicant in order to submit its opinion within 30 days, according to art. 23 par. (8) of the Regulation for the implementation of Law no. 129/1992 on the protection of drawings and patterns.

If the applicant does not express its opinion, OSIM shall decide on the opposition, relying upon the records in the file.

Chairman of the Opposition Examining Commission, if deemed necessary, may invite the parties to the hearing set for the settlement of the opposition.

Opposition Examining Commission may accept or reject the opposition, drawing up, in this regard, a report in connection thereto. The report shall be submitted to the Commission examining the drawings and patterns for further examination in terms of fulfilling the conditions on the matter and shall be forwarded to the applicant and the opponent.

In conclusion, we find that for the settlement of an objection, the Opposition Examining Commission of OSIM allows conflicting parties to express their views on objection filed and propose evidence in support of their positions. Thus, solving an opposition to an application for registration of a drawing or pattern supposes passing a procedure pertaining to *"advisory-type public administration, but marked by numerous elements of apparent jurisdictionality"*<sup>15</sup>.

As shown, the Opposition Examining Commission of OSIM completes its activities not issuing an administrative act, but with a report that *"in terms of formality, does not act as an administrative document, but as a technical-material operation"*<sup>16</sup>.

Also, in terms of substantiality, the report groups the conclusions of the administrative body "on issues under consideration by specifying various matters of fact or law, the clarification of which will depend on the issue of an administrative act by another public administration body"<sup>17</sup>.

In 2012, the Opposition Examining Commission of OSIM had to solve a number of 19 oppositions, of which 18 objections were introduced during the year. Of the 19 objections, the Commission resolved 15 objections, 4 oppositions whose term expires in the first part of 2013 pending settlement<sup>18</sup>.

## 2.5. Suspension of opposition settlement

In some cases expressly provided by law, the resolution of opposition may be suspended. Thus, the settlement of the opposition may be suspended when relying on an application for registration of a drawing or pattern, until a decision is made in connection

<sup>13</sup> According to paragraph 12 of Annex no. 5 of GD no. 41/1998 on fees for the protection of industrial property and rules for their use, the fee for the examination of an opposition to the registration of a drawing or pattern is 30 euros, equivalent in lei at the date of payment.

<sup>14</sup> Art. 2 letter l) of the Regulation for the implementation of Law no. 129/1992 on the protection of drawings and patterns.

<sup>15</sup> Cr. Clipa, works cited, p. 25.

<sup>16</sup> Idem.

<sup>17</sup> T. Draganu, Acts of administrative law, Ed. Stiintifica Publishing House, Bucharest, 1959, p. 130, quoted by Cr. Clipa, works cited, p. 25.

<sup>18</sup> OSIM Activity Report for 2012, available at [www.osim.ro](http://www.osim.ro)

thereto, where, opposing drawing or pattern is the subject of an action for annulment by final resolution of the case<sup>19</sup>.

However, both the legislation in force and the practice show that there are no regulations regarding the establishment of a deadline by which the opposition suspension procedure is settled, nor sanctions against the parties that do not apply that the opposition settlement procedure be resumed. For these reasons, we propose *de lege ferenda*, that provisions establishing deadlines by which the settlement of opposition may be suspended, be adopted and the possible sanctions if the parties do not apply for the procedure be resumed in order to complete the opposition.

From reading the art. 21 par. (3) of Law no. 129/1992 on the protection of drawings and patterns, we observe that the term in which the applicant may submit its views with regard to the opposition filed is two months<sup>20</sup>, and in art. 23 par. (8) of the Regulation for the implementation of Law no. 129/1992 states that "the examiner of the application shall communicate the objection to the applicant for it to submit its views within 30 days."

Thus, we find that the two laws, namely Law no. 129/1992 on the protection of drawings and patterns and the Regulations for implementation thereof, provide for different times in which the applicant for the registration of a drawing or pattern can present its point of view with reference to the opposition filed.

Given these inconsistencies, and taking into account the provisions of art. 1 par. (5) of the Constitution of Romania, according to which "in Romania, observing Constitution, its supremacy and the laws is mandatory" and that the purpose of a regulation implementing a law is to allow the law be executed, to clarify concepts and legal situation arising from the law, and also to detail specific issues and/or procedures arising from the law in question, we believe that, as already shown in literature,<sup>21</sup> time in which the applicant for the registration of a drawing or pattern must present its point of view with reference to the opposition filed is that provided in art. 21 par. (3) of Law no. 129/1992 on the protection of drawings and patterns, i.e. *two months*.

To avoid misunderstanding, we consider *de lege ferenda* that in art. 23 par. (8) of the Regulation for the implementation of Law no. 129/1992 on the protection of drawings and patterns, the period during which the applicant may submit its views with regard to the opposition filed be two months.

### 3. Challenge

#### 3.1. Introductory matters

The challenge, in the analysis of the matter, is a mean of appeal available to the applicant for the registration of the drawing or pattern, to challenge the decision of the Examining Commission of OSIM on application for the registration of a drawing or pattern.

The procedure for settling the challenge is provided both in art. 24 and art. 25 of Law no. 129/1992 on the protection of drawings and patterns and in art. 45-50 of Government Decision no. 211/2008 approving the Regulation for the implementation of Law no. 129/1992 on the protection of drawings and patterns. We must also mention that the provisions of art.

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<sup>19</sup> Art. 21 [par. (5) letter a)-b)] of Law no. 129/1992 on the protection of drawings and patterns.

<sup>20</sup> According to art. 21 par. (3) of Law no. 129/1992 on the protection of drawings and patterns "Within two months of the notification of opposition, the applicant may present its point of view."

<sup>21</sup> C.Duvac, C.R. Romitan, *Penal and legal protection of drawings and patterns*, Universul Juridic Publishing House, Bucharest, 2009, p 137.

45-50 on the procedure for solving challenges is properly supplemented by the provisions of Code of Civil Procedure<sup>22</sup>.

From the analysis of the legal provisions laid down in the special law and the Regulation for the implementation of Law no. 129/1992 on the protection of drawings and patterns<sup>23</sup>, we find that people that have the right to file challenge against decisions on applications for registration of a drawing or pattern are persons who by law were communicated these decisions, namely:

- applicants whose application for registration of a drawing or pattern was rejected;
- applicants whose application for registration of a drawing or pattern was partly accepted to the record.

Therefore, from the above it results that the challenge procedure is not *inter partes*.

Concurrently, the legislation in force reveals that the report of Opposition Examining Commission prepared under art. 21 par. (4), last sentence, of the Law no. 129/1992 on the protection of drawings and patterns cannot be attacked by formulating a challenge by a third party - opponent.

Under the provisions of art. 21 par. (4), last sentence of Law no. 129/1992 on the protection of drawings and patterns and art. 23 par. (12) and art. 26 par. (6) of the Regulation for the implementation of Law no. 129/1992, the Opposition Examining Commission issues the report referred and submits it to the Examining Commission for further examination in terms of the fulfilment of conditions on the matter and is forwarded to the applicant and to the opponent. The decision of the Commission examining the drawings and patterns shall be based on the report prepared by Opposition Examining Commission.

The third party - opponent which is dissatisfied with how the opposition was settled, may, under art. 42 of Law no. 129/1992 on the protection of drawings and patterns<sup>24</sup>, apply for the cancellation of the certificate of registration of the drawing or pattern in question at the Bucharest High Court.

Likewise, the legal literature following the adoption of the special relevant law<sup>25</sup>, stated that the defence the law makes available to the third party – after the opposition settlement is the action for annulment of the certificate of registration of the drawing or pattern.

As far as we are concerned, we agree with this solution and appreciate that in this way the remedies are fair and equal to those of the applicant, i.e. the other party involved. In this way the provisions of Part III (Means of enforcing intellectual property rights), Section II, entitled "Civil and administrative procedures and remedies" are also observed.

### 3.2. The procedure for filing a challenge

Challenges shall be made in writing and filed with the General Registry of OSIM within 30 days of the communication of decisions on applications for drawing or pattern registration, made by the OSIM Commission examining the drawings and patterns. As shown, following amendments to the special relevant law in the Law no. 280/2007 amending and supplementing Law no. 129/1992 on the protection of drawings and patterns, the time to file a challenge has been reduced from 3 months to 30 days, which should be appreciated because it

<sup>22</sup> Art. 51 of the Regulations for the implementation of Law no. 129/1992 on the protection of drawings and patterns.

<sup>23</sup> Art. 46 par. (10) of the Regulation for the implementation of Law no. 129/1992 on the protection of drawings and patterns.

<sup>24</sup> According to art. 42 par. (1) of Law no. 129/1992 on the protection of drawing and patterns, "drawing or pattern registration may be cancelled, in whole or in part, at the request of an interested person, for the reasons set out in art. 22 par. (3). Cancellation may be required throughout the duration of the certificate of registration and is judged by the Bucharest High Court"[par. (2)].

<sup>25</sup> Y. Eminescu, *Protection of industrial drawings and patterns*, Lumina Lex Publishing House, Bucharest, 1994, p. 131, V. Ros, *Intellectual property law, works cited*, pp. 516-517.

is assumed that this will speed up the processing of applications for registration of the drawing or pattern.

Challenges shall be in Romanian language and, according to art. 46 par. (4) of the Regulations for the implementation of Law no. 129/1992 on the protection of drawings and patterns shall include: name, surname and domicile, residence of the individual or, if applicable, name and address of the legal entity filing the challenge; OSIM deposit and contested judgment number; object of the challenge; the factual and legal grounds underlying the challenge; power of attorney, if any; attaching proof of payment of the prescribed fee for the examination of a challenge<sup>26</sup>; signature of the applicant or of the authorized representative, as appropriate. If documents are written in a foreign language, certified translation thereof into Romanian shall be submitted.

The challenge may be made in person, by representative, attorney or legal counsel. Foreign natural or legal entities may file challenges and may bring conclusions before the Commission only by representative, according to art. 13 of Law no. 129/1992 on the protection of drawings or patterns<sup>27</sup>.

### 3.2.1. Registering challenges

Challenges are recorded in chronological order in the Register of challenges. Record of challenges is kept on annual basis, starting each year from the serial number 1 (one). Challenges will be reviewed within 3 months from the filing of the challenge by the Commission of Challenge of OSIM Department of Appeals.

The Commission of Challenge of the State Office for Inventions and Trademarks *exercises special administrative jurisdiction and can be regarded as a court*<sup>28</sup> within the meaning of art. 6 par. (1)<sup>29</sup> with marginal name "The right to a fair trial," of the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>30</sup>.

As mentioned above, special administrative jurisdiction is defined as "activity carried out by an administrative authority which has, according to special relevant organic law, the jurisdiction to hear a dispute concerning an administrative act by a procedure based on adversarial principles, ensuring the right to defence and independence of jurisdictional administrative activity."<sup>31</sup>

The registry of challenges that records the challenges must contain, according to art. 50 par. (2) of the Regulations for the implementation of Law no. 129/1992 on the protection of drawings and patterns, the following items: the date the challenge was filed and the number under which the challenge was registered, surname, first name or the name of the appellant, subject of the challenge, the time limit for resolution of the challenge, the judgment of the Commission on challenge filed, number of receipt or payment order proving the payment of

<sup>26</sup> The challenge examination fee is 150 euros, equivalent, according to point 11 of Annex no. 5 of GD no. 41/1998 on charges of industrial property protection and rule for their use.

<sup>27</sup> According to art. 21 par. (1) of Law no. 129/1992 on the protection of drawings and patterns, "In proceedings before OSIM the applicant of the registration or its successor in title may be represented by an authorized industrial property counsel. For persons who are not resident or located in Romania, representation under par. (1) is mandatory, except for application filing" [par. (2)].

<sup>28</sup> C. Birsan, *European Convention on Human Rights. Comments by articles*, Volume I, 2<sup>nd</sup> edition, C.H. Beck Publishing House, Bucharest, 2010, pp. 487-503.

<sup>29</sup> According to art. 6, par. 1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, "Any person has the right to a fair trial of the case, publicly and within a reasonable time by an independent and impartial law court judging whether on his/her civil rights and obligations infringement or on the merits of any criminal charge against him/her."(...).

<sup>30</sup> The Convention was adopted in Rome on November 4, 1950 and entered into force on September 3, 1953. Romania ratified the Convention by Law no. 30/1994, published in the Official Gazette No. 135 of May 31, 1994.

<sup>31</sup> Art. 2 par. (1) letter e) of Law no. 554/2004 - Administrative Litigation Law, as amended and supplemented, republished in the OG no. 751 of November 6, 2007.



the fee for the examination of the challenge, the Commission decision number, the number and the date the judgement was communicated.

### 3.3. Procedure for challenge settlement

Settlement of challenge is made by the Commission of Challenge on drawings and patterns that is organized and operates under art. 24 of Law no. 129/1992 on the protection of drawings and patterns.

Commission of Challenge on drawings and patterns consists of the chairman and two members. The chairman is the CEO of OSIM or, by delegation of responsibility, Head of Department of Appeals. The two members of the Commission of Challenge are in the Department of Appeals, one of which is a legal counsel. The members of the Commission shall be approved by the CEO of OSIM. Commission secretariat is provided by an adviser in the Department of Appeals.

By analysing the special legislation specific for invention patents, we note that Government Decision no. 547/2008 approving the Regulation for the implementation of Law no. 64./1991 regarding invention patents<sup>32</sup> stipulates that „The members of the re-examination commissions cannot take part in resolving any challenge or requests for revocation if they have a personal interest in the challenge at issue or if they have participated, as examiners or members of an examination commission, in the invention patent examination application subject in the challenge”<sup>33</sup>.

Although the special relevant legislation on drawings or patterns does not include a regulation regarding a state of incompatibility, the literature<sup>34</sup> states that, in order to ensure decisional autonomy, the specialists within the challenge commission should not have been involved in the examination proceedings.

Therefore, we hereby propose *de lege ferenda* adopting provisions by which an application to recuse be filed in the procedure of challenge against decisions regarding the application for registering a drawing or pattern, against a member of the examining commission who exerted a personal interest in the challenge at issue or if he/she participated, as examiner or member of an examining commission in the examination of application for drawing or pattern the challenge refers to.

Pursuant to art. 47 par. (1) of the Regulation for the implementation of Law no. 129/1992, the chairman of the challenge commission shall set the appeal session time and decide on summoning the parties. In this regard, the secretary of the challenge commission shall summon the parties at least 14 days prior to the date set for the settlement of the challenge, by mail, with acknowledgement of receipt. If the summoned party fails to appear at the date and time set, the procedure before the commission may be carried out by default.

The presence of parties at the challenge resolution term covers the irregularities regarding the summons procedure. The parties may appear before the challenge commission in person or represented by an authorized patent counsel or attorney. Legal entities may appear before the commission through a legal representative or legal counsel with a delegation.

The opinion of the commission examining the drawing and pattern, drawn up by an examiner within the Drawing and Pattern Service, authorized by the chairman of the commission examining the drawings and patterns, shall be attached to the case file at least 5

<sup>32</sup> Published in the Official Gazette no. 456 of June 18, 2008.

<sup>33</sup> Art 55 par. (4) of Government Decision no. 547/2008 approving the Regulation for the implementation of Law no. 64/1991 on patents.

<sup>34</sup> E. Stoica, Settlement of challenges on drawings and patterns in RRPI no. 4/2008, p 37.

days prior to the term set for resolving the challenge. The opinion shall include the response to the pleas de facto and de jure provided by the appellant in support of his challenge<sup>35</sup>.

Compliant to art. 47 par. (8) of the Regulation for the implementation of Law no. 129/1992, the files for drawings and patterns registration applications, shall be provided in original copy, upon request, to the challenge commission by the drawings and patterns service, upon request.

The session is public. The challenge commission may decide on a secret session if a public dispute affects one of the parties or public order. The session opening, suspension or closure is called by the commission chairman.

The secretary of the commission shall verify if the procedure is complete and if the challenge examination fee was paid and informs the chairman of the aforementioned. Upon the term set, if the parties are present or if the summons procedure was duly effected, the chairman initiates the dispute and gives the floor to the party who brought the challenge.

The law entitles the chairman to question the parties<sup>36</sup>, in order to clear the aspects shown in the appeal. The chairman is entitled to dispute any situation de facto or de jure in order to resolve the case even if such are not included in the challenge.

Moreover, under art. 48 par. (6) of the Regulation for the implementation of Law no. 129/1992, members of the challenge commission can also question the parties, but only through the chairman. The latter may allow members of the challenge commission to directly address questions.

Subject to the duly justified request of the parties or to the necessity of providing new evidence implied by the disputes, the challenge commission may grant a new due date, the parties being informed of the latter.

Upon dispute closure, the challenge commission shall deliberate in the absence of the parties and pronounce a decision on the same day during the session or, in special cases, may postpone the pronouncement for up to 3 weeks. The chairman listens to the commission members' opinions and finally pronounce a decision.

The session disputes and the commission decision are recorded by the secretary in the session registry.

Upon making a decision, the commission shall draft the operative part of the judgment, recorded in the session registry for each case, and the rapporteur shall draft the decision. Divergent opinions of the commission members are recorded in the operative part of the judgment under signature and are motivated separately.

We may conclude that the examination request subject in the appeal, „is a graceful request that only in exceptional cases and when confronted with opposition may be resolved as a result of a procedure riddled with jurisdictional elements”<sup>37</sup>. Therefore, the examination commission within OSIM (State Office for Inventions and Trademarks), invested with an application for registering a drawing or pattern, becomes a jurisdictional administrative body as the dispute resolution is rendered according to a procedure based on the adversarial principle, ensuring the right to defend and independence of administrative-jurisdictional activity<sup>38</sup>.

### 3.4. Decisions of challenge commission

The commission decisions are made with majority of votes and shall be drafted in a single original copy, submitted with the commission decision folder and kept within the secretariat thereof. The decisions are signed by the chairman and members. If one of the

<sup>35</sup> Art. 47. (6) and (7) of the Regulation for the implementation of Law. 129/1992 on the protection of drawing and patterns.

<sup>36</sup> Art. 48 par. (5) of the Regulation for the implementation of Law. 129/1992 on the protection of drawing and patterns.

<sup>37</sup> Cr. Clipa, *works cited*, pp. 26-27.

<sup>38</sup> *Ibidem*, p. 498.

members is unable to sign a decision, the Commission chairman shall record such situation within the decision.

The commission decision shall be recorded within the Decision Registry of Challenge Commission and must include the following information: decision number; last name and first name or names of the appellant, of the authorized proxy or of the attorney, as the case may be; decision content; number of commission file, number from the commission session lists<sup>39</sup>.

According to the provisions of art. 49 par. (6) of the Regulation for the implementation of Law no. 129/1992 on the protection of drawings and patterns, the Drawing and Pattern Challenge Commission may decide, in the settlement of the challenge on the matter on trial:

- to admit the challenge and forwarding the case to the Drawing and Pattern Service in order to implement the decision;
- to dismiss the challenge and uphold the decision against which the challenge was filed.

### 3.4.1. Withdrawal of challenge

If necessary, the Drawing and Pattern Challenge Commission may take note of the challenge withdrawal, through session closure, according to the provisions of art. 523 of the New Code of Civil Procedure, according to which “The appeal may be withdrawn at any time until its resolution. Once withdrawn, the appeal cannot be reiterated<sup>40</sup>”. The possibility to withdraw an appeal is the expression of the principle of availability in the civil trial<sup>41</sup>.

### 3.5. Ways of appeal against the decisions of a challenge commission

According to art. 25 par. (1) of Law no. 129/1992 on the protection of drawings and patterns, the decision of the challenge commission shall be communicated to the parties, in original certified copy, within 30 days from decision delivery.

Within 30 days from communication, the decisions of the Challenge Commission *may be contested* with the Bucharest High Court. The decision is only subject to an appeal with the Bucharest Court of Appeal<sup>42</sup>.

The final decisions of the Drawings and Patterns Challenge Commission shall be published in BOPI – Drawings or Patterns Section, within 60 days from decision delivery<sup>43</sup>.

Considering the aforementioned:

- against a decision pronounced by the Challenge Commission within the Directorate of Judicial, Contestation, International Cooperation and European Affairs of OSIM<sup>44</sup>, the Romanian legislator *established distinguished means of appeal*, namely *the challenge*;
- the challenge must be promoted with the Bucharest High Court, a court with an exclusive material jurisdiction;
- against the first court decision of the Bucharest High Court, the interested party may only submit *an appeal within the competence of the Bucharest Court of Appeal*;
- The Bucharest Court of Appeal shall resolve the appeal and deliver a final decision.

Since the enactment of Law no. 129/1992 on the protection of drawings and patterns to the present day, provisions regarding the judicial control of decisions pronounced by the

<sup>39</sup> Art. 50. par. (4) of the Regulations for the implementation of Law no. 129/1992 on the protection of drawings and patterns.

<sup>40</sup> Ban on reiterating an appeal is appreciated by Professor I. Deleanu “*that it does not correspond to the nature of the specific ways of appeal.*” For details, see I. Deleanu *New Code of Civil Procedure, Comments by articles*, Vol. I, Universul Juridic Publishing House, Bucharest, 2013, p. 714.

<sup>41</sup> Idem.

<sup>42</sup> According to art. 25 par. (1) of Law no. 129/1992 on the protection of drawings and patterns, as in force on February 1, 2013. To date, the text of art. 25 par. (1) reads as follows: “*The decision of the Challenge Commission shall be notified to the parties within 30 days from delivery and may be appealed to the Bucharest High Court, within 30 days of notification.*”

<sup>43</sup> Art. 25 par. (2) of the Law no. 129/1992 on the protection of drawings and patterns.

<sup>44</sup> Structure of OSIM management, according to GD no. 573/1998, was updated on July 30, 2013.

challenge commission have changed, the legislator noting, that the establishment of a jurisdiction of the Bucharest High Court to resolve appeals against the decisions of the Drawings and Patterns Challenge Commission of OSIM *was incorrect*.

Moreover, the establishment of this jurisdiction for the Bucharest High Court was repeatedly criticized in the literature. Thus, one highlighted that the appeal resolution was incorrect „because the appeal is a devolutive remedy which may be exercised against judicial decision. Its extension to decisions pronounced by authorities with jurisdictional activities distorts the nature of the remedy of appeal, as well as the function exercised by the court of appeal”<sup>45</sup>.

Another author<sup>46</sup>, shows that the notion of „appeal”, although „suggestive in terms of full control, de facto and de jure, exercised by the court with regards to the decision of the jurisdiction authority within OSIM, was used inadequately, as, in this case, no judicial control was exercised so that a court was informed for the first time on verifying the legality and soundness of a decision pronounced by a jurisdictional activity authority, outside the court system”.

On the same lines<sup>47</sup>, one mentioned that „the decisions issued by the re-examination commission cannot be contested by appeal before a court of law, only as an action representing the main issue of the matter on trial, compliant to the law. The appeal is a devolutive remedy of appeal specific to civil procedure by which a decision by a court of law, and not by an administrative authority, is censored, whether the latter is granted following a remedy procedure similar to the one carried out before a court of law”.

In conclusion, considering the aforementioned, we appreciate the changes made by the legislator to art. 25 of Law no. 129/1992 on the protection of drawings and patterns through Law no. 76/2012 for implementing Law no. 134/2010 regarding the Code of Civil Procedure, since the establishment of a jurisdiction for the Bucharest High Court to resolve appeals against the decision of Drawings and Patterns Challenge Commission within OSIM *was incorrect*.

### 3. Conclusions

The main directions discussed in the article aim at drawings and patterns protection in terms of national administrative law and through this proposed paper the author desired to identify the administrative law means aiming at and ensuring the recognition of the right during the procedure of drawings and patterns registration and the procedure for releasing the registration certificate for drawings and patterns. Without this procedure the desired result would not be achieved, namely the recognition of legitimate ownership of the invention (intellectual products) made. The expected impact is to understand the importance of this segment, better saying this element in the whole ensemble the intellectual property represents. For future research, my suggestion is to find common elements between domestic and international administrative law, namely those which are applicable to international regulations and conventions and which apply in the field.

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