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THE ENFORCEMENT IN INDUSTRIAL PROPERTY AND IN UNFAIR COMPETITION

A. Institutions in the Field of IP and Competition Law

I. The System of Judicial Procedure in Hungary

1. Judicial Organization and Jurisdiction

Matters of industrial property and competition law are heard in the first instance by the appeal courts. In IP matters, all matters go exclusively to the Appeal Court (Metropolitan Court) in Budapest.¹

In cases where the appeal courts are courts of first instance, appeal may be lodged with the Supreme Court. A further appeal to the Supreme Court against appeal decisions by the appeal courts can be brought under certain circumstances.²

2. Composition of the Courts

Matters by the appeal court (even in the first instance) are judged by a chamber. When deciding matters in the first instance, the appeal court's chambers are composed of one professional and two lay judges, and in appellate matters of three professional judges.³ The IP chambers of the Metropolitan Court are composed of three professional judges.

The appeal courts have several divisions, e.g. criminal, civil, commercial and military. The Supreme Court has divisions on criminal, civil and administrative matters, and those for the uniform application of the law. Industrial property and unfair competition matters are decided by the civil division.

3. Type of Civil Procedure

Civil proceedings can be *inter partes* or *ex parte* in nature. A typical example of the latter in the IP field is an appeal of a Patent Office decision. The Code of Civil Procedure recognizes two types of decisions: judgments and orders. While the merits of the case are always decided by judgment, matters that arise within a proceeding are mostly decided by order. This is also true for *ex parte* proceedings, e.g. in IP matters.

II. Current Situation and Problems Related to Intellectual Property Rights in Hungary

The Hungarian intellectual property system has strong historical foundations upon which the 1990's modernization built. The system thus includes national achievements that are still in

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¹ Sec. 23, Code of Civil Procedure (Law No. III/1952).

² In certain cases, there is no ordinary remedy available against decisions. These first instance decisions become final immediately.

³ Any Hungarian citizen over 30 with no criminal record is eligible to be a lay judge (Sec. 122(1), Law. No. LXVI/1997 on the organisation and management of the courts).

conformity with European laws.⁴ While the field of industrial property law is still considered exclusive and inaccessible to the public at large, including generalist lawyers, the last five years have seen a marked increase in interest in this field.

B. The Procedure in IP-Related Suits

I. The Parties

While the general rules laid down in the Code of Civil Procedure also apply to IP-related suits, certain special provisions apply which modify these general rules.

1. The Admissible Parties in *ex parte* Proceedings

Ex parte IP proceedings are directed at altering a decision by the Patent Office.⁵ They are initiated on request, in particular by the applicant in a previous proceeding at the Patent Office. However, under certain circumstances, third parties also are afforded standing to sue. Requests to revoke a patent or utility model may be initiated by the true inventor, decisions to revoke a registered topography by its author, and decisions in trademark matters by third parties who have a legal interest in the matter and who have already taken positions in the application procedure before the Patent Office.

In *ex parte* proceedings, the person making the request is party to the proceeding. If in the previous administrative proceeding another party was involved as an opponent, the subsequent court proceeding will become *inter partes*. If, in the case of joint ownership, only one of the owners appeals in order to protect the joint patent, utility model, topography or trade mark right, or if proceedings were initiated only against one of the joint owners, the court notifies the others that they may join. Other persons who have a legal interest in the outcome of the proceeding may intervene alongside the appealing party. The general rules of intervention under civil procedure apply (Sec. 48, Code of Civil Procedure).

2. *Inter partes* Proceedings

Inter partes proceedings in IP matters follow the general rules of the Code of Civil Procedure with the following modifications:

- (a) In order to preserve, maintain, defend or extend an IP right, each one of the joint owners is entitled to sue even without the participation of the others.⁶
- (b) In the case of inventions made for hire, the employer, as the proper owner, is entitled to sue. For other inventions made in the course of employment, the employee, as owner of the right, is entitled to sue, while the employer is merely entitled to a non-exclusive license and does not have standing to sue.

⁴ See: Vida: Harmonization of Hungarian Patent Law with the Law of the European Union. AIPPI Proceedings (Hungary) 1995, at 5; Ficsor: The Hungarian Patent Act of 1995: AIPPI Proceedings (Hungary) 1997, at 53; Ficsor: the Hungarian Trademark Act of 1997 and the European Law, AIPPI Proceedings (Hungary) 1998, at 25.

⁵ E. g. rejecting a patent or a trademark application or cancelling a patent or trademark.

⁶ To that extent, such action also may have negative repercussions on the others, e.g. if a deadline is not properly maintained and such omission is not corrected in due course. The above rules do not apply to topographies created by different persons independent of each other.

- (c) The registered licensee is entitled to raise an infringement action after having given notice to the licensor without the latter having failed to act against the alleged infringement within a period of 30 days from the request.⁷
- (d) At the application stage, the applicant is entitled to raise an action e.g. for infringement, although such action will be suspended until the right is finally and conclusively granted.
- (e) In cases of a litigation over the rights over an invention, all registered inventors, owners and those who claim rights over the invention must be parties to the suit.⁸

3. Role of the Prosecutor

In 1994, the Constitutional Court ruled the general right of the prosecutor to intervene in any given suit to be unconstitutional.⁹ However, in some suits where only the prosecutor can prevent infringements of the law, it is useful and justified to allow participation of the prosecutor. In IP matters, the prosecutor is entitled to request invalidation of patents, utility models or trademarks in cases of contravention of the public order and good morals. In trademark cases, the right to intervene applies to invalidation requests due to the danger of deception.

4. Representation in Court

While the general rules of representation as laid down in the Code of Civil Procedure also apply to IP matters, it should be noted that industrial property cases can also be pursued by patent attorneys in court, where they enjoy a position comparable to attorneys at law. Representation by a patent attorney is rather common in matters of patents, utility models and topographies, while attorneys often represent clients in matters of trademarks, designs and cases of know-how. Larger companies are typically represented by their in-house lawyers or their patent attorneys.

II. Questions of Jurisdiction

1. General Remarks

The Code of Civil Procedure contains fairly detailed rules on jurisdiction. In IP matters, one should distinguish between *inter partes* and *ex parte* proceedings, between different types of rights and between different types of claims.

2. Jurisdiction in *inter partes* Proceedings

a) Exclusive jurisdiction of the Metropolitan Court

Certain matters come under the exclusive jurisdiction of the Metropolitan Court.¹⁰ These matters are:

- (1) for patents and semi-conductor topographies: grants, amendments or revocations of compulsory licenses, prior user rights and all suits related to infringement;

⁷ See Vida/Kowal Wolk/Hegyí: Das ungarische Patentrecht, Köln/Budapest/Bonn/München 2001, at 161.

⁸ Supreme Court, Civil Division, decision No. 277, reprinted in *Bírósági Határozatok* (Supreme Court Decisions, subsequently referred to as BH), 1988/8.

⁹ Constitutional Court decision No. 1/1994.

¹⁰ Generally, these matters are regarded as the genuine matters: Németh: "A polgári per-rendtartás magyarázata" (Commentary on the Code of Civil Procedure) 148 (1st ed., Budapest 1999).

- (2) for utility models: grants, amendments or revocations of compulsory licenses, determination of an equitable remuneration in case of use, disputes on prior user rights and/or matters of infringement;
- (3) for designs: all proceedings related to infringement; and
- (4) trademarks and geographical indications: all matters related to infringement.

The Metropolitan Court, with exclusive jurisdiction in the above matters, sits as a panel of three professional judges to decide these matters. In the division that deals with patents, utility models and topographies, at least two of the three judges must have an additional technical qualification.

b) Other IP matters

For other IP matters not mentioned above, jurisdiction lies with the Appeal Courts as the courts of first instance. Other IP matters are, in particular, those that relate to disputes over licensing agreements and possible damage claims ensuing therefrom.¹¹

3. Jurisdiction over Unpatented Inventions and Know-How Protection

There are no special rules of jurisdiction for know-how and unpatented innovations. As a consequence, the ordinary county courts are competent to deal with these matters.¹² The Supreme Court has confirmed this, holding that disputes on the remuneration for innovations in general do not belong to copyright or industrial property disputes, and the general rules of jurisdiction should thus apply.¹³

4. Matters of Unfair Competition

Cases that concern matters in connection with unfair competition such as libel or slander, infringement of trade secrets, boycotts, slavish imitation and other acts of unfair economic activity¹⁴ fall under the jurisdiction of the appeal courts. The fact that know-how cases can be argued both under unfair competition law and the Hungarian Civil Code with different rules on jurisdiction is somewhat unfortunate. The definition of trade secrets under unfair competition law is broader, yet an action can only be brought against a competitor. Depending on the basis of the claim (Civil Code or Unfair Competition Act), there is jurisdiction of the ordinary county courts or, alternatively, the appeal courts.

5. Ex parte Proceedings

All appeals against decisions of the Patent Office fall under the exclusive jurisdiction of the Metropolitan Court. Decisions of the Patent Office are in particular the grant or revocation of a right, stay of proceedings or ascertainment of a right.

¹¹ Supreme Court, decision Gf. VI. 32. 777/1997, reprinted in: BH, 2000, at 218.

¹² As of 1 January 2003, matters concerning the protection of know-how and creations not otherwise protected will fall under the jurisdiction of the appeal courts. Matters concerning unprotected innovations will remain under local jurisdiction.

¹³ Supreme Court, decision Pk. IV.21,275/1993, reprinted in 1994 BH 83; Supreme Court, decision Pf. IV.20,368/1990.

¹⁴ See Bacher: Court Practice in Matters of Unfair Competition; AIPPI Proceedings (Hungary), 1997, at 101; E. Boytha: The Competition Act of 1996, AIPPI Proceedings (Hungary), 1998, at 95.

III. Preparation for Trial

1. Preparatory Acts

Once filed, a claim is examined by the court within 30 days for form and content. If incomplete, the claim is either dismissed (rare), or the plaintiff is invited to supply the missing facts or documents. The defendant will normally submit his defense in writing, whereupon the plaintiff will reply. At this stage of the claim, the court may be asked to make an interim decision, or to decide upon the submission of further documents. Interim measures can also be requested at a later stage.

The preparatory phase is very thorough, and it is not uncommon that, in order to clarify the facts or claims, the parties will exchange documents five to six times. The court can request submission of further facts or documents, e.g. a copy of the recordal of the IP right or a notarized power.¹⁵ The preparatory phase takes between two to five months, whereupon the court will set a hearing date within seven to eight months.

In the preparatory phase, the court quite often suspends proceedings, in particular if the defendant has initiated invalidation proceedings before the Patent Office. Such challenges to the patent's validity is frequently used by defendants to delay the suit.¹⁶ In order to prevent the defendant from raising an invalidation action prior to the infringement suit, plaintiffs often refrain from sending warning letters to the defendant prior to their suit. Before a suit is filed, the defendant may initiate proceedings of both invalidation and ascertainment of invalidity¹⁷ before the Patent Office, but after commencement of the suit only the former. Reasons for invalidation can be that the requirements for protection are not met; reasons for cancellation in connection with a trademark can be the lack of use or the confusion of consumers.

According to the general rules of the Code of Civil Procedure, the court may, yet does not have to, suspend proceedings (Sec. 152(1) Code of Civil Procedure, Sec. 104(9) Patent Act, and Sec. 95(8) Trade Mark Act). However, it is customary for the court to suspend the proceedings.

2. Interim Measures

Interim measures are among the most important measures in the preparatory stages of a trial. In the Trade Mark Act, interim measures were particularly mentioned.¹⁸ In about 80% of all trademark cases, interim measures are requested by the plaintiff. In litigation over other IP rights, the request is not as frequent. In trademark matters, the request for an interim injunction is usually granted, also due to the new provisions concerning customs procedures.¹⁹ In patent matters, courts are more cautious due to the difficulty of proving a likelihood of infringement. In trademark cases, it is sufficient to compare the accused mark to the registered one. In patent

¹⁵ According to Sec. 68(3) of the Code of Civil Procedure, it is not sufficient for a foreign company simply to sign a power of attorney, but rather the document has to be properly notarised.

¹⁶ These are often deliberate tactics. If the defendant requests an invalidation trial, the court will decide on preliminary measures independent thereof. See: Mikófalvi: The Ordering of an Interim Injunction in a Case of Trademark Infringement. AIPPI Proceedings (Hungary), 1997, at 79; Túri: Interim Measures: Judicial Practice, AIPPI Proceedings (Hungary), 1999, at 29.

¹⁷ Only in patent cases, the Trade Mark Act does not provide on this latter proceeding.

¹⁸ Law No. XI/1998 on the protection of trade marks and geographical indications (Trademark Act).

¹⁹ The most frequent infringement being the importation of goods under a reputed mark of another.

matters, the likelihood of success is more difficult to assess, e.g. when it comes to comparing chemical processes²⁰. Apart from the likelihood of success, the plaintiff needs to show that damages are "imminent"²¹. In this respect, the Supreme Court overruled the Metropolitan Court in holding that "imminent damages" can also be shown in cases where damages have already occurred, yet further damages are likely due to the continuing infringement. As a third requirement of an interim injunction, the court needs to weigh the pros and cons of the requested relief. In this respect, there are no firm guidelines as to what should be regarded as proportionate. For that reason, the court needs to consider the matter carefully, not only for granting the interim injunction but also when calculating the security the plaintiff has to post.

IV. The Trial

1. Role of Courts and Attorneys

The court plays a very active role in the trial proceedings. The President of the chamber directs the procedure and determines the sequence of action. As a starting point, the claim is read by the judge in charge or by the plaintiff. The plaintiff then has to state whether he wishes to uphold or amend the claim, whereupon the defendant has to state his reasoned defense. If necessary, the court would then ask that evidence be presented. Although the parties will argue their case orally, thorough preparation in writing is more important in IP matters.

Patent proceedings normally require two or three full days. Five to six months can pass between each hearing due to the participation of experts or if it is necessary to supplement the claims.

The hearing of evidence is generally more important in cases of technical IP rights, while cases of trademark infringement can be more easily determined by the court. Evidence would normally be presented in the form of an expertise by the expert, documents or other factual evidence.

2. Experts

To the extent necessary, the court can request or order participation of experts. The expert would normally be a member of certain institutions as specified by law, yet someone else can be named if deemed appropriate. The names of experts according to their fields of expertise are registered with the Ministry of Justice. In nominating an expert, the court may take requests by the parties into account. The parties very often disagree on the expert and are allowed to present a so-called "private" expert. It is up to the court to decide to what extent such a "biased" expert is taken into account by the court.

V. Proving Infringement

1. General

In practice, most IP-related matters concern the infringement of trademarks or patents. The following explanations will thus deal with these two types.

²⁰ Turi, *supra* Note 16, at 27.

²¹ *Ibid*, at 32.

2. Proving Infringement in Patent Matters

It is up to the plaintiff to prove that the defendant has made infringing use of his patent. The allegedly infringing device or process must thus correspond to the registered patent, although in the case of process patents, the products directly resulting therefrom are presumed to have been produced under this process. The basis for proving infringement must thus be the patent claim and description. Several decisions have held that a device or process is only infringing if it corresponds to all characteristics of the patented device or process. While the patented invention is not limited to the strict wording of the claims, the claims may not be interpreted as a mere indication of directions for the person skilled in the art to determine the patented invention.²² In interpreting the contents of the claims, the court very often relies on the expertise of an expert from such institutions as the Technical Expert Institution of the Court or the State Pharmaceutical Institute. Infringing use by the defendant can, for instance, be proven by sample purchases or other commercial documents.

3. Proving Infringement in Trademark Matters

In order to prove trademark infringement, the plaintiff has to show valid registration of a mark, identity or similarity of marks and goods/services, use of the accused indication, and unlawfulness of such use.

Trademark registration can be proven on the basis of the trademark register. Most often, the courts have to decide on issues of similarity of marks or goods/services. In order to do so, the courts do not require experts and can decide themselves by inspection. More difficult to decide are cases of combined word/picture marks. Here, in a number of decisions, the courts have held that greater emphasis should be placed on the word element as consumers seek out products according to name. The picture element can thus only be viewed as distinctive in connection with the word.²³ A similarity of words was assumed in the cases of *Adidao v. Adidas* and *Flik-Flak v. Tic-Tac*.²⁴ In these cases, a phonetic expert is sometime heard. The Supreme Court has also accepted surveys or comparable foreign decisions as evidence.²⁵ Practical cases regarding well-known marks are rare. The character of a well-known mark would largely be determined by the knowledge of the judge.

Proving use of a mark according to Sec. 12(3) Trade Mark Act can be accomplished by furnishing documents such as invoices, advertising material, labels etc. In order to determine the scope of (infringing) use, an accountant may be asked to determine the amount of damages.

VI. Defenses

Typical defences are the following:

1. Request for Invalidation

It is usual in IP infringement cases that the defendant uses an offensive tactic as the preferred defense. He would thus request invalidation of the ip right or - in trademark cases -

²² Supreme Court, decisions Pf. IV.21,139/1992 and Pf. IV.20,415/1983.

²³ Metropolitan Court, case III. P. 22,230/1998.

²⁴ Turi: "A bírósági ítélezési gyakorlat az utánzás, hamisítás és védjegybitorlás területén" (Decisions in the Field of Imitation, Piracy and Misleading Use of Marks), *Védjegyvilág* 1999/3, at 13.

²⁵ Supreme Court, case Pf. IV.23,066/1997. This type of evidence is rare, however.

cancellation for lack of use before the Patent Office. Due to the stay of proceedings in such case, the procedure might well take four to five years.²⁶

2. Better Rights

It is not infrequent that the defendant invokes his own patents or trademarks as a defense. In this connection, the Supreme Court has held that an unlawful use of one's own mark is not possible in principle, as the owner should enjoy an exclusive right of use under the Trade Mark Act. To the extent that the two marks in suit are deemed similar, the case can only be resolved in the course of a cancellation action.²⁷

3. Legitimate Use

Further, the defendant may allege that he or the seller of the goods has a valid licensing agreement. In practice, this defense is usually unsuccessful.

4. Importation²⁸

If the goods have been detained at the border, the defendant cannot argue that because they are in the hands of customs, he has not committed an act of "importation". Such importation is already completed by the physical importation and request for a customs declaration.²⁹ The defendant may also plead exhaustion of rights, yet this is a fairly new concept in Hungarian IP law, without much case law on the matter.

VII. Remedies

The plaintiff can request the following remedies: ascertainment of infringement, injunctive relief, request of information about others involved in the infringement (*e.g.* suppliers), and commercial contacts concerning subsequent purchasers. The plaintiff may further request publication of a notice on infringement in a newspaper determined by the court, surrender of the defendant's profits, and seizure and destruction of the goods used primarily to manufacture the infringing products. All the above remedies can be requested cumulatively.

The rights owner may of course also request damages. Characteristically, these are not requested in the same procedure that determines the infringement, but rather in a subsequent action. The reasons for this bifurcated approach are considerations of duration and cost of the proceedings. Even if successful, the plaintiff cannot claim reimbursement of attorneys' fees from the other side. Attorneys' fees can be freely determined between the parties and are not dependent on the outcome of the case.

²⁶ In the course of the cancellation action, the defendant can also argue acts of unfair competition by the plaintiff.

²⁷ Supreme Court, decision Pf. IV.21,314/1997. For similar arguments regarding interim injunctions in patent cases, see Supreme Court, decision Pf. IV.25,602/1999.

²⁸ See Bencze, The Protection of Intellectual Property Rights in Customs Procedure. Hungarian Trademark News, 1998-199, at 15; Szamosi, Warehouse Fees Payable as a Result of Customs Proceedings, AIPPI Proceedings (Hungary) 2000, at 59.

²⁹ Metropolitan Court, cases III.P.26,236/1998 and III.P.28,087/1998.

Pharmaceutical Patent Litigation

I wish to give an account of my recent experiences, gained directly or indirectly, during the enforcement of patent rights. I do not wish to answer the above question myself, I would rather leave it to the readers.

In this article I intend to discuss

- a) different possible forms of collecting evidence,
- b) problems concerning experts, and
- c) a practical example of the above questions in connection with a completed case.

The question often arises as to what advice the patent attorney should give if an originator, i.e. the patentee of an invention directed to the process for the preparation of a **new compound** or to a **new product**, has a good reason to believe that his patent is being infringed.

Suspicion may arise if the examination of a marketed product indicates that the patentee's patent has been realized, or if, although the patentee knows that the other party has a patent for the preparation of the product, he considers that the latter patent is not independent.

In such cases, the patent attorney will recommend an infringement lawsuit.

An originator, as well known, expends extreme amounts of resources to develop new product; this expenditure explains why such innovators were placed in an exceptional position in the transitional act No. VII of 1994, before the elaboration of the new patent act. Namely, the act made more unambiguous **the reversal of the burden of proof**. This means that the originator does not bear the burden of proving that the other party sells or intends to sell a product manufactured by the originator's patented process, an almost impossible task for the inventor.

In the case of a **new product**, the law therefore shifts the burden of proof to the future manufacturer, and "until proved to the contrary," i.e. until the future manufacturer demonstrates that the product is not prepared by the patented process, infringement is presumed. Consequently he is regarded an assumed infringer.

This is more or less in order, i.e. this paragraph of the act already has been adopted by the Court, but only on the level of declaration. The problem is what is meant by „**until proved to the contrary**” in the law.

1. What is considered evidence?

Is it sufficient if a defendant simply declares that he uses the plaintiff's patent in manufacturing the product – **version 0**.

If this is not sufficient, then what if the defendant alleges that he manufactures his product via process(es) protected by his patent(s) (he refers to several process variants or several processes) – **version 1**.

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And if even this is insufficient, suppose he concretely names the process variant by which the product is prepared – **version 2**.

Let us suppose that, as this is also only an allegation, the Court asks OGYI (the National Health Institute) to present the process(es) serving as a base for registration and the decision is based on that – **version 3**.

Or, if even this is not enough, since even this is only a simple allegation and not evidence, suppose the Court sends the **expert of OGYI** for a field-survey for the identification of the process(es) – **version 4**.

If this approach is unacceptable as indirect evidence, what if the Court sends a neutral expert **for a field-survey and asks for the manufacturing documentation (batch papers)** – **version 5**.

If the product is imported, the Court may ordain the supply of **customs papers** – **version 5a**.

What if, while this may already serve as an evidence but it does not seem to be convincing, the Court allows that, in addition to the appointed independent expert, both parties send their own expert for a field-survey, or both parties attempt to demonstrate and disprove, resp., infringement by the reproduction of experiments – **version 6**.

If the problem is not the manufacturing process, but the equivalent character of the processes, the evidence could be **scientific expert opinions**, but this is generally not accepted by the Court – **version 7**.

In such cases the Court uses the expert opinions revised by a neutral expert as a basis for the Court's decision – **version 8**.

The experiences show that the Court would already be satisfied even with version 0 in the first step.

In the two cases of which I was involved, the Court used version 5; that is, the Court asked for the batch papers to be submitted through its neutral expert and for the customs papers to be filed directly by defendant. Five years passed between version 5 and version 0. This is a very long time. One has not to be particularly spiteful to think that, after 5 years, the filed batch papers and customs papers are not very convincing, at least for plaintiff. We have made attempts at versions 7 and 8, i.e. filed expert opinions. The Court considered them, but a neutral expert was ordered. The expert has not looked into the excessively complicated matter thoroughly, and the Court evaluated the contradictory expert opinions as mooting each other.

I think that for plaintiff, but theoretically for both parties, version 6 is the most acceptable solution, i.e. the reproduction of the experiments or the inspection of the production on site, carried out **in the presence of both parties' representatives**. At present, however, this is unimaginable in the Hungarian practice. In the case of version 6, defendant's **interest in keeping factory secrets** naturally should be considered.

2. Who is an expert?

While analyzing the versions of evidence I have already mentioned, we can see that, from the point of view of enforcing rights, the **collection of evidence by an expert**, and particularly **the identity of the expert**, is important.

The practice is that the Court often orders expert evidence if the professional issue is considered to be too complicated. In such cases, as a first step, the Court calls upon the parties **to agree whom the expert will be**. Should no such agreement be reached, the Court **appoints the expert**.

Several terms come up in connection with the identity of the expert. **Own expert**: a professor chosen by the parties, usually from a university, research institute or from their own research staff. **Judicial expert**: in compliance with the requirements of the law, both the judicial experts included in the original expert list and the experts appointed from institutions authorized by a separate statute are called judicial experts, with the latter being **case experts**.

Is it justified that only the Court can appoint a **neutral expert**? The originators namely call an expert a neutral expert, who is appointed by them as being a professor from a research institute or a university independent from their company, and who is generally a foreigner.

According to §177 (2) of the Code of Civil Procedures, an own expert cannot be considered to be independent. Another expert can be employed only for serious reasons. This may be the case if no **judicial expert** is available in the professional field. In such cases a **case expert** can be appointed.

Before appointing a judicial expert, in most cases, the plaintiff, but generally also the defendant, submits the expertise of their own expert, who is however not acknowledged by the Court to be indifferent. The neutral expert is not necessarily familiar with the special professional issues arisen in the case. Since it happens very rarely that **an agreement about who the expert should be** can be reached, in such cases a case expert is appointed.

Taking into view that Hungary is a small country and very often it is difficult to eliminate the relationships between a Hungarian defendant and a Hungarian researcher, the statute does not exclude a foreign expert from being appointed by a Hungarian court, but the practical effectuation of this is questionable.

Maybe it could be a solution to establish an **expert team** consisting of members who are retired, independent of any company. This would be a rather idealistic solution, and perhaps it is still better than the present situation.

3. What can be the consequences of a poorly drafted claim and how does the evidence work in the procedure for collecting evidence?

The problem outlined in the title will be discussed in connection with a recently decided case with respect to the evidence and the experts.

The case consisted of two parts, a non-infringement and an infringement case. The infringement case took several years to finish. The case started with a non-infringement suit and continued with the infringement process, and it serves as a good example to answer my main question: **Can patent rights be enforced in Hungary?**

The non-infringement part has become public; it lasted 3 years and ended with the victory of patentee.

The patent related to a radioactive diagnostic composition and the claim protected a **composition containing 1 to 10 % of active ingredient**. At the time the patent was granted, this type of claim was held progressive, as it related to the composition per se, before the amendment of the Hungarian patent law afforded product protection. That is why the concentration range had to be inserted to the claim, to avoid the problem of unpatentability of a single component product. Not even the patentee had foreseen, however, the problem arising later **when the patent was to be enforced**.

When patentee was informed that a 0.96% product of the same active ingredient appeared at the market, the defendant was warned to stop infringement. On the basis of this warning, defendant immediately launched a **non-infringement procedure** with the **Patent Office** to establish whether the **0.96% and 0.72% products were infringing**.

Plaintiff launched an **infringement process** at the **Metropolitan Court in connection with the 0.96%, 0.72% and 0.45 %** products and generally with products of the same active ingredient.

Then, the **infringement process was suspended** due to an ongoing non-infringement process.

In our case, this latter delayed the end of the process for 10 years, while production went on undisturbed.

The non-infringement process ended in victory for the patentee, as the Office interpreted the claim on the basis of the disclosure, i.e. that the concentration range has no limiting role with respect to the scope of protection. Petitioner appealed only the **0.72% case**. **The 0.96% product** could no longer be produced. The Metropolitan Court found no infringement in case of the **0.72% product**, as the claim was interpreted literally. **The Supreme Court**, however, came to the surprising conclusion on the basis of the Court's expert's expertise, that the concentration range of 1 to 10% cannot be interpreted in a restrictive sense, due to the character of the invention i.e. in the sense of chemical activity mechanism. It is obvious to someone skilled in the art that the invention also is realized when using a 0.72% product. The **principle of equivalence** was applied. A physician also acted as a second expert, who was of the opinion that the two products did not differ from a medical point of view. It later turned out (when the infringement process was restarted) that the physician could only test the infringing 0.96 % product, as the 0.72% product has never been produced by defendant (Case No.Pkf. IV. 27599/1993).

In the **infringement procedure** defendant suddenly admitted that it never produced the 0.72 % product but that it did market a previously unknown product of **0.17 %**, for which no non-infringement procedure had been initiated. The suspension of the infringement case was thus unnecessary.

Plaintiff argued that defendant prepared and marketed products of concentration 0.17% and 0.41% and any other concentrations comprising the same active ingredient "Cardiospect," thus infringing the patent.

Defendant argued that the concentration of the active ingredient in their product did not reach the lower limit of 1 % in the claim.

The Metropolitan Court found the 0.96% product infringing, but the 0.72% and 0.45 % products were not infringing due to the lack of production and marketing, and **the 0.17 % product was qualified as novel**. The earlier decision of the Supreme Court, i.e. that the concentration range of 1 to 10% is not restrictive, was not considered. According to the Court the **0.963% product is infringing** as the difference of 0.037% from the lower limit of 1% can not be evaluated from chemical or patent point of view as a real difference, as it is below the accuracy that can be expected from chemical operations. The product of 0.17% active ingredient content, however, contains about 1/6 active ingredient compared to the claimed 1 %, and this difference can no longer be ignored. The Metropolitan court did not consider the decision of the Supreme Court in connection with the 0.72% product in the non-infringement procedure as a general guideline for all the claimed lower concentrations being infringing.

Even more surprising was the decision of the Supreme Court Case No. Pf. IV.24101/1997, who had to examine only the 0.17 % product, and who had **not considered its own earlier decision**, but ordered a new process **to collect evidence**.

The chemical and medical experts had to answer the question of whether the product is novel from chemical and medical point of view. The chemical expert was the same, and his opinion did not change, but a new physician expert found that the product was different and indeed better than plaintiff's product. Plaintiff protested that the experiments were not convincing. According to plaintiff not even the fact was clear which product had been tested, particularly as the 0.17% product had not been marketed yet, when the test was carried out.

The Court rejected plaintiff's request to order a new process of collecting evidence at a neutral place by a neutral expert (version 8) to establish infringement.

The Court referred to the expert's opinion, according to which further tests would be expensive and would last long.

One can see, that neither version 6 nor 8 could be applied, i.e. the parties could not check the witness's expertise. Also it was not the task of the expert to give an opinion on the efficacy of further expert evaluation.

I tried to avoid declaring who was right in the above cases, but tried to outline how the patent rights could be enforced by using various methods of collecting evidence and applying experts.

**PROCEEDINGS ON THE LAPSE OF TRADEMARK PROTECTION
BY REASON OF NON-USE**

The current Hungarian Trademark Act (No. XI of 1997)³⁰ empowers a 3-member board formed by the Hungarian Patent Office to hold not only cancellation proceedings but also proceedings to decide whether the trademark protection has lapsed due to lack of use of the mark. (This was the case under the former (old) Trademark Act No. IX of 1969 as well.)

This Article summarizes some experience gained in 3-member board cases during the last 4 years, from the date the new trademark law became effective.

The new Trademark Act 1997 – beyond actions based on non-use of the mark – provides two new types of actions that constitute lapse: lapse by reason of losing the distinctive character and lapse by reason of becoming deceptive (Article 35).

In Hungary, proceedings have been filed until now almost exclusively due to the lack of use of marks. (Since the 1997 Act came into effect, there was only one proceeding initiated for lapse by reason of losing the distinctive character of the mark. There has been no action based on the mark becoming deceptive.)

In this article proceedings for a decision on the lapse of trademark protection by reason of non-use (called revocation in the UK) are simply referred to as non-use actions.

The legal basis for actions for cancellation and lapse of trademark protection by reason of non-use was outlined by Dr. Gy. Sorosi in his article entitled "Changes on Board Procedures to Trademarks According to the New Trademarks Act."³¹

1. Weak and strict compulsory use

Compulsory use is usually understood as a legal requirement, according to which the commencement of using a particular trademark registration has taken place within a certain period of time or the cessation of use of a mark during a consecutive period of time (usually 5 years) has legal consequences.

Some countries (such as the USA) require that a declaration of intention to use be filed and the applicant furnish to the Office, within a time limit fixed in its law, evidence of the actual use of the mark, as required by the said law. This solution is referred here to as strict compulsory use.

Compulsory use can be considered weak in the country, where under national trademark law "use" is not needed to establish trademark rights and no official actions are provided during trademark protection period as to the extinction of trademark protection due to lack of use.

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³⁰ See: Dr. G. Vékás: Main Legal Aspects of Trademark Protection in Hungary. Hungarian Trademark News 1998-1999, p. 5.

³¹ Hungarian Trademark News, 1998-1999, p. 33.

Where compulsory use is weak, the main tool for the implementation thereof is action for lapse of trademark protection by reason of non-use.

Proceedings may be instituted by any person against the proprietor for a decision on the lapse of trademark protection by reason of non-use. The Hungarian Trademark Act does not require a compulsory use of the mark during the registration process.

There was no provision in the old Trademarks Act, 1969. However, the Supreme Court of Hungary decided well before the present Act became effective that the applicant cannot be obliged to use the mark before registration thereof. Seemingly the Supreme Court and later the Hungarian legislation shared the concept of weak compulsory use.

2. Legal consequences of non-use

Provisions as to compulsory use and legal consequences of non-use of a mark are incorporated in Sec. 18 of the Hungarian Trademark Act.

Under Sec. 18(1) if, within a period of five years following the date of registration, the proprietor has not commenced the genuine use of the trademark in the country in connection with the goods or services for which it is registered, or if such use has been suspended during an uninterrupted period of five years, trademark protection shall be subject to the legal consequences provided for in this Act, unless the proprietor duly justifies non-use.

3. Significance of 5-year grace period – premature requests

A question exists regarding what is the period of time within which use or lack of use must be examined.

The five-year period under the current Hungarian Trademark Act is always determined by the date that the action is filed. The five-year period is counted back from this date. Consequently, when the applicant starts an action within this 5-year period, the action is considered premature.

After filing this action, the applicant has no option to wait until the expiry of this five year period. It is vitally important, therefore, that the plaintiff knew the exact date of registration of the attacked mark before filing an action.

4. The date of registration from the perspective of compulsory use

The earliest date for filing an action in this respect is the day when the five year period, counted from the completion of the registration process, elapses.

Which day should be considered as the date of registration in this respect?

In most cases, the Hungarian Patent Office enters the mark in the Register with respect to all goods included in the specification.

In other cases, after a total rejection by the Hungarian Patent Office, the registration of the mark is ordered by the Metropolitan Court with respect to all goods included in the specification.

Thus, the date of registration can be read from the certificate of registration.

In some cases the situation is more complicated where a decision is given granting protection only to some of the goods included in the specification and a partial refusal was issued by the Hungarian Patent Office with respect to the other goods included therein.

There are several options for deciding a request for review by the Metropolitan Court:

The Court can approve the decision of the Hungarian Patent Office totally. In this case, the date of registration is the date of the decision issued by the Hungarian Patent Office granting protection.

The second option, which is much more difficult to judge, is the case where the Hungarian Patent Office rejected the application partially, and subsequently the Metropolitan Court orders registration with respect to all goods or the parts previously rejected by the Hungarian Patent Office.

In this particular case, there are two options for terms to consider: the first is the date of registration by the Hungarian Patent Office, with a partial specification of goods or services, and the second is the day when the decision of the Metropolitan Court becomes effective (the second one is obviously later.)

Another option would be possible where a particular date would be the effective date of registration with respect to the goods originally accepted by the Hungarian Patent Office, and a later date would apply for the protection granted by the Court.

A serious disadvantage of this solution for the applicant would be that he has to consider two dates: the date of registration and the date that the Court's decision became effective.

I am of the opinion that the unity of the process is decisive here, i.e. only one date should be taken into consideration with respect to a single application.

(When the applicant/proprietor of the mark feels this is disadvantageous, he is entitled to divide the application/registration.)

When the decision of the Hungarian Patent Office is changed by the Metropolitan Court by granting protection for further goods or services included in the specification of goods or services, the date of registration – the starting date of the five-year grace period of compulsory use – is the date of the decision of the Metropolitan Court for all goods or services.

The date of the finishing of a trademark application process is influential as well in case of international trademark applications (in the framework of the Madrid System).

In case of international trademarks, the day of registration, under the Madrid Agreement and Madrid Protocol, is the day when the application is entered into the International Register. However, in the countries where *ex officio* search is provided among earlier trademark rights (and Hungary is one of these), the international registration of a mark is deemed a pending international trademark application for registration.

A 12-month period is granted by the Madrid Agreement, starting from the date of notification issued by the International Bureau on this particular registration as an objective deadline which cannot be justified or extended, for the national authorities (in Hungary the Hungarian Patent Office) to issue official actions (provisional refusal) governed by their national laws. (The Hungarian Patent Office does not apply the option of 18-month deadline provided by

the Madrid Protocol but applies the 12-month deadline in case of international applications governed by the Madrid Protocol, too.)

The national authority, the Hungarian Patent Office in Hungary, is entitled to issue a provisional refusal on the last day of this 12-month period.

In the absence of a rejection or a provisional refusal, the mark is deemed registered in each designated country separately. The 5-year grace period is counted from that date.

Provisional refusal can be issued by the Hungarian Patent Office involving a part of the specification (partial provisional refusal) or involving all specified goods or services (total provisional refusal).

This proceeding is governed – naturally – by the national law. Accordingly, the applicant is entitled to answer within the deadline set by the Office – the same way as that of nationally filed applications.

What happens if the national authorities, in Hungary the Hungarian Patent Office, sends an objection with respect to some goods included in the specification, while no objection is raised within the 12-month period with respect to all other products?

Can the International Registration be deemed as registered with respect to the specification of goods not included in the official action?

The situation is similar to the one presented in the national procedure, the difference being that the national authorities are not entitled to issue an official action after the lapse of the 12-month period with respect to the goods not included in an eventual official action sent within the 12-month period of time.

This situation is similar to the registration having partial effect to the specification.

Provided that the applicant files a statement within the deadline set by the Hungarian Patent Office, the application procedure continues.

When the applicant fails to answer the action, the Hungarian Patent Office mails a “refus confirmatif” which is a decision approving the contents of the provisional refusal.

The “refus confirmatif” is practically equal to the refusal of the application, for which a request for review can be filed at the Metropolitan Court similarly to national application matters.

Returning to the case where the application was – in fact – registered or deemed to be registered with respect to some goods, while the procedure is going on with respect to the other goods. There are several options.

When the Metropolitan Court, due to a request for review, orders that the Hungarian Patent Office proceed repeatedly, the new procedure cannot be extended to the particular goods which were not objected to within the 12 month period.

When the Office issues a decision on the acceptance with respect to some or all of the specified goods, the date of this decision will be the date of registration.

When the Metropolitan Court approves the action or refusal issued by the Hungarian Patent Office, the mark is registered according to the national rules with the partially restricted specification. The unity of the proceeding shall apply; accordingly, several dates of registration will not be created.

Take, for example, a case relating to 42 classes, and the partial refusal covers 21 classes but partially accepts the other 21 classes. Obviously a very complicated situation would occur if we did not start out from the principle of unity of the registration process.

5. Burden of proof and ways of use

Under the Hungarian Trademark Act, burden of proof – as usual – is on the party requesting the lapse of trademark protection.

Lapse of protection cannot be declared both in the case when the mark was used in the 5-year period and also in the case when the mark was not used but the proprietor submits an admissible excuse justifying the non-use.

Sec.12(3) of the Trademark Act delineates the ways of use. Although this provision deals with infringing acts of others, the same acts by the owner of the mark are not only permissible but even compulsory with respect to the compulsory use of a mark. These are the following:

- (a) affixing the sign to the goods or to the packaging thereof;
- (b) putting on the market or offering for sale the goods under that sign, or stocking them for such purposes;
- (c) offering or supplying services under that sign;
- (d) importing or exporting the goods under the sign;
- (e) using the sign in business correspondence and in advertising.

Under Sec. 18(2) within the meaning of Sec. 18(1), the following shall also constitute genuine use of the trademark in the country:

- (a) use of the trademark in a form differing from the registered form only in elements which do not alter the distinctive character;
- (b) affixing of the trademark to goods or to the packaging thereof in the territory of the country solely for export purposes.

Under Sec. 18(3) within the meaning of Sec. 18(1), use of the trademark with the authorization of the proprietor shall be deemed to constitute use by the proprietor.

6. Use of the mark in business correspondence

Business correspondence can constitute genuine use as well.

In the matter of STRULIK trademark, the Hungarian Patent Office stated that a correspondence with only one contractor during the relevant five-year period, including sending of pro forma invoice, is not considered sufficient use.

The correspondence – according to the statement of the Hungarian Patent Office – did not lead to public knowledge of the mark beyond the corresponding parties. So, the lapse by reason of non-use was declared by the Patent Office.

7. Use of a mark in advertising

In some cases before the Hungarian Patent Office, trademark proprietors referred to the use of the marks in advertising.

In the matter of the MANPOWER trademark,³² the Hungarian Patent Office refused to accept evidence filed by the trademark owner.

In this particular case, the proprietor of the mark, an Austrian firm, had neither a registered office nor a commercial representation in Hungary. He submitted a four page leaflet which had been disseminated by individual agents in several places, e.g. at the entrances of underground stations exits. Having examined the invoice of a printer's shop (in German) submitted by the owner, it was impossible to determine whether it was issued in connection with the printing of the leaflet.

The trademark proprietor also did not prove that the supposed dissemination actually ever occurred and, if it did, when it occurred.

Due to the above reasons, the Patent Office declared the protection of the mark MANPOWER lapsed by reason of non-use.

In the ASPEN case, the trademark owner submitted to the Hungarian Patent Office several advertisement materials published in daily newspapers in Hungary.

Despite the fact that a packaging device of the mark ASPEN was clearly visible in the published advertisements, there were no inscriptions or wordings in these advertisements. It was impossible to state, therefore, what kind of a product had been offered by them.

The Patent Office thus declared a lapse of protection of the ASPEN mark by reason of non-use.

In advertising, the trademark should be indicated in such a way that the consuming public can learn and identify the goods included in the specification of the particular trademark.

8. Domestic use

In the above-mentioned ASPEN case, the windows of a tobacco shop or a shop of similar kind were shown in the photograph submitted by the proprietor.

The word ASPEN was clearly legible on several cigarette boxes shown in the photo. It was not clear, however, whether this photo had been taken in Hungary, and, if so, when. The fact that the ASPEN mark was clearly legible on several packs shown in the picture was not evidence of domestic use but only makes it probable that the proprietor truly has a product under this mark.

9. Excuses justifying non-use of a mark

Under Sec.18(1) of the Trademark Act, trademark protection shall not lapse by reason of non-use if the proprietor duly justifies the non-use.

There has not been a case since the Trademark Act 1997 became effective where the excuse justifying non-use has been successful.

Excuse justifying non-use can be a force majeure condition, war, embargo, etc., or in the case of a natural person, the death of the owner of the trademark.

³² Supreme Court maintained Pfv.IV.20.557/2001

It should be taken into consideration the period of time needed for the development of a product which is put into the market with this mark.

With respect to special goods, such as pharmaceutical products, a longer period of development is needed. When a mark goes on some fashion articles, however, a much shorter period of time probably is needed to be launched to market.

As far as excuses justifying non-use are concerned, full consideration must be given by the Hungarian Patent Office to all the relevant factors of the case.

10. Trademark use and specification of goods (partial extinction)

Trademark protection shall lapse by reason of non-use with respect to some or all of the goods or services for which the trademark is registered, depending on whether non-use covers all or some of the goods or services for which the trademark is registered [Sec. 34(1)].

An obligation is laid on the Patent Office by the Trademark Act of 1997 to examine in non-use proceedings which particular goods or services were covered by genuine trademark use and which goods were covered by excuse for non-use.

It is doubtful whether genuine trademark use shall cover each and every item included in the specification of goods or services or a trademark use with respect to only one item included in the specification would do. (The issue of an excuse justifying non-use is not mentioned here separately).

The Trademark Act presently in force does not restrict the manner in which applicants formulate the extent of the specifications of goods for which they are applying.

The practice developed by the Hungarian Patent Office under the former trademark act was more or less connected to the scope of industrial or commercial activities of applicants. The Hungarian Civil Code in force before 1978 was very restrictive in this respect.

The amendment of the Hungarian Civil Code, which became effective in 1978, made it possible for state-owned firms and cooperatives to extend their scope of activity. These secondary activities could appear in the specifications of goods or services of trademark applications afterwards.

(The correlation between scope of activity and specifications of goods or services of trademark applications filed by foreign firms was never examined officially.)

Under the rule of the earlier Hungarian Trademark Act of 1969, the commercial registration proceeding of the applicant firm sometimes was pending.

In these cases, although the trademark application met all the other requirements of registration, the Hungarian Patent Office waited until the end of the commercial registration proceeding, and trademark registration took place afterwards.

Although it does not regulate substantive law questions, the Trademark Law Treaty, enacted in Hungary by Act No. LXXXII of 1999, provides under Sec. 7 that no national office may demand the furnishing of any certificate of, or extract from, a register of commerce.

A precondition for natural persons formerly was the carrying out of an industrial or commercial activity.

Under the Hungarian Trademark Act presently in force, it is a matter for the applicant to decide on the specification of goods of his application.

This does not depend on

- whether he carries on an industrial or commercial activity or
- what kind of industrial or commercial activity is carried on by him.

The Patent Office does not control specifications of goods and services regarding other forms of industrial property protection.

The subject matter of an invention or a title of an industrial design is defined by the Hungarian Patent Office under professional requirements.

The specification of goods of a trademark application, however, is defined by the applicant independently, so he is entitled to decide which particular goods or services should be protected.

The provisions of the Nice Agreement should be taken into account since Hungary is a party to this Agreement. The classification established by the Nice Agreement is not hierarchical; nothing can stop the applicant from describing the same goods/services with definitions of higher or lower logical levels.

What should be done when the specification of goods [of a registered trademark] does not cover the particular item? Is it justified to extinguish protection with respect to a broader notion and maintain trademark protection for only the particular item?

The Hungarian Patent Office, therefore, dismissed the request and maintained the trademark in the Register in such a case.

If we say “yes”, as a consequence of this concept, the proprietor would become a necessary partial loser in the proceeding, despite the fact that neither the use of the mark nor the specification of particular products are required at time of filing the application. If the proprietor effectively uses the mark for a preparation relating to a particular therapeutic indication, there are ethical and – the registration rules of pharmaceuticals – legal prohibitions to launch a product having different effect.

Supposing that only those items could be maintained in the specification of goods or services for which there was genuine use, then after each action for lapse for non-use which is not wholly lost by the proprietor of the attacked mark, only lists of goods covering specific items in the lists of goods would be maintained – exactly the same way as in the United States where the applicant shall give evidence about the use of the mark prior to filing trademark application in respect of particular goods/services – since he shall restrict the specification of the goods of his trademark application to the goods/services effectively used by him.

It is easy to accept that the Hungarian legislation had no concept of this kind, because the solution described above would not lead to a weak compulsory use under the effective Trademark Act but would constitute a strict compulsory use, although “retarded” to a later date after the five-year grace period.

Can we declare that use of a registered trademark for only one particular item would qualify sufficient use of the mark when one or more whole class headings are attacked? The answer is: certainly not.

In each case it has to be examined whether the use of the trademark on one or more particular products should be classified under particular items included in the specification, and the use should be considered by taking into account the relationship between the whole and a part of the specification.

In the procedure filed against International Trademark Registration No. 561,500A, the applicant requested lapse of protection of the mark due to non-use with respect to “newspapers, journals” exclusively, although the specification of goods of the attacked mark extended to “printed matter” and “books” as well.

In the procedure the proprietor submitted evidence proving the effective use of the trademark registration in the country with respect to temporary publications and printed advertising material.

The Hungarian Patent Office stated that the proprietor effectively used the mark with respect to printed matter. This is common sense as newspapers and journals belong to printed matter. Accordingly, the proprietor proved genuine use of the goods included in the specification of goods of the mark.

The Patent Office, therefore, dismissed the request and maintained the trademark in the Register.

In the matter of International Trademark Registration No. R 438,114 ORIENT EXPRESS, the request for lapse by reason of non-use was dismissed by the Hungarian Patent Office. With respect to the transporting of goods or persons falling into Class 39, regular use was accepted even by the applicant.

The Patent Office took into consideration the the characteristics of the particular kind of service and examined whether auxiliary services doubtlessly rendered related to the transportation of goods or persons should be considered. Specifically, the office examined whether the genuine use of the mark on railway wagons should be considered as a use in the other two classes (Classes 12 and 42) included in the specification of goods and services of the mark.

Although railway carriages falling into Class 12 are not manufactured or sold by the trademark proprietor either, but are effectively used by him, indicating the trademark thereon. Use of the mark was considered proved.

The use with respect to the services falling under class 42 was accepted by the Hungarian Patent Office, because on the ORIENT EXPRESS trains, drink and food are provided in a restaurant, and wagon-lits are also operated, while a reservation of tickets is rendered as a service by the offices operated by the trademark proprietor, accordingly, hotel reservation and booking of railway tickets are connected.

In the matter of International Trademark Registration No. 484,398 PRESTY (Class 31), a genuine use of the mark was proven by the proprietor with respect to fresh tomatoes.

The Hungarian Patent Office maintained the registration with respect to the following goods: “fresh fruits and vegetables, particularly tomatoes, cucumbers, pepper, French beans, aubergines, cantaloupes, watermelons, strawberries, beans and peas.”

Lapse of trademark protection due to non-use was, however, declared by the Hungarian Patent Office with respect of the following goods:

agricultural, horticultural and forestry products and grains not included in other classes; live animals; seeds, natural plants and flowers; foodstuffs for animals, malt.

The Patent Office in its decision took into consideration that, in the specification of goods of the attacked mark, there are different products; among them, a distinction can be easily made between fresh fruits and fresh vegetables as gardening products on the one hand and foodstuffs for animals or propagation material or live animals on the other. The main purpose of buying “plants and flowers” is not for nutrition but for decoration.

The lack of use was not considered justified by the Patent Office with respect to the goods where no evidence of use was filed by the trademark owner and lapse of protection was declared.

It is doubtful, consequently, that it would be good to lead a practice resulting in a situation where the obviously winning party of the extinction proceeding is not able to gain trademark protection since the goods/services maintained in the specification are – according to the practice of Hungarian Patent Office – deemed to be similar to those involved in the specification of goods of the pending mark of the attacking party. (Otherwise a successful request for lapse of protection for non-use had no retroactive effect to the application proceeding initiated by the attacking party as an applicant.)

This would be an off-putting practice for the applicant, because he filed a request for lapse of protection in order to get its own trademark application, which is later than the attacked mark, entered in the Registry.

Supposing that trademark protection should be maintained by the Hungarian Patent Office for the particular names of those goods or services, whose effective use was proved in the procedure, the attacking party should partially win, but somewhat later in the application procedure the pending application of the attacking party had to be refused in respect of the same goods or services by the Hungarian Patent Office.

11. Marks having a reputation in the country (reputed marks) and compulsory use

The applicant requested lapse of protection of International Trademark Registration No. 218,444 VARILUX in Class 9 with the exception of “optical goods”. The proprietor claimed that the mark VARILUX has a reputation in the Country but submitted evidence relating to optical articles only.

The Hungarian Patent Office decided in favour of the request. The Patent Office took into consideration that the trademark VARILUX became widely known among optical articles only. The other [submitted] documents proved that the mark is used with respect to optical goods as well.

As a consequence of the above-mentioned facts, the Patent Office declared that the proprietor did not fulfill the requirement incorporated in Sec. 18 of the Trademark Act demanding that use of the mark in Hungary has to cover all goods included in the specification.

(In this case, the Patent Office did not consider optical goods and the other goods included in the specification of the mark as similar ones.)

The extended protection of marks having a reputation in the country does not cover any exemption of the mark from compulsory use but extends to protection against later trademark applications of other specifications of goods or services even if these are related to dissimilar products or services.

An exceptional practice as to trademarks having a reputation in the country should remind us of the traditional British concept of defensive marks, where there was no compulsory use for the proprietor with respect to marks registered as defensive marks. Under that system, an applicant was entitled to file applications in a single class of the Nice Classification, where he had had prior use of the mark.

With respect to other classes involving dissimilar goods, the applicant was entitled to invoke the reputation of the mark in the country, and registration was made as a defensive mark. Today, the institution of defensive marks became somewhat out of time, and even in the Trademark Act 1994 of the UK there are no provisions for the registration of defensive marks.

Reputation of the mark can be taken into consideration eventually in the framework of causes for justification. (Until now no such case has occurred.)

12. Instead of closing chapter

The Hungarian Trademark Act takes into account that procedures for lapse of trademark protection by reason of non-use are in many cases filed, when the applicant for lapse had filed a trademark application which is provisionally refused by the Hungarian Patent Office based on the attacked trademark registration (exclusively or among other registrations) and the proprietor of this latter registration had refused to grant a consent declaration to the registration of the pending trademark application.

This is underlined by Sec. 30(d) of the Trademark Act. Section 30(d) provides that, although the date when trademark protection shall lapse by reason of non-use is the date of starting the procedure for lapse of trademark protection due to non-use, if there is a conflicting trademark application that has been filed by the applicant, the Hungarian Patent Office shall give a decision as to the lapse by reason of non-use with a retroactive effect to the date of priority of this conflicting later trademark application.

Summary

Experience shows that provisions of extinction proceedings should not be applied separately from proceedings of applications of the marks but in a harmonized interactive way with them.

On the grounds of the new Trademark Act, new Hungarian Court practice is expected in the near future. Hopefully, the aspects and views expressed in this article will be taken into consideration.

WHO PAYS THE CUSTOMS WAREHOUSING COSTS?

In a case decided in the second instance of an administrative court action at the end of October 2001, the Supreme Court took a position in an unsettled question giving rise to legal uncertainty.

I.

As an introduction, without the intention of giving a fully detailed overview, I refer to the following provisions highlighted from the legislative framework:

- ⇒ Under Article 5(3) and Article 7(1) of Government decree No. 128/1997 (VII.24.) on measures applicable against infringements of intellectual property rights in customs administration proceedings (hereinafter referred to as the Decree), the customs authority may place the presumably infringing customs goods under direct customs supervision.
- ⇒ Under Article 62(1) of Law No. C of 1995 (hereinafter referred to as the Customs Act) the **ex officio warehousing of the customs goods** may be ordered where
 - a) the customs goods have been seized or their issue has been prohibited by the customs authority, the court or another authority, or
 - b) the direct supervision of the customs goods is required.
- ⇒ Under Article 144(8) of the Customs Act, costs are to be paid with respect to the warehousing of goods placed under direct supervision in a warehouse operated by the customs authority, and under Article 144(8)(b), costs are not to be paid regarding customs goods seized by the court.
- ⇒ As a result of a direct customs supervision ordered pursuant to the request of the intellectual property rights holder, warehousing costs thus arise from the date the goods are placed under customs supervision to the date of the seizure ordered by a provisional measure or final decision of the court.
- ⇒ Under Article 8(1) of the Decree, the rightsholder must provide security for the customs authority in order to cover the costs of warehousing the customs goods placed under customs supervision, the cost of destroying the items if so required and to cover the possible damages payable to the person submitting the goods for customs clearance. Under paragraph (3), if the amount of the security does not cover the cost mentioned in paragraph (1), the rightsholder must pay the difference. Under paragraph (4), the customs authority, **considering the final court decision on the merits of the case**, accounts for the amount given as security in accordance with the provisions of the Customs Act.
- ⇒ Under Article 222(14) of Government Decree No. 45/199 (III.25.) on the implementation of the Customs Act (hereinafter referred to as the Implementation Decree) as amended

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effective 1 July 2000, if direct customs supervision has been ordered to protect intellectual property rights, the costs of warehousing are to be paid by the person entitled to dispose of the (customs) goods if he has infringed intellectual property rights or if he has come to an out of court settlement with the rights holder; in other cases costs are to be paid by the person requesting the placement of the goods under direct supervision. The latter provision satisfactorily settles the issue of posing and paying warehousing costs for procedures started after the decree's effective date; however, in the case reviewed above, the statute was not applicable, as the case started at the end of 1997.

II.

The "background case" was an action for trademark infringement that started with a customs measure: the relevant customs authority notified the legal representative of the holder of a famous mark, a well-known company producing sporting goods, that it had placed under direct supervision several thousand coats bearing a mark likely to be confused with the rightsholder's trademark; the addressee of the customs goods could not prove that he was authorized to use the trademark. The rightsholder took the necessary measures under Article 5(4) of the Decree within the period laid down therein: he started court proceedings for trademark infringement, submitted a request for a provisional measure and, providing verification of the above, requested that the customs authority maintain direct customs supervision. Under Article 8(1) of the Decree, the customs authority invited the rightsholder (hereinafter: the plaintiff) to provide security, which the plaintiff duly deposited.

In the course of the proceedings, the Metropolitan Court first ordered, by provisional measure, the seizure of the customs goods under direct customs supervision. The Court then found trademark infringement by the importer and ordered, among other sanctions, the removal of the infringing marks by the defendant.

The plaintiff notified the processing customs authority of the final decision and, referring to Article 8(4) of the Decree, requested the return of the provided security. The customs authority did not approve of the request for accounting for the amount placed as security and decided that the warehousing costs arising for the period between placing the goods under direct customs supervision and the provisional measure, decreased by the amount of the security, must be paid by the plaintiff. The plaintiff, after unsuccessfully appealing the decision, requested the review of the final administrative decision and the rescission of the allegedly unlawful decisions of first and second instance by the competent court.

III.

In the course of the administrative lawsuit, the court of first instance rescinded the challenged administrative decisions and remitted the case for further prosecution. The court stated that, on the basis of Article 8(4) of the Decree, the provision of the court decision taken in the course of the "substantive procedure" (i.e. the proceedings for trademark infringement) is decisive in accounting for the amount of the security provided by the plaintiff. This implies that a successful plaintiff may not be required to pay the costs of warehousing (*3.P.20.572.1999/4*).

The administrative lawsuit was taken to the Supreme Court on an appeal lodged by the customs authority of second instance as defendant (hereinafter: the defendant). The defendant based his appeal on Article 8 of the Decree. According to his reasoning, and I quote: "*Paragraph (1) of the mentioned article establishes the costs in respect of which the rightsholder must provide a security; the costs of warehousing are listed among such costs. Paragraph (3) provides that if the amount of the security defined in paragraph (2) does not cover the costs mentioned in paragraph (1), the difference must be paid by the rightsholder. Furthermore, in the view of the defendant, the plaintiff may claim the costs of warehousing imposed on him vis-à-vis the trademark infringer, as costs arisen in relation to the infringement.*"

Moreover, at the hearing held in the appeals procedure the defendant made reference to case decision *Kfv.I.35.171/2000/3*. by the Supreme Court in a similar case, which in his opinion supports the defendant's interpretation.

In his request for rejecting the appeal, the plaintiff argued as follows:

For an administrative organ to lawfully settle an obligation for a person, there must be a legal ground. As regards the bearing of the costs of warehousing arising in consequence of measures applicable in customs administration procedures against the infringement of intellectual property rights in respect of the period in question, that is before 1 July, 2000, no positive legal provision was contained in either customs legislation or any other special legislation; therefore the customs authority had to settle the obligation to pay by means of interpretation of certain legal provisions, which interpretation is mistaken for the following reasons.

The subtitle above of Article 8 of the Decree is "*Security*". Paragraphs (1) to (4) of Article 8 deal with the security, whose function is explained by the above-cited paragraph (1) of Article 8 (costs of warehousing, costs of destroying, coverage of possible damages). However, due to the nature of the security, the obligation to provide security does not mean there is an obligation to pay, but, in a way analogous to security required for a provisional measure ordered under Article 156 of the Code of Civil Procedure, it serves as a guarantee for the case where the person submitting the request (who may happen to be the plaintiff) should unlawfully cause costs or damage by the requested measures. In case of any different interpretation the amount to be provided should not be considered security; respectively, if the defendant's interpretation was correct, the successful plaintiff might be obliged to pay also the costs of destroying the infringing goods.

In light of the above, therefore, the provision of Article 8(3) referred to by the defendant, according to which "*if the security does not cover the costs mentioned in paragraph (1), the rightsholder shall pay the difference*", does not establish an obligation to pay any costs but an obligation to provide security. (*The author's remark*: No doubt the customs authority may, on the basis of this, invite the plaintiff to supplement the provided security, arguing that it does not cover the costs mentioned in Article 8(1) of the Decree, and more specifically, the warehousing costs in themselves either. No such invitation was issued in the given case, but I suppose this has no significance, as the substantial question of the dispute is not the obligation to provide

security but the question of who is to be obliged by the customs authority to pay the costs of warehousing.)

With regard to the above, the provision of Article 8(4) of the Decree, according to which *"the customs authority, taking into account the final court decision on the merits of the case, shall account for the amount placed by the rightsholder as a security in accordance with the provisions of the Customs Act"*, may not, in the plaintiff's view, be interpreted in a way other than that the security is to be repaid to the prevailing plaintiff in the "substantial procedure", that is the procedure for trademark infringement, from which it obviously follows that the costs of warehousing must be paid by the infringer, as costs caused by the unlawful act.

The amendment of the customs legislation, effective as of 1 July, 2000 (*Article 159 of Government Decree 89/2000*), introduced a clear provision on the payment of warehousing costs arising from measures applied by the customs authority against the infringement of intellectual property rights. Under the provision cited in the introduction of Article 222(14) of the Implementation Decree in force, the warehousing costs are to be paid by the person entitled to dispose of the customs goods, provided he is the losing party in the procedure for trademark infringement. Though this provision is not applicable for the present case because it had not yet taken effect, it is of decisive importance with respect to the disputed issue of legal interpretation, for the following reasons. Paragraphs (3) and (4) in question of Article 8 of the Decree remained unamended after the said amendment of customs legislation. If the defendant's interpretation is correct, the provision of Article 8(3) of the Decree as in force would be directly contrary to the provision of Article 222(14) of the Implementation Decree as in force. On the other hand, according to the plaintiff's interpretation, the said amendment of the Implementation Decree is a gap-filling provision with respect to the obligation to pay the costs of warehousing, which, in accordance with the previously effective provisions, makes it clear whom the customs authority is to oblige to pay the warehousing costs. There is no reasonable argument to support the defendant's legal interpretation, which is by the way also logically refuted, that the amended provision was aimed at giving regulation differing from the previous regulation without amending the relevant previous provisions. Therefore, the defendant's interpretation is logically incorrect, and the measure based on it is unlawful.

Regarding the previous Supreme Court decision referred by the defendant, the plaintiff argued that the facts of the prior case were not identical with the facts of the present case, and that, regardless, the case decision was not binding and not even necessarily correct.

IV.

The Supreme Court found that the appeal was not grounded and it approved of the decision of the court of first instance. I quote the reasoning of the Supreme Court:

"The court of first instance was correct in establishing the facts, and its legal conclusion drawn therefrom is sound, too. Under Article 8(4) of the Decree the customs authority, taking into account the final court decision on the merits of the case, shall account for the amount placed by the entitled person as a security in accordance with provisions of the Customs Act. Taking into consideration that the Metropolitan Court declared the act of trademark infringement

committed by the person entitled to dispose of the customs goods, it follows from the cited provision of the Decree that, after such decision has been taken, the defendant customs authority may not oblige the plaintiff to pay the costs of warehousing, as the law enables it only to account for a previously deposited amount placed as security.

Therefore, in the course of his first instance proceeding and in the appeal against the decision of first instance the defendant customs authorities gave a false interpretation of the provisions of Article 8 of the Decree referred to by it, as on the basis of those provisions it is the person entitled to dispose of the customs goods to be obliged to pay. As the plaintiff correctly pointed out in his request for the rejection of the appeal, Article 222(14) of the Implementation Decree already contains a clear provision on the payment of warehousing costs. No doubt that this provision is not applicable in the present case; however, its entry into force did not affect the provisions of the Decree, and consequently, it may not contain a provision contrary to that of Article 8(4) of the Decree regarding the person to be obliged to pay.

In making its decision, the Supreme Court could not take into consideration the contents of the decision of the Supreme Court referred by the defendant at the appeals hearing because the decision is based on facts different from those of the present case (Kf.III.28459/1999)."

V.

The above reviewed case decision of the Supreme Court is, in my opinion, in all aspects reassuring, as it allows the conclusion that in all cases where a final decision of infringement has been taken against the person entitled to dispose of the customs goods, or the parties have settled the dispute out of court but the customs authority obliged the holder of the intellectual property right to pay the costs of warehousing arisen from direct customs supervision, the rescission of such decisions may be achieved by means of an appropriate remedy.

THE PECULIAR CHARACTER OF A USE CONTRACT BY THE EXAMPLE OF "LIFE-WORK" CONTRACTS

1. System of regulation of use contracts

A use contract is a typical juristic act ensuring the lawful utilization of works protected by copyright. Under Hungarian copyright law, the regulation of use contracts is realised on three distinct levels. Proceeding from the special to the general area, the individual specific rules of contracts concerning motion picture works, advertising and, indirectly, the utilization of software and data bases are regulated by the Act LXXVI on Copyright of 1999 (hereinafter: Act of 1999), taking into consideration the specific features of genres. As these rules stipulate only particular dispositions, the applicable rules have to be compiled from several fields, related to a given use contract. Essentially, the contracts aimed at the transfer of the material rights of authors and the utilization of their performances also belong to this sphere as they are explicitly mentioned by the Act; thus they are of a specific nature in comparison to the "general" use contracts, nevertheless complimentary rules governing them have not been provided.³³

Making use of a suggestive disposition, i.e. Sec. 55 of the Act of 1999, the contracts in question are applicable also in terms of the general dispositions referred to below. With reference to a provision of Sec. 86(2) of the Civil Code, the Chapter V of the Act of 1999 contains general provisions applicable to all kinds of use contracts.³⁴ Finally, at the broadest level, the general provisions of the Civil Code covering all contracts are applicable to all contractual conditions for which neither the general nor the genre-specific rules of the use contracts have stipulations.³⁵

As a rule, the provisions of the Act of 1999 concerning use contracts are dispositive except in the cases in which a deviation is prohibited, explicitly or implicitly, by this Act or an other legal rule.

2. The use contract as a peculiar type of contracts

The special regulation of use contracts as compared to the system of the Civil Code has been justified on the basis of the particular features of works protected by copyright, and the amalgamation of personal and material rights, on the one hand, and on the typically weaker position of the authors within the process of contracting, on the other. One must keep in mind here the concentration of works from the field of culture and information industry. In fact, another basis for treating use contracts in the copyright context separately is to bring into equilibrium the position of the bargaining parties, for it is susceptible to tilting over continuously.³⁶

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³³ For the specific nature of a contract concerning the transfer of property rights see: Faludi: "A felhasználási szerződés" (Use contracts), Budapest, KJK, 1999, pp. 21 to 25.

³⁴ Act on Copyright, Sec. 42 to 45, correctly General Rules, Sec. 42 to 54.

³⁵ Act on Copyright, Sec. 3.

³⁶ The importance of maintaining balance is testified by the draft Supplementary Act concerning the rules of contracts in German copyright law. See Herta Daubler Gmelin: Zur Notwendigkeit eines Urhebervertragsgesetzes. GRUR Int. 2000/9, pp. 764 to 778.

The use contracts that set the conditions for utilization of copyrighted works belong to a particular, *sui generis* type, even if they are frequently related to other types of contracts within the greater family of contracts. Distinctions between use contracts may be made on the basis of whether they regulate the use of a work already completed at the time the contract is entered, or whether the purposes of the contract include the future creation of one or more works. In this latter case, the contracts may contain provisions relating to performances that represent an activity (*facere*).

Actually, it is arguable whether the provisions of contracts aimed at carrying out an activity are directly applicable to use contracts concerning works to be created in the future. If so, then the peculiar character of a use contract, emphasised in the foregoing, may be questioned.

As to "facere-type" performances, the rules of enterprising seem to be best applicable, especially in the field of subsequent impossibility which cannot be imputed to any of the parties³⁷ and the legal warranty of the authorised party licensing the right of use.³⁸ The reference to enterprising contracts is supported by the circumstance that their subtypes, i.e. design and research contracts stipulated in the Civil Code, contain provisions on legal warranty, with a reference to sale. Regrettable as it is, a reference to legal warranty, regulated for the time being within the rules of sale, is not provided in the Act of 1999 and, for this reason, legal warranty is stipulated in use contracts only in case of an explicit provision of the contract concerned. This is because the rules governing legal warranty are not appropriately placed within the structure of the Civil Code.³⁹ In truth, they ought to be arranged among the legal consequences of faulty performance within the general rules of contract, and this would provide a direct way to legal warranty, with a general reference to the Civil Code or the Act of 1999.

If the rules on "facere-type" performances were applicable to use contracts, this undoubtedly would be advantageous as, through the logic of the application of the law, the way to legal warranty would become free by means of the provisions governing the subtype of the relevant enterprise contract. Nevertheless, this logical step of applying the law is not practicable because of the following argumentation:

A use contract is of a peculiar character, i.e. at the same level as enterprise and other "facere-type" contracts. This view is supported by its historically established form and its specific subject matter, i.e. the transfer of specified rights of use that can be interpreted only on the basis of the Act on Copyright, on the one hand, and its close relationship to the author's rights.⁴⁰ Actually, this requires the coordination of creator, investor and public interests which influence the rules of copyright law in general and its contracts in particular. In fact, a use contract has an economic function that can be easily delimited, i.e. the exchange of goods with a license relating to works under copyright protection. The said function is concurrent with other viewpoints affecting justice, legal safety and the security of exchange, meaning on the one hand

³⁷ Civil Code, Sec. 399.

³⁸ Civil Code, Sec. 369-3701, applicable also to other types of contracts.

³⁹ Vékás L.: A szerződési rendszer fejlődési csomópontjai (Crucial points of development of the system of contracts), Budapest, AK, 1978.

⁴⁰ Faludi G.: A felhasználási szerződés (Use contracts), Budapest, KJK, 1999, pp. 185-186. A szerzői jogi törvény magyarázata (Comments on the Act of Copyright). Ed: Gyertyánfy P., Budapest, KJK, 2000 (hereinafter: Comments), pp. 84-90, 164-165.

the protection of the investor creating the work, and, on the other hand, the protection of the author who is typically the weaker party. Furthermore⁴¹ relevant viewpoints are the just principle of the work's inseparability from the creating personality, and, last but not least, the access of the public to the works without a hitch, including access from public interest. It is not for nothing the consideration in the motivation of the draft bill modifying the German Act on Copyright with not much, but essential changes under the topic "Urhebervertragsrecht" (law of copyright contracts) which was on the agenda for as long as since 1965 and, following a thorough theoretical preparation, was formulated recently.⁴² In terms of the underlying text, the establishment of a balance of interests by means of rules of use contracts, which should be maintained continuously in the course of the long-term utilisation of work enjoying copyright protection is, in fact, the organic consequence of property law, including the rights related to intellectual creations.

According to a comprehensive study on the system of contracts⁴³ the functions enumerated in the foregoing, all based on constitutionality, are appropriate to give form to the type concerned here which, however, may represent too high of a level of scientific abstraction for the considerations of legal practice. Presenting the role of use contracts in the formation of copyright law in the context of the historical development of the publication of works, Boytha takes a stand for their historical integration in the legal culture as a peculiar type.⁴⁴ Also in the view of Lontai, use contracts form an original type, separated from license contracts governing the protection of industrial property, as clearly expressed in his monograph on license contracts treated from the perspective of the protection of industrial property.⁴⁵ In an other work of the same author it is laid down that, in case of a contract concluded for the creation of works in the future, the regulation comprises, beyond granting the right of use, also the obligation of the delivery of the work in question.⁴⁶

Among other points, Lontai makes here a distinction between a license (use) contract under copyright law and a license contract regulating the protection of industrial property. In the latter case, the basis of a peculiar type and its specific features lie in the subject-matter, far from the use in the sphere of copyright law, qualified as a know-how and broadened by economic elements. Arguments for the peculiar type of use contracts got support recently⁴⁷ being

⁴¹ See also Footnote No. 4.

⁴² See source in Footnote No. 4.

⁴³ See Vékás: op.cit. No. 7.

⁴⁴ Boytha Gy.: Ambivalente Züge des Urheberrechts. Festschrift zum 60. Geburtstag von Ulrich Uchtenhagen. Nomos Verlag, Baden-Baden, 1987., pp. 53-71. Boytha Gy.: Nutzungsorientierte Entwicklung im internationalen Urheberrecht. GRUR Int. June/July 1973, pp. 247-252. Boytha Gy.: The development of legislative provisions on authors' contracts. Columbia – VLA, Journal of Law and the Arts, 1988/12, pp. 155-179. Boytha Gy.: The relation between editing-publishing and copyright protection as far as books and journals are concerned. WIPO/CR/NJ/8513. Boytha Gy.: Whose right is copyright? GRUR/Int., June/July 1983. Boytha Gy.: Die Entwicklung der Regelung von Urheberverträgen in verschiedenen Ländern. UFITA, 1989, Vol. 110, pp. 5-33. Boytha Gy.: Konventionsrecht und nationale Gesetzgebung. Internationale Gesellschaft für Urheberrecht e.V. 1990, Vol. 7, pp. 135-158. Boytha Gy.: The justification of the protection of authors' rights as reflected in their historical development. RIDA, January 1992, pp. 53-101.

⁴⁵ Lontai E.: A licenciaszerződések alapvető kérdései (Fundamental problems of license contracts). Budapest, KJK, 1978.

⁴⁶ Lontai E.: A szellemi alkotások joga (Law of Intellectual Works), Budapest, Ed. Eötvös University, 2001, p. 114.

⁴⁷ Faludi G.: see Footnote 8, pp. 85 to 91.

demonstrated that, essentially, a use contract is nothing but the "constitutive granting" of the right of use. This means, then, that the existence and validity of the right of use depends on the use contract concerned, sharing thus its legal fate. Consequently, if a contract becomes non-existent or its validity ceased, the right of use is directly affected.

Furthermore, if the future obligation of delivering a work is related to a use contract, then the delivery proper also gets separated, and a causal act with a title is concerned.⁴⁸ Then the title means the exercise of the right to agree to publication from the rights of the use contract, on the one hand, and the rights coupled to the person of the author, on the other. In juridical sense, the delivery of the work and the transfer of property right of the specimen of the work, respectively, are completely separated from granting the right of use. Use contracts concerning either works to be created in the future or those already existing have a common, and essential, feature in that the author or the authorised party grants permission to exercise the right of use (exceptionally, the right of use proper is licensed, together with the right of granting), on the one hand, and a right arises for the user or acquirer, on the other hand. This being a specific, direct subject-matter of the contract proves, together with the factors detailed in the foregoing that use contracts are of a peculiar type.

Actually, carrying out an activity ("*facere*" performance) is not an essential feature of this type of contracts. But if this is true, then the logics of the Hungarian Civil Code regulating the law of obligations and following here ideas of the French Code Civil and the German ABGB, only permits the party applying the law to make recourse to the general rules of contracts in respect of questions not regulated for the given type, in the absence of a particular stipulation of the law. This is supported by judicial practice, especially in the field of software use, representing the most functional genre of work, profit-bound as enterprising. Viewing the disposition parts and motivations of software cases judged by the Supreme Court published from 1985 to 1994 it seems demonstrated⁴⁹ that only the general rules of contracts are applicable beyond a use contract in a given ambiance of regulation. The norm governing the relationship between the Civil Code and the Act on Copyright brought no change with the Act of 1999, so reference to judicial practice is still well-founded.

3. Effect of peculiar type of life-work contracts on the use of works to be created in the future

The indirect subject-matter of a use contract is a work enjoying copyright protection. A contract of this kind is efficient in the field of cultural organisation if the users obtain help to get in a legal position that permits them to store means consisting of works that enjoy copyright protection qualified as intellectual products or immaterial goods.⁵⁰ The available legal inventory

⁴⁸ Kísfaludi A.: Az adásvételi szerződések (Purchase contracts), KJK, 1997, pp. 115, 142-143, 162-163. In: ed. Vékás L.: Commemorative volume, 1999.

⁴⁹ Cases: BH 1985/260, 1989/102, 1991/231, 1992/339, 1992/632, 1993/295, 1993/545, 1994/25, 1994/407.

⁵⁰ Act C of 2000 on book-keeping, Sec. 24, Sec 25(1), (2), (6), (7) and (10). From the view dealt with here, the property right of an author is an intellectual product, and the right of use of an author's work is an immaterial thing.

should permit the users to build up a corporate strategy helping them, first, to select the works destined for the market and, second, to fix the date of this action. This inventory should include all use contracts on future works, particularly such works that could not be mentioned precisely at the time of concluding the contract.

Norms established for the specific rules of contracts concluded for the use of a work/works to be created in the future comprise provisions for faulty performance and modifications granted for the user.⁵¹ These dispositions concern all cases obliging the author to deliver the work, i.e. contracts providing for the use of works published earlier in which the author obliged himself also for the delivery of the work; in such cases the user may have access namely to an example or copy of the work needed for the exercise of the right of use from other sources as well. Similarly, these rules are applicable in use contracts that refer to precisely explained future works, as well as in legal life-work contracts, provided that the author complies with his obligation to perform the work and the work is utilised by the user. As such, delivery, faulty performance of the author, and the right of change due to the user by strength of the law is here excluded from the analysis, as these items would exceed the fixed subject-matter of this study. Also, it has to be explained why the nullity of a life-contract is analysed in order to deal with the cases of legal life-work contracts. The main reason here is that, as a principal rule, the Act stipulates the legal consequence of nullity for the obligation of the author concerning an indefinite, future work. Taking the order of succession of the provisions of the Act of 1999 as a basis, a legal life-work contract forms, accordingly, an exception.

3.1 Nullity of a life-work contract

The peculiar character of a use contract is underlined by the fact that specific causes for the nullity of its contents are here applicable. One of these is that a life-work contract is null and void.⁵² This means that no contract may be concluded validly for the use of an indefinite number of works to be created in the future. The cause of nullity concerns the contents of the declaration of intention, as the legislator's intention was to prevent an author from taking – usually against a pre-fixed contract price – an unspecified, possibly unilaterally disadvantageous obligation, without closer delimitation of the contents of the contract, i.e. the work or works, to be created within an indefinite or definite delay. If the contract provides for the use of an indefinite number of future works, then it is null and void, and it is irrelevant whether the kinds of works to be created are formulated in the contract clearly or less precisely. For the nullity of a contract, its duration is, essentially, also irrelevant. If an author obliges himself to create and transfer an indefinite number of works and to grant a license for their use on the basis of a contract concluded for a fixed duration, then the nullity is established. Nevertheless, contracts of this type used to be concluded for an indefinite time, as their real purpose is to cover an entire life-work; but an uncertainty of this kind must not imply legal effect. This provision came from the French

⁵¹ Act on Copyright, Sec. 49 and 50.

⁵² The other point is the nullity of a license granted for an unspecified way of use. Act on Copyright, Sec. 44(2); A szerzői jogi törvény magyarázata (Comments on the Act on Copyright), Budapest, KJK, 2000. Ed.: Gyertyánfy P., pp. 232-233.

law.⁵³ Besides, a life-work contract is not explicitly forbidden under German and Austrian law, in which the relevant provisions are closer to the fundamental principles of Hungarian copyright law. Rather, the possible unilateral disadvantages and insecurity mentioned above are compensated by the right to terminate, introduced also into Hungarian law (dealt with below) and based on a cogent rule that permits the revision of the author's remuneration and other conditions of use at prefixed intervals.⁵⁴

The declaration of nullity is a measure of protection for the weaker party, but it is not clear that it is the most efficient one. Here the legal consequences of nullity have to be examined, and Sec. 3 of the Act of 1999, which makes reference to the Civil Code,⁵⁵ is applicable.

If a work was not delivered nor the right of use was exercised on the basis of an invalid life-work contract, the court may reconstitute the original situation meaning that the contract will have no legal effect, i.e. the parties will be relieved from their obligations or will order a remedy.

If the user commenced to use the work delivered by the author on the basis of an invalid life-work contract, then no restitution is practicable (in a legal sense, this would be an irreversible performance). Then the court may eliminate the cause of nullity if possible⁵⁶ or can declare the contract to be valid until a decision will be taken, and will take measures to bring about an appropriate settlement between the parties.⁵⁷ This means, practically, that the court will modify an invalid life-work contract in terms of the provisions of Sec. 52 of the Act of 1999 or, on the basis of effected validation, the parties will get in a position in respect of the already delivered and used works as if the contract were not invalid. As to the works to be created in the future, however, the contract cannot imply a legal effect, following the court decision to be taken. This does not mean more than that the parties might have concluded a quasi life-work contract and the court terminated it for the future with its decision, instead of ensuring the right of abrogation after the lapse of five years as stipulated in Sec. 52(1) of the Act of 1999. If this happens within five years from the conclusion of the contract, then nullity means an "additional" legal protection; if this occurs later, then the difference between invalid and legal life-work contracts becomes indistinct, but only for practical reasons.

3.2 Legal use contracts for works to be created in the future

A recourse to the Civil Code is not absolutely needed if the parties wish to conclude a use contract similar to a life-work contract. Giving a preference to aspects of practicability and efficient functioning and requiring appropriate guarantees, the new Act of Copyright permits the

⁵³ Code de la Propriété Intellectuelle, Article L. 131-1. (A complete transfer of rights for works to be created in the future is null and void.) For a same wording of a modern law on copyright, see Sec. 79(3) of the Slovenian Act on Copyright.

⁵⁴ Austrian Act on Copyright, Sec. 31(2); German Act on Copyright, Sec. 40(1) and (2).

⁵⁵ Civil Code, Sec. 237(2).

⁵⁶ It may be considered whether or not the elimination of the cause of nullity (invalidity) in terms of Sec. 237(2) of the Civil Code may comprise such a broad judicial power forming the contract, i.e. a) amending a contract concluded for an unspecified genre or type so that the court would specify these elements of the works to be created or, b) complete the contract by the right of abrogation as per Act on Copyright, Sec 52(1), thus validating it. In the absence of actual judicial practice, this remark outlines only possible provisions.

⁵⁷ Civil Code, Sec. 237(2).

author to conclude a use contract for more and not precisely stipulated works to be created in the future, even for an indefinite time.⁵⁸

3.2.1 Agreements in principle

Agreements in principle, i.e. a solution stipulated in the Civil Code to fill a gap in this field, fail to regulate definitely the crucial problem concerning contracts for the use of future works. On the basis of an agreement in principle, an obligation of contracting comes into being providing for the mutual transfer of use or an economic right, concerning works either already existing or to be created in the future. But, of course, the agreement in principle itself does not establish a right to use the work, as this comes into being only by a use contract to be concluded on the basis of an agreement in principle.⁵⁹ Nevertheless, the actors in the market are interested in finding a legal structure which, even in case of the still non-existent works, permits them to transfer a right to use or an economic right of the author without specification of the works concerned.

3.2.2 Option contracts

An option contract (to be dealt with below) is known as a special kind⁶⁰ of purchase applied by analogy, which grants a right concerning future performances and uses. The difference between an option contract and an agreement in principle is that the former does not establish a mutual obligation for future contracting; instead it establishes only a unilateral right of use so that, during the validity of the contract, the beneficiary may put into being a use contract by a unilateral declaration. Accordingly, a contract of this kind does not comprise an obligation for the realisation of a work. Moreover, option contracts may include, in practice, a stipulation of the content, but, in such cases, they are more qualified as a contract concerning the use of works to be created in the future. The difference between a legal life-work or quasi life-work contract for unspecified future works and an option contract is that, in the former case, the user obtains the right of utilisation or strength of the contract with the suspending condition; however, the work to be created under the contract will be realised actually. On the other hand, an option contract does not imply the right of utilisation. This latter comes into being under three conditions: the realisation of the work, the exercise of the right of option, and with the establishment of the contract of use based on the option. The said creation of a contract of use involving an option, on the basis of a unilateral statement of the user, requires the agreement of the parties in the essential conditions of the use contract which was still non-existent at the time of establishment of the option contract. In terms of the Civil Code, the indication of the thing in question and the purchase price is crucial for the right of purchase of the thing.⁶¹ By means of analogy, the existence of an option contract under copyright law needs the indication of the work

⁵⁸ Government Decree No. 1100/1997 (IX.30.) on the comprehensive supervision of statutes on copyright, Subsec. 2c) and 3m.

⁵⁹ See agreements in principle as termed in Sec. 208(1) of the Civil Code. The provision is in full harmony with point c) of Note 4) to Sec. 40 of the German Act on Copyright, explained in Fromm-Nordemann: Urheberrecht, Verlag Kohlhammer, 1994 (hereinafter: Nordemann).

⁶⁰ Civil Code, Sec. 375.

⁶¹ Civil Code, Sec. 375(1).

or works, the remuneration of the author, and the right and ways of use. The remuneration of the author and the special sum possibly stipulated for granting option are not identical. In fact, the former means the counter-value of the right of use that will come into being while the sum given for option is due for the right of the user. As an option contract does not imply in itself a right of use, the provisions of the Act of 1999⁶² concerning the definition of the right of use and the means of use by interpretation are here also applicable. In fact, these rules are destined to permit to specify the contents of a use contract to be concluded. It can be hardly disputed that the provisions of interpretation mentioned above, relating to the use of unspecified works to be created in the future, are applicable. If so, there is no argument against an option contract destined for a similar economic purpose, by interpreting the right and ways of use.

It is difficult to find an answer to the question whether the provisions of the Civil Code concerning the right of purchase, partly of cogent nature, are applicable to option contracts under copyright law. The relevant stipulations of the Code concern the expiration of an option provided for an indefinite period after six months, the maximum period of an option of five years, and the application of the clause *rebus sic stantibus* with which the court may relieve the party granting a right of purchase from his obligation deriving from this right.

A formal approach argues with the conclusion that an option is not regulated by the Act of 1999. Thus, parties wishing to conclude a contract for works to be created in the future will be subject to the provisions of the Civil Code applicable by the applicability of Sec. 3 of the same Act. On the basis of this approach, and making recourse to Sec 375 of the Civil Code, the parties

- may contract, practically, for a period of five years,
- the court may relieve the author from his obligation to grant the right of use in case his circumstances have altered significantly,
- may agree directly concerning the remuneration for option.

An other approach, based on content, focuses on the parties' intent, i.e. the purpose of the contract, meaning rights for works to be created in the future. As the new Act on Copyright contains provisions for either specified or unspecified works, there is no need to make recourse to the Civil Code, and the appropriate specific provisions of the Act of 1999 will apply.⁶³ The consequences of this approach may be summed up as follows:

- the parties are free to contract for an indefinite period of time;
- with respect to an agreement for the use of unspecified works to be created in the future, i.e. a legal or quasi life-work contract, both parties are allowed to abrogate it every five years as detailed in the foregoing;
- in view of the long-term legal relationship concerned here, a contract may be amended by the court, applying Sec. 241 of the Civil Code, in the case of alterations in the

⁶² Act on Copyright, Sec. 43(1) and (4-5), Sec 46(1), Sec. 47. The statutory rules, in the absence of other provisions of the parties, fill up a possible gap in the fundamental questions of the contract.

⁶³ First of all, Sec. 52 of the Act on Copyright concerning the use of unspecified works is in mind. In fact, if well specified works are to be realised on the basis of an option contract, the special provisions bear upon the delivery of an already accomplished work, not the period between the conclusion of the option contract and the realisation or delivery of the work produced on its basis. In the case analysed here, the rules for the period of applicability of the right matter.

circumstances of both parties, instead of using the clause *rebus sic stantibus* favouring only the author;

- as the most important difference between an option and a use contract concerning a work to be created in the future is that only the latter creates a right of use that comes into being with the conclusion of the contract and the realisation of the work, respectively, the specific causes of unilateral abrogation regulated in the Act of 1999 and relating only to a use contract are applicable only in this case.⁶⁴ In case of an option contract, these stipulations are applicable only following the exercise of the option, i.e. "in the phase of actual use".

With respect to the problem of whether option contracts should be assessed on the basis of a formal contents-concentrated approach, by means of the analogy of the Civil Code, or making recourse to the Act of 1999, respectively, we have in mind more German copyright law supported by an important judicial practice. The argument is that, as it will be clear in the following, the regulation of contracts for the use of unspecified works to be created in the future by the new Act on Copyright is derived from German roots. Taking into consideration the provisions of the German Act on Copyright it should not be contested that the specific stipulations of the new Act shall apply to option contracts concerning the use of future works that enjoy copyright protection, instead of the provisions of the Civil Code on the right of purchase.⁶⁵ These rules are dealt with in the following chapter.

3.2.3 Legal or quasi life-work contracts

As it was mentioned in the preceding, a classic life-work contract is null and void. If a life-work is not equivocal to the contract as a whole but constitutes only a stipulation in the contract, then a partial nullity exists⁶⁶.

If the parties wish to conclude a contract close to a life-work agreement in which the works to be created in the future are not specified precisely, but only their genre or type is designated, e.g. musical compositions with lyrics composed not for stage, novels or software programmes, a specific use contract designed for a particular situation is allowed which goes beyond the aforementioned agreement in principle or option contract. In such a case the possible detrimental effect of the lapse of time may be compensated by the use of a normal right of abrogation of six months, admissible every five year.⁶⁷

a) Exclusivity

The relevant provisions of the Act of 1999 apply to both exclusive and non-exclusive contracts. In fact, the special rule is motivated here not by the superiority derived from an

⁶⁴ See Sec. 51 of the Act on Copyright for abrogation by the author or waiving the right of exclusivity on account of the non-exercise or abuse-like exercise, as well Sec. 53 for a limited right of abrogation of the author concerning revocation, mainly because of changed wishes of the author.

⁶⁵ Schricker: Urheberrecht, Kommentar, Beck Verlag, München, 1999 (hereinafter: Schricker); Notes 5-7 to Sec. 40, pp. 646-647.; Nordemann: op. cit., Note 4) to Sec. 40. The decisive point is that the author obliges himself to transfer the rights of use of works to be created in the future, and it is of no importance from this point of view that granting an option does not establish a right of use in itself. Note to this that the creation of the work is, in fact, a suspending condition of establishment of the right of use in the case in question.

⁶⁶ Sec. 44(1) of the Act on Copyright

⁶⁷ Sec. 52(1) of the Act on Copyright

exclusive right of use but the unsafety at the time of contracting and the long-term character of the contractual relationship concerned. Anyhow, a quasi life-work contract without exclusivity can hardly exist in practice.

b) Commencement of the right of abrogation, time of abrogation

The right of abrogation commences with the lapse of five years, determined from the day that the contract is concluded, and it may cover six months of legal use. For example, in the case of a contract concluded on June 1, 2001, for a period of exceeding five years by at least six months or stipulated for an indefinite period of time, the right of abrogation commences on June 1, 2006, and the contract will be terminated on November 30, 2006, at the earliest even if the party concerned exercised his right of abrogation the aforementioned day. Irrespective of the delay of six months of the term of abrogation, the abrogation proper is not related to the end of the calendar year concerned.⁶⁸

c) Prohibition of waiving the right of abrogation

Favouring the author, the new Act of 1999 does not permit the author to waive the right of abrogation in advance.⁶⁹ As this stipulation does not cover the exclusion of the exercise of the right to abrogate, it remains disputable whether or not this represents full-scale protection. So, may one conclude that the parties are free to exclude or limit the exercise of the right of abrogation? In our view, this exercise may not be excluded by virtue of the system of the unilateral causes of abrogation as provided by the Act because the parties are entitled to abrogate only once in five years⁷⁰. A special case for exercising the right of abrogation before a lapse of five years under the contract is prescribed by the Act.⁷¹

The literal interpretation of the provisions referred to above seems to weaken the above argumentation, as the author is not allowed to waive the exercise of his right of abrogation only in advance. This would occur, practically, only when the said exercise is already due. Nevertheless, this implies that the author waived, in fact, not his right of abrogation but its exercise, and not in advance but at a time when he may consider to maintain or to abrogate the contract. This argumentation could explain why the prohibition concerns only waiving in advance⁷². In fact, it is a fundamental difference between this case and one when the exclusion of the exercise of the right of abrogation is concerned as, in the first case, the question whether the author waives his right when he is entitled to exercise the right of abrogation may be the subject of a special bargaining while, in the second case, the exercise of the right of abrogation can be excluded at the conclusion of the contract. The parties are in different positions in the two cases compared. If the author declares, after a lapse of five years, that he intends to abrogate the contract for unspecified future works without motivation and the user would need these future works, he is in a vary favourable bargaining position. In the other case, when the parties

⁶⁸ See in the same sense Nordemann: op.cit., Note 3), point a) to Sec. 40, i.e. provision of the German Act on Copyright for a period of abrogation of six months after the lapse of five years.

⁶⁹ Sec. 52(2) of the Act on Copyright; Comments, op.cit., p. 257.

⁷⁰ Sec. 52(1) of the Act on Copyright stipulating that either party may abrogate the contract after the lapse of five years following the conclusion of the contract and every five years thereafter.

⁷¹ Sec. 51(2) of the Act on Copyright, Comments, op.cit, p 257.

⁷² Schricker: op. cit., Note 8) to Sec. 40.

are going to conclude a contract, the bargaining positions will decide whether the exercise of the right of abrogation of the author will be excluded in terms of the contract.⁷³

d) Legal regulation in France and Germany

Considering that use contracts for future works that are not specified appropriately, in particular, constitute one of the most crucial points of the law of contracts under copyright, it is useful to have a short survey of solutions in foreign law and judicial practice. It will facilitate, doubtless to say, whether it is real and justified to conclude that a use contract for all and unspecified works of an author is permissible. This concerns, in other words, the Hungarian approach detailed in the foregoing, i.e. a classical life-work contract is null and void, and a quasi life-work contract implies a cogent right of abrogation.

French solution

The French law is based on a dualist system that permits the complete transfer of a property right. Nevertheless, in terms of a stipulation, an unlimited transfer of rights for works to be created in the future is null and void.⁷⁴ This relates not only to a life-work contract but also to agreements concerning unspecified works to be created in the future, but not all works, that would result in the complete transfer of rights. In fact, a valid contract transferring rights has to specify the works to be created in the future. The provisions concerning publication contracts permit option contracts but within narrow limits, and a contract is valid only if the works to be created in the future are precisely specified by their genre and type. An option contract may be concluded for a maximum of five works, e.g. artistic photos within a genre, and for five years at most, measured from the date of conclusion of the contract. It should be noted here that, essentially, a mutual obligation of contracting, or better an agreement in principle, is more appropriate⁷⁵ than a comparison to a particular case of purchase⁷⁶. The publisher has to exercise then his/its right of option and to notify the author in writing of its/his decision whether or not it/he will accept the work or ask for its correction. The notification has to be made in writing. The refusal of acceptance has to be justified, of course, and it may be contested before a court. After a subsequent refusal of two works of the same genre the author is relieved from his obligation of performing the work but, nevertheless, has to repay the remuneration already accepted⁷⁷. According to established judicial practice, a contract concerning the transfer of rights for works to be created in the future, concluded between the artist and the dealer, is only valid if the individual rights of the author are honoured and its effect is limited in time.⁷⁸ Based on a specific provision of the law, contracts with users, permitting public performances and concluded by collective right management organizations, are valid also with respect to works to be created in the future and managed by the organizations in question⁷⁹.

⁷³ Sec. 52(2) of the Act on Copyright; cf. Sec. 51(4).

⁷⁴ Loi No. 92-597 du 1er juillet 1992 relative au Code de la propriété intellectuelle. Art. L, 131-1.

⁷⁵ Sec. 208 of the Civil Code.

⁷⁶ Sec. 375 of the Civil Code.

⁷⁷ Loi No. 92-597 du 1er juillet 1992 relative au Code de la propriété intellectuelle. Art. L, 132-4.

⁷⁸ Dreier, Th. – Kasser, R.: Das französische Gesetzbuch des geistigen Eigentums. VCH Verlagsgesellschaft, Weinheim, 1994. p. 27.

⁷⁹ Loi No. 92-597 du 1er juillet 1992 relative au Code de propriété intellectuelle, Art. L, 132-18.

German solution

The roots of the regulation in the new Act on Copyright appear in the German Act on Copyright. Thus, the Hungarian statute permits both parties to obtain relief from the contract due to changed circumstances after the date of contracting by granting them a right of abrogation of six months due five years following contracting.

e) Duration of the contract

The right of abrogation applies to use contracts concluded for both a definite and indefinite period under Hungarian and German laws, provided that the duration exceeds five years and six months. Although it is not customary in the Hungarian law of obligations that a contract concluded for a definite period of time may be terminated by means of normal abrogation, in the particular case dealt with here a contract may contain uncertain elements at the time of conclusion, such as unspecified subject-matter of its contents, which justify the introduction of this special right of abrogation.

f) Effect of the lapse of time

This section concerns changes and adoptions which may occur in long-term legal relations. In other words, this part discusses a kind of clause "*rebus sic stantibus*" when an amendment by a court as stipulated in Sec. 241 of the Civil Code offers no appropriate solution.⁸⁰ An amendment of a contract by the court and the right of abrogation do not exclude each other. So it is common that a party anxious to change the contents of a use contract for unspecified future works tries to amend the contract, first by agreement of the parties and then by the court. In case of failure, he can exercise his right of abrogation. Nevertheless, this should not mean that the legal conditions of contract amendment by the court and the exercise of the right of abrogation are identical. They have in common that any of the two legal institutions apply only to a long-term contractual relationship. It should be noted here, however, that a long-term relationship is not the same as an indefinite period of time, as this is confirmed by judicial practice applying the provision of Sec. 241 of the Civil Code⁸¹. It is a difference that a contract amendment by the court is applicable only in consequence of a circumstance following the conclusion of the contract which breaches any essential rightful interest of one of the parties. These conditions are not stipulated in the Act of 1999, i.e. the parties are entitled to the right of abrogation without motivation, and the basis is not an alteration of the circumstances but possible changes arising from a pre-existing uncertainty.

⁸⁰ The general rules do not always provide a satisfactory regulation for the case dealt with here and the right of abrogation as granted by the German law is concurrent according to the German approach.

⁸¹ The court ruled that amendments of contracts were practicable in the following cases: license fee contracts of invention, case: BH 1985/100; contracts for the utilization of inventions, case BH 1985/470; contracts for the use of trademarks free of charge, case BH 1993/442. For all cases, the contract has to be concluded for a fixed period of time considering that the underlying protection of industrial rights is also for a finite period of time (it is here not considered that trademark protection may be prolonged).

g) Number of works

There is a difference here between the Hungarian and the German solution. According to established German theory, a use contract concluded for a single unspecified work to be created in the future and described only by its genre or type may be abrogated. Nevertheless, the text of the German act speaks of more than one work.⁸² To explain this wording, reference is made to a formal argument known in codification, saying that the plural form is used by the legislator frequently if the provision should cover more facts of the case without excluding a singular case from the effect of the rule. On the other hand, the legislator might relate the existence of the right of abrogation to the extent of the contracted creative activity which might appear in one greater work and not to the number of works to be created, e.g. the contract was concluded for an opera to be composed in the future but details were not indicated.⁸³ The codification system of the Hungarian Act of 1999 uses the singular, even in cases in which the provision applies equally to one work or more works. That is, the wording of Sec. 49(1) of the Act of 1999 on the rules of contracts to be created in the future uses the singular but covers multiple works. Compared to this, the provision of Sec. 52(1) of the Act of 1999 on the right of abrogation mentions works to be created in the future meaning that the parties are entitled to the right of abrogation only if the contract concerns more unspecified works to be created in the future. In fact, the intention of the legislator is not expressed in the Motivation saying that "it should be permitted, under appropriate guarantees, that the author may grant the use of a work or works to be created in the future".⁸⁴ Even in view of the aforementioned, one may expect that the courts will accept the German approach when applying the Act of 1999, i.e. to acknowledge the right of abrogation also for a contract concluded for a single unspecified work.

h) Other causes of the unilateral termination of a contract

The German Act on Copyright stipulates that other rights of abrogation based on a contract or the law are not affected by the special right of abrogation discussed above. The Hungarian law seemingly offers less help for its application as the Act of 1999 has no provision for this case. The parties are entitled to the right of abrogation under a legal rule or a contract.⁸⁵ In the case dealt with here, only an act may be referred to, as either other facts of the case (provided in the Act) or causes entitling a party to unilateral cancellation of the contract in specific cases of a breach (stipulated in the Civil Code) may be in question.

The causes of unilateral cancellation of the contract delineated in the Act on Copyright are concurrent with each other, i.e. if the conditions of more of them subsist, all rights of abrogation or waiver are enforceable. Hence, if a contract is concluded licensing an exclusive right of use for unspecified works to be created in the future, rights of abrogation concerning both the exclusive transfer (Sec. 51) and provided with respect to indefinite nature of works to be created in the future (Sec. 52) are enforceable. Then, if the author delivers a work on the basis of a

⁸² "... an künftigen Werken ...", Sec. 40(2) of the German Act on Copyright.

⁸³ Nordemann: op.cit. Note 5d) to Sec. 40 of the German Act on Copyright, pp. 322-323.

⁸⁴ Detailed Motivation to the Act on Copyright (comments by M. Ficsor). Viva Média Molding, Budapest, 1999. p. 65.

⁸⁵ Sec. 321(1) of the Civil Code.

contract of this kind, the user asks for revision or correction and the author fails to comply with its without a reasonable cause or to perform it by the fixed time, the user is entitled to waive the contract with respect to the given work. Nevertheless, this will not affect the existence of the contract as well as the rights and obligations of the parties concerning works to be created in the future.⁸⁶

Summarising, it may be stated that, although a classical life-work agreement is null and void, a contract for the long-term use of rights ensuring the realisation of the intentions of the parties may be concluded under the terms of the Act of 1999. It has, however, a very particular nature as the work or works, i.e. the subject matter, are unspecified at the time of conclusion of the contract. The recourse of the Act of 1999 to the new German Copyright Act is here reflected.

⁸⁶ Nordemann: op.cit. Interpretation of Note 2e) to Sec. 40, on the special consideration of agreement relating to works already accomplished and to be created in the future.

Book Review

Thoughts apropos of a book review

**Csécsy: Védjegyjog és piacgazdaság (Trademark Law and Market Economy), Novotny
Kiadó, Miskolc 2001, 239 p.**

It is a good thing that there has been an influx of new blood in the circle of industrial property theorists. It is even better that the usual circle centred in the capital is beginning to expand to a country city: Miskolc, the city in which, after the publication of György Csécsy's textbook "Intellectual Property Law" (now appropriately polished after the 5th edition) and a former monograph of his Theoretical Issues of Know-How (Miskolc, 1992), Csécsy chose trademark law for the subject of his second monograph.

The book is divided into nine chapters, the first of which is actually the introduction.

Chapter Two bears the title "The development of Hungarian trademark law", under which the period between 1858 and 1969 is worked up laudably thoroughly. It is to the author's credit that he relies on a number of sources hardly cited today, as well as on more recent ones. On the basis of them all he gives a picture that truly reflects the first 120 years of Hungarian trademark law.

Chapter Three aims at the detailed discussion of the former trademark law of 1969. It might have been worth discussing the judicial practice developed in trademark cases which still is applicable today. At a minimum, it may have been appropriate to reference, in a footnote, for example, the law reports reflecting it in a nutshell (Horeczky-Szilágyi-Zanathy, HVG-ORAC 1996), which devotes due space to judicial practice in trademark law in the framework of intellectual property law. Such consideration is appropriate because the extra-proceedings decisions of the Supreme Court and its decisions in trademark infringement proceedings contain a rich experience that crystallised many legal principles. These principles provided the foundation – either by acceptance of or dispute over them – for the 1997 trademark law. And the theoretical conclusions that can be drawn from judicial practice surely make even the highest level of discussions of legal theory more colourful and interesting.

Another observation of mine is of supplementary and not critical character: the author, relying on Bobrovsky, soundly mentions the influence of cooperation within the Comecon on Hungarian industrial property activities. More specifically, however, and this is my view, experience gained in the AIPPI may not be ignored. That was the organisation in the work of which participation meant that Hungarian experts – otherwise separated from the western world – could get to know the prevailing international trends, and the utilisation of such knowledge took place first in the preparation of the 1969 patent law, and later, of the 1969 trademark law. The 1969 law had a significant role in creating a trademark law that was up-to-date and advanced in its time, and even served as a model within the group of Comecon countries, introducing e.g. unchallengeable trademarks, "mild" compulsory use and trademark licences. Of course it was not advisable to unvarnishedly report on such influences not even in the time of "soft" socialism,

therefore their documentation occurred, as far as I know, in the French language only (Mélanges Mathély, Paris 1990, p. 323-334.). Perhaps it is no exaggeration to say this, too, is a part of the cultural heritage in the world of trademark law that is worth being remembered and preserved. (Of course this was no intellectual "resistance" like when the profession stood up as one man for patents instead of the soviet-patterned certificates of authorship.)

The author was right in devoting about one third of the monograph to Chapter Four on the international aspects of trademark law: the 1997 trademark law was decisively affected by the 1988 Trademark Directive of the EU, which the law discusses in detail as legal harmonisation. The directive also served the purpose of updating Hungarian trademark law. As compared to the former law, radical changes included:

- the precision of the absolute and relative grounds for refusal and for cancellation (application in bad faith, precision concerning the assertion of well-know marks etc.)
- the introduction of "strict" compulsory use
- the limitation of the exclusive right to use (use of the mark for accessories and spare parts)
- the introduction of the exhaustion of rights (for the time being within national boundaries)
- the introduction of acquiescence.

The community trademark (CTM) is also discussed in a laudably detailed manner, which can be justified by the mere fact that more and more Hungarian enterprises make use of that option for seeking protection; in addition, in some years domestic enterprises will be faced with a vast mass of community trademarks either in the offensive or the defensive form. At this part the only thing I do not like is that instead of the term "community trademark" he keeps using the English indication "CTM trademark". Even though he did so in a time when the "language law" (Law XCVI of 2001) was not yet in force, nevertheless in Hungarian legal literature the endeavour to use Hungarian terms has always been energetic irrespective of that law, despite that no Hungarian equivalents were found for terms like "domain name" or "franchise". (As a consolation: the French and the German could not manage to do that either, but the "CTM trademark" is not mentioned in either French or German literature.)

Still in the same chapter we can read about French, German and English trademark laws and the trademark laws of some developing countries. It is surprising that no mention is made of the trademark law of the world's number one industrial power, the USA; on the other hand it is remarkable that the trademark laws of the above-mentioned countries are dealt with at all. Albeit differences in the substantial trademark laws of EU member states and some candidate members have already disappeared, differences have remained in procedural law only. The reason for this is the 1988 trademark law directive of the EU, with which the Hungarian, Czech and Polish legislatures also have harmonised their national trademark laws in light of presumable accession to the EU.

The following chapters, among which the first (Chapter Five) discusses the interrelations between trademark law and the law of advertising, are those really justifying the selection of the

subject matter and title of the book. It is laudable that the author goes beyond advertisements, which are only one, though important, tool of market competition, and touches upon the competitive function of trademarks already in the first subchapter. Besides the competitive function in the narrow sense he also discusses the informative function of trademarks (which is actually the basis of, or if we like, is of greater importance than the competitive function). And I suppose in the advertisement itself the trademark is often its "hard core", as the goal of advertisements is to encourage the addressee of the advertisement to buy the advertised product, and where such goal is achieved the consumer will ask for the product using the mark, or in the case of self service shopping, take the identified product.

In the same chapter the thought cited from Csepregi concerning the theory of communication is remarkable: according to this theory, trademarks are "basic signs" of communication as they can call forth more sophisticated meanings in the consumer's mind by means of a single word or image.

In the foregoing it is also suggested that advertisements are not only a tool of competition, since the aim of market economy is no longer solely the promotion of product sales, but also a form of information to the consumer. Namely, the mark provides information that the product in question is worth buying. Such competitive character leads to another problem, as the author soundly points out, which is the issue of clarity and fairness of competition.

In discussing the issues of trademark law and consumers' protection (Chapter Six) the author similarly approaches competition law, more instinctively than making reference to the concept of the competition law trio (protection against unfair market competition, protection against the misleading of consumers, antitrust law) that becomes more and more general today. He soundly points out that even trademark law in the narrow sense has provisions that are at the same time targeted at consumer protection. Examples are the absolute grounds for refusal, the prohibition of misleading assignments or licenses etc.

The author is among the first to discuss the issues of franchise as a new field of using trademarks (Chapter Six) in Hungarian literature. All I would like to add is that licence or franchise agreements are nice examples of fair market practices. His statement on the lack of Hungarian legislation is to be corrected inasmuch as albeit the decree on franchise group exemptions, probably living its last days [Government decree 246/1997 (XII.20.)], makes a mere reference to trademarks, it contains a definition adopted from the former EU legislation. All the same Csécsy is of course right in stating that it is basically the agreement of the parties and the Civil Code as background law to be decisive in both the interpretation or performance of the contract and any possible dispute settlement; however, some interpretation is also provided by the legislation serving the competition law function. Indirectly, on the basis of the European legal norms, he arrives at similar conclusions himself to those laid down in the franchise groups exemptions decree.

The reader is faced with a completely different set of problems when arriving at the trademark law aspects of privatisation (Chapter Eight). If we only think of how hard battles the heirs of the former owners fought in relation to the PICK, HERZ and ZSOLNAY trademarks, starting proceedings against the successors in titles of state-owned enterprises, the recent

actuality of this topic is obvious. But I go further: need there be a better example of how important role the trademarks play in market economy? From the historic aspect it is interesting that four decades after the legal representatives of the then state-owned enterprises were at daggers drawn with the former owners about the acquisition of trademark rights (as far as I remember, with respect to Hungary, the US court decision taken in the ZWACK case raised the most dust) the Supreme Court has had to take position in a series of opposite sign lawsuits recently. I dare hope that both direction conflicts are legal history today, but for future lawyers and economists this two-direction process, the second phase of which aims at restoration, is properly discussed by Csécsy and is most instructive.

This leads us to the chapter which I find the most successful one (Chapter Nine), bearing the title "Elements of the effective Hungarian trademark law system". Here it is actually the 1997 trademark law which is discussed by the author in a nutshell, making use of the reasons for the law and laudably illustrating his message with cases. As far as I am concerned I would have preferred this chapter to be a little longer. Apart from the reasons for the law, no overall discussion is available, but the chapter is mature and, despite its brevity, substantially rich on this point. I have only one minor observation relating to infringement – the working up of which is faultless – with respect to the orientation of the book. It would have been worth mentioning that infringement is often both an unfair market practice as well as a misleading of consumers.

Finally, referring to what has been said in the introduction, here I only wish to comment that in my view the author succeeded in completing the task that he set for himself: namely the discussion and legally tuned working up of trademark law from a market economy approach.

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Book review

Dr. L. Tattay: A bor és az agrártermékek eredetvédelme (The Protection of Geographical Origin of Wine and Agricultural Products). Mezőgazda Kiadó, Budapest 2001, 221 p.

"Over and above the evergreen theme of love, poets of all times devoted attention to the drink, an inexhaustible source of carnal pleasure ... The legend of wine is attached to the name of biblical Noah, who did not lack the wise foresight to carry some vine-shoots with him into his arch, thus saving wine, the lifeblood of much jollity (and grief), for posterity," writes Bikády, editor of the anthology of poems *The vine-shoots of Noah*.

Such a nice thought of literary tone for the introduction to the review of a basically legal book seems allowable to me mainly because Tattay's book, written with great empathy, deals not only with legal norms and practices relating to protection of geographical origin but also, to add some colouring, touches upon the role of geographical indications in trade and market economy. The book also presents wine trade mark policies and some historic flashback on, for example, the "discovery" of the Tokaj production process in 1631, not to mention the unusually abundant illustration material which keeps the reader's attention awake during and after discussing issues that are dry by nature (e.g. foodstuffs law or financial law).

The book is divided into five chapters, accompanied by a laudably detailed table of contents. Chapter One is a historic and economic foundation outlining the evolution of National and International Protection of Geographical Indications from antiquity to our days, by which I mean the TRIPS Agreement of 1994.

Chapter Two treats the topic of Protection of Geographical Indications in Hungary. Particularly interesting points here concern the proceedings and decisions of the Office of Economic Competition regarding the production elsewhere and trade of products under the geographical indications attached to the sparkling mineral water BONAQUA, the cognac CORDONIER NAPOLEON and the PAPRIKA OF KALOCSA. The Supreme Court decision involving the case of the unlawful imitation of the appellation of origin PILSENER also is discussed. Reference is also made to some decisions of the European Court, e.g. in the CASSIS DE DIJON, the SEKT-WEINBRAND and the TOURRON D'ALICANTE cases. In the foregoing, the chapter may be given credit for not stopping at discussing the relevant provisions of Law XI of 1997 on the protection of trademarks and geographical indications but moving on to further discuss related provisions contained in other Hungarian legislation (e.g. the law on symbols or the law on foodstuffs etc.), thus also supporting the author's concepts on the complexity of the protection of geographical indications.

The next chapter, bearing the title Protection of Geographical Origin of Wine in Hungary, is the focus of the author's examination. It gives a list, interesting also from a cultural history perspective, by the oldest Hungarian poets such as Mihály Csokonai Vitéz to the internationally known Sándor Márai, moving on to culinary aspects of wine, arriving at the less colourful but inevitable discussion of the laws on hillside communities, wines and excise. From the

subchapter "An integral part of our national heritage: the wine of Tokaj" we learn that in Article 79 the Hungarian Parliament bindingly ordered as early as in 1655 the separation of the specific Tokaj grapes in the wine hills of Tokaj. In the foregoing the chapter contains an interesting overview concerning the legal sanctions of wine counterfeiting and the use of misleading wine indications.

Chapter Four, dealing with the protection of geographical indications abroad, gives an insight to the systems of protection of geographical origin in France, the United States of America, Japan and the European Union. It reports with apparent satisfaction on the "successful breakthrough" as regards the issue of the use of the name TOKAJI achieved through the conclusion of the 1992 agreement on protection of geographical origin between Hungary and the EC (today EU). Under that agreement France undertook to discontinue, after the expiry of a transitional period of thirteen years, the use of the indication TOKAY PINOT GRIS (and as far as I know also the use of TOKAY D'ALSACE) and Italy undertook to discontinue, also after a transitional period of thirteen years, the use of the indications TOCAI FRIULIANO and TOCAI ITALICO. However in the Hungarian-Swiss agreement on protection of geographical origin, Hungary undertook to allow the use of cheese indication EMMENTALI only if "Hungary" or any other geographical indication referring to the origin of the product is attached thereto, in characters identical as to their typeface, size and colour. – I can report, on the basis of my own experience, on the Hungarian Patent Office consequently rejecting trademark applications seeking protection for the sign Emmentáli occurring in a way different from the above.

The last chapter of the book treats the procedural rules concerning applications for protection of geographical indications, illustrated by numerous examples and sample documents (in the Appendices).

The work is completed by an ample bibliography, containing a number of sources in French and German in addition to works in Hungarian.

Credit is to be given to the Ministry of Agriculture and Regional Development for supporting the creation and publication of this monograph.

Nonetheless such support turned to the reverse side to some extent: the author laid the emphasis on wine and agricultural products (including foodstuffs) as "bearers" of geographical indications and the indirect subject matter of protection. This of course would not be such a big problem if he had dealt a little more thoroughly with geographical indications used for distinguishing other industrial products. The author refers to PORCELAIN OF HEREND, (French) LACES VALENCIENNES, but he could have equally mentioned MURANO GLASS, SOLINGEN STEEL, SCHAFFHAUSEN CLOCK and so on. In the light of all that, I find the author too modest when dedicating his book to agricultural lawyers, whereas in my view it should be noted by all lawyers specialized in commercial law.

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Book Review

Prof. Dr. Alexander Vida, Dr. Tatjana Kowal-Wolk, Dr. Gábor Hegyi:

Ungarisches Patentrecht (Hungarian Patent Law).

Carl Heymanns Verlag KG, Köln/Berlin/Bonn/München, 2001

(Schriftenreihe zum gewerblichen Rechtsschutz, Band 114)

This book written in German is an eminently useful treatise of the present Hungarian patent law according to Act No. XXXIII of 1995 on the Protection of Inventions by Patents, as amended until 2001. It was published in the well-known series of publications of the Max-Planck-Institute for Foreign and International Patent, Copyright and Competition Laws, Munich, Germany.

The Patent Act of 1995 effective as of January 1, 1996 repealed the Patent Act of 1969. There were so many changes with respect to the old law that instead of amendments a wholly new patent law was enacted in 1995. One of the present authors, A. Vida already published a book⁸⁷ in German on the Hungarian patent law under the Patent Act of 1969.

According to the preface of the present book, written by Prof. Dr. Dr.h.c.mult. Gerhard Schricker, a new treatise was appropriate not only for the new Act but for the profound changes in the political and economic systems in Hungary since 1976.

The text is divided into two parts. In Part A there are 15 chapters. Chapters I to IX are devoted to substantive and procedural aspects of the patent law under the following subtitles: Development of the Hungarian Patent Law; Subject Matter of Patent Protection; Criteria of Patentability; Patent Application; Application Proceedings; Rights of Inventors in General; Other Proceedings Before the Patent Office and the Courts; Rights from Patent Protection and their Scope; Service and Employee's Inventions; Patent Infringement.

In Chapter X patent licences are dealt with. In Chapters XI to XV the subject matter goes beyond the patent law under the following subtitles: Know-How Agreements; Protection of Products of Creative Activities According to the Hungarian Civil Code; Transfer of Technology and Provisions of the Antitrust Law; Utilization of Patents and Know-How as Investment; Application of Hungarian International Private Law to Patent Licence and Know-How Agreements.

In Part B summaries of selected court decisions in patent cases are published. Due to the short time period that has elapsed since the entering into force of the Patent Act of 1995, there has been hardly any case law under the new Act. There is another reason why the application of the new Act in the case law is delayed.

⁸⁷ Dr. habil. Alexander Vida in Zusammenarbeit mit Dr. jur. Adolf Dietz: Das ungarische Patentrecht (The Hungarian Patent Law). Carl Heymanns Verlag KG, Köln/Berlin/-Bonn/München, 1976 (Schriftenreihe zum gewerblichen Rechtsschutz, Band 39).

According to the transitional provisions in the new Act, nullity proceedings against patents with a priority date preceding the date of entering into force of the new Act shall be governed by the substantial provisions of the old Act.

Taking into account what has been said before, the authors have selected 43 cases decided under the old Patent Act of 1969 where relevant provisions in the old and new Acts are substantially the same; therefore, it can be expected that the old case law will be followed under the new Act. Of course, one should rely on the old case law for cases to be decided under the new Act with some reservations. For example, the undersigned is far from sure that the case reported under No. 1 on page 223 on a "prior claim" situation will be followed by the Patent Office and the Courts under the "whole contents approach" of the new Act.

The book contains a detailed bibliography which is a good assistance for students or readers looking for information on a specific problem. In view of the volume of the book (331 pages), a subject index would have been a helpful addition.

Finally, mention must be made of two useful appendices. In Part C a German translation of the Decree No. 86/1999 (VI. II.) Korm. on the Exemptions of Certain Categories of Technology Transfer Agreements from the Prohibition of Restrictions of Competition, in Part D that of the Patent Act of 1995 as amended until 2001 are published.

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Book Review

Versenyjog (Law of Competition) Series editor: Dr. T. Sárközy, authors: Dr. E. Boytha, Dr. A. Bodócsi, Dr. K. Kaszai, Dr. Z. Nagy, Dr. K. Pázmándi, Dr. I. Vörös. HVG-Orac, Budapest 2001, 605 p.

The editor of the series, Dr. T. Sárközy, recommends the book for reading noting that it is the second volume of the series of commentaries on commercial law. Hungarian competition law has a history of about a century. Its first laws were made in the fashion of German legislation. In the socialist economy, the law of competition fell into Sleeping Beauty's dream. Law LXXXVI of 1990 on the prohibition of unfair market practices and Law LXXXVII on prices, still in force today, were among the first significant commercial laws of the change of regime of 1990. These laws laid the foundations of the integral Hungarian competition law, the development of which has been consistent ever since. The commentary reviewed below discusses the legislation enacted in such codification process.

Deviating from the usual structure of commentaries, the work starts with two studies.

The author of the first study is Dr. I. Vörös, who long has been publishing in the field of the theory of Hungarian competition law, discusses the competition law of the European Union and the legal practice of developed European states, summarizing in a nutshell and updating his formerly written monograph on the subject (Competition Law in Europe, Budapest, 1996). As a former judge of the Court of Constitution, he begins with the competition law-related provisions of the Constitution, moving on to the analysis of the regulatory concepts of modern competition laws. He soundly points out that the prohibition of unfair competition was created by judicial practice based the provision laying down delictual liability in the Code Civil initiated by Napoleon: French judicial practice replaced the condition for culpability on delictual liability with the criterion of "unfairness". I merely wish to add that the 1909 German law on the prohibition of unfair competition (UWG) abstracted into facts the experience of German (and French) judicial practice, and the same road was traveled also by the 1923 Hungarian law on the prohibition of unfair competition. – The foundations of the other pillar of competition law, namely antitrust law, were laid down by the US Sherman Act of 1890, which was took over by German law and the 1931 Hungarian antitrust law.

The author of the other introductory study, Dr. Z. Nagy, president of the Office of Economic Competition, analyses the 2000 updates to the competition law. The two major aims of the amendments were the more effective protection of consumers' interests and the further improvement of the rules on official procedures. As regards the three main roots of the amendment of the law, it is stated that the first was to "raise at the legislative level" the experience drawn from the practice of the Competition Board of the Office of Economic Competition. The second was to make use of the experience of EU competition law. The third was to benefit from the experience of the law of competition of the OECD and of some leading industrial countries. Finally, mention is made of each new element introduced into the law by the

amendments, such as provisions on the improvement of antitrust cases proceedings, fusion control and the rules of procedure before the Office of Economic Competition.

These introductory studies are followed by the publication of the text of Law LVII of 1996 on the prohibition of unfair market practices and the restriction of competition (as amended in 2000) and its commentary, which is the work of three authors.

The commentator of provisions on the prohibition of unfair market practices (including those on the prohibition of the undue influencing of consumers' decisions), which can be considered traditional provisions, is Supreme Court judge Dr. K. Kaszai-Mezey, who discusses several recent cases in detail. From among these I note as of paramount importance the decision of the Supreme Court in the case of the imitation of medicine capsules of a cream and green colour combination. This decision stirred considerable debate in the literature and was also published in the Medical Weekly. It is similarly worth mentioning the discussion of some decisions of the Competition Board of the Office of Economic Competition against several companies concerning the use of superlative adjectives ("the best quality", "the cheapest", "the greatest" etc.). – In light of such decisions one can be glad and hopeful when the commentator considering as a model the European Court, decides its cases from the perspective of the conscious and inquiring consumer. All I would like to add is that, affected by the latter notion, even the formerly rather strict German judicial practice has slackened significantly in the past years.

Provisions of the law on unfair competition relating to cartels, the abuse of a dominant market position, and fusion control are commented upon by Dr. A. Bodócsi, member of the Competition Board of the Office of Economic Competition, relying on his almost unique practical experience and theoretical knowledge. An example of the latter is his presentation of abstract models that illustrate methods of indirect control and intertwining, which makes this little known system of norms and terms more comprehensible.

The commentator of the procedural part relating to the Office of Economic Competition is Dr. E. Boytha, who chaired the Competition Board of the Office of Economic Competition for ten years and whose textbook "Law of Competition" (Budapest, 1998) has served as a good starting point for many students familiarizing themselves with this special field of law. The material discussed by her is particularly noteworthy because the 2000 amendments dealt mostly with changes in procedure.

In the foregoing, the commentary discusses three other laws more or less related to the law of competition. The first is Law LXXXVII of 1990 on the determination of prices, which is commented upon by Dr. A. Bodócsi. When the reader reaches this point of the book (s)he might be question the relevance of this law in a market economy. The answer is provided in the commentator's remark concerning Article 3 of the law on prices: the government can prescribe the obligation of prior notice of prices for those who are in a dominant market position on the basis of the criteria laid down in the law against unfair market practices. In such cases enterprises may be prevented from setting unreasonably high prices that abuse their dominant market position.

The commentator of Law CLV of 1997 on the protection of consumers is Dr. K. Kaszai-Mezey. Dr. Mezey's discussion suggests that the relation of consumer protection to competition law is manifested even at the level of procedural law (it is to be noted that the subject matter of Chapter III of the law on competition is expressly the protection of consumers), namely the 2000 amendment of the law on competition entitled not only organizations charged with the protection of consumers' interests and competent chambers of commerce but also the Office of Economic competition to start proceedings in the case of detriments to a wide range of consumers or of significant value, even where the injured consumers may not be identified.

The commentator of the Law LVIII of 1997 on commercial advertising (as amended in 2001) is Dr. K. Pázmándi, who of course does not have to write about competition law and advertising law being twin brothers, as illustrated by the decisions of the Competition Board of the Office of Economic Competition mentioned by her, though only in the manner of a telephone registry. As it can be expected from a commentator, she keeps an objective tone, even on issues hotly debated by the advertising profession, such as the prohibition of advertising tobacco, where again the Hungarian legislature has been among the strictest.

Credit should be given to the publisher for issuing a newer, updated and completed commentary four years after the previously published commentary (Dr. K. Kaszai-Mezey - Dr. P. Miskolczi Bodnár: Manual of the Law of Competition. HVG-Orac, Budapest 1997).

The editor, too, is to be acknowledged for having been able to mobilize the authors most suitable, in my view, to create the work.

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