

Question Q213

National Group: Hungary

Title: The person skilled in the art in the context of the inventive step requirement in patent law

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Questions

I. Current legislation and case law

The suggested questions will try to analyze and to understand the definition of the “person skilled in the art” in three steps: the notion of the “person”, the issue of its personal “skills” and finally the “technical field” in which these skills are exercised.

Patent law presently in force:

The Hungarian Patent Act, i.e. Act XXXIII of 1995 on the Protection of Inventions by Patents, hereinafter referred to as HPA, defines the concept of *the person skilled in the art* in the following sections:

Art. 4(1): “An invention shall be considered to involve an inventive activity if, in regard to the state of the art, it is not obvious to a person skilled in the art.”

Other sections of the HPA relating to the person skilled in the art:

Art. 24(3): “The terms of the claims shall not be confined to their strict literal wording; neither shall the claims be considered mere guidelines for a person skilled in the art to determine the claimed invention.”

Art. 60(1): “A patent application shall disclose the invention in such a manner and so detailed that it can be carried out by a person skilled in the art on the basis of the description and the drawing.”

- 1) *The study proposed by AIPPI starts with the consideration of the person as one of the elements of the definition of the person skilled in the art.*

The Groups are therefore requested to indicate if the person skilled in the art is one, or more, person.

If a skilled person is a team of people, then are the team members all the same or may they be different in their various attributes, specifically if such a team may comprise persons from various disciplines or having different levels of qualifications?

According to the literal meaning of the HPA, the person skilled in the art is one person. However, according to the Guidelines of the Hungarian Patent Office, hereinafter referred to as HPO, it may be a group of people in case of certain technical fields if the invention is of multidisciplinary character. The knowledge of a team member is simply added to that of the others. Furthermore, we are not aware of any case law that would prohibit the interpretation of the skilled person as a team for such inventions.

- 2) *Is the skilled person a real person (or team of persons) or a hypothetical person?*

According to established case law and the Guidelines of the HPO the skilled person is a hypothetical person.

- 3) *The person skilled in the art has to be analyzed in the frame of her/his personal capacities and attributes.*

At first, it is necessary to know whether and if so to which extent this person has reasoning and/or creative capacities or if he/she has merely the capacity to perform or execute the orders or instructions from other people.

The skilled person has the capacity to perform or execute the orders or instructions from other people. He/she can also perform known or usual experiments and can make combination of pieces of information that is routine on that particular technical field.

Another point that can be discussed is whether the personal attributes of the person skilled in the art are the same also for other circumstances in which the person skilled in the art may have a role, such as construction of the patent or for the consideration of the sufficiency of the disclosure in the specification, even if this last point goes beyond the scope of the present study.

There should be no difference regarding the personal attributes of the person skilled in the art in respect of different circumstances. However, in practice this is very difficult to achieve.

Finally, the question that can be discussed is the issue of knowing if the personal attributes of the person skilled in the art are the same for different IP rights covering technical creations, like patents or utility models, species, etc., if they exist in the national law.

According to the HPA the inventive step requirement for patents is defined by the use of the term "person skilled in the art". For utility models the corresponding term is "skilled craftsman" in the utility model law. Therefore, the difference in inventiveness is reflected by the different meanings of the terms "person skilled in the art" and "skilled craftsman". Both terms denote hypothetical persons.

In respect of other IP rights it shall be noted that

- the Hungarian design law uses the term “informed user”, i.e. the overall impression of an *informed user* shall be considered when evaluating individual character; and
- a plant variety can be protected if it is distinguishable, i.e. it is not a *matter of common knowledge*.

Since Question Q213 deals expressly with patent law, we do not discuss in details the corresponding terms of utility model protection and other IP rights in this report.

- 4) *Another important aspect of the question is to know what are the personal skills of the “person skilled in the art”?*

At least, two important issues deserve to be analyzed:

- *What is the level of the qualification or skills of the person?*

It is depending on the technical field in question. If the level of the technical field is more developed, the qualification or skills of the person is also higher. In most cases the level of the qualification is a simple university degree.

- *And what are the nature and the scope of his/her knowledge?*

On the one hand, the skilled person should know the entire state of the art in the given technical field, has limited knowledge of other technical fields that are related to the subject matter of the invention, and also has basic general technical knowledge.

On the other hand, the skilled person has only average skills when considering combination skills or problem solution skills.

The skilled person has the necessary means of the particular technical field, can perform known and usual experiments, and make combination of pieces of information that is routine in that field.

However, the fantasy of the skilled person is limited and it is devoid of intuition. His activity can only lead to expected (and not surprising) results. The skilled person is under the influence of the preconceptions in the technical field concerned, and is unable to turn away from these preconceptions.

The second issue encompasses more precisely the question of the capacity to understand and to analyze the documents which are accessible to the person skilled in the art, this capacity being called “the general knowledge” and concerns the proof of the content of the “general knowledge”:

- a) *what is the scope of such knowledge in general terms?*
- b) *is such knowledge limited to the general technical training of such person?*
- c) *to what extent is information in documents – articles or prior patents - considered to be included as part of such working knowledge?*
- d) *can such knowledge include information which the person may not have memorized, but can readily look up?*

Since the answers to these questions have already been dealt with in our previous answers, we do not detail this issue here (see our answer to the second question of item 4, especially its first paragraph).

- 5) *The question of the person skilled in the art raises also the problem of the moment of the evaluation of those skills: should they be all evaluated at the moment of the appreciation of the validity of the patent, i.e. at the moment of the priority date, or could they be evaluated also at the date when the patent is assessed by the Judge, for example in the infringement proceedings, where the validity can be debated jointly with the infringement claim? This may conduct to the differences of appreciation in case the notion of the equivalence is used in relation to the prior art.*

For the question of validity, the evaluation of the skills of the person skilled in the art should always be made at the moment of the priority date.

- 6) *The next issue related to the definition to the person skilled in the art is the technical domain or "the art" in which his or her skills are performed.*

The first sub-question is to know if those skills are concentrated in one or several technical fields.

See our answer to the second question of item 4, first paragraph.

And the second one is related to the way the frontiers between different technical fields can be established: how this determination is assessed by the Judges or Patent Offices?

The way for determination of the frontiers between different technical fields is not prescribed by the applicable law, neither is any guidance in the Guidelines or in the case law.

- 7) *The question is also to know what is the nature of his/her competence in the technical field and particularly if this competence theoretical or practical?*

The competence of the person skilled in the art is both theoretical and practical.

- 8) *The Groups are requested to indicate how in practice the assessment of the skills of the person skilled in the art is operated. What is the role of the opinion of the experts on this point?*

The assessment of the skills of the person skilled in the art is determined exclusively by the board in charge or by the judge.

The opinion of a court expert is mostly taken into account by the judge, while party experts have usually weaker influence on the decision.

- 9) *Finally, the Groups are also invited to present all other questions which may appear in the context of the question of the person skilled in the art.*

II. Future harmonization

After assessing the national solutions, the Groups are invited to present their proposals for the possible harmonization and specifically the harmonized definition of the person skilled in the art. The object of this section is not to repeat all the questions related to the current statute of the national law, but to find the most fundamental points on which the international harmonization could be sought.

- 1) *Specifically, the Groups are invited to precise on which points they see the particular need of the international harmonization on the issue of the person skilled in the art.*

In view of the Hungarian Group, the standards for determining the skills of a person skilled in the art should be harmonized.

- 2) *The Groups may indicate if the “person skilled in the art” standard should be assessed as a hypothetical model or on the contrary appreciated in concreto?*

The “person skilled in the art” standard should be assessed exclusively as a hypothetical model.

- 3) *Should the skills of the “person skilled in the art” be only to execute other person orders or should they be creative and both practical and theoretical?*

Beyond being able to execute orders of other people, the person skilled in the art shall be able to carry out combination of pieces of information without fantasy.

- 4) *Should the art in which the skilled person intervene be of only one discipline, or should it cover several technical fields?*

If the person skilled in the art is one person, the art in which he/she intervenes should be only one discipline.

- 5) *The Groups are also invited to present all other suggestions which may appear in the context of the possible international harmonization of the definition of the person skilled in the art.*

Summary

The person skilled in the art according to the Hungarian patent law and practice is a hypothetical person or a group of people, who should know the entire state of the art in the given technical field, has limited knowledge of other technical fields that are related to the subject matter of the invention, and also has basic general technical knowledge. He/she has only average skills, has the capacity to perform or execute the orders or instructions from other people, can also perform known or usual experiments and can make combination of pieces of information that is routine in that particular field. His/her fantasy is limited and he/she is devoid of intuition. The evaluation of the skills of the person skilled in the art should be made at the moment of the priority date, but in practice this is very difficult to achieve.

Zusammenfassung

Die über Fachwissen verfügende Person ist gemäß dem ungarischen Patentrecht und der ungarischen Rechtspraxis eine hypothetische Person oder Personengruppe, die den gesamten Stand der Technik auf dem gegebenen technischen Gebiet kennt, bestimmte Kenntnisse auf anderen technischen Gebieten besitzt, die mit dem betroffenen Gegenstand der Erfindung zusammenhängen, und die außerdem über allgemeines technisches Grundwissen verfügt. Sie besitzt nur durchschnittliche Fähigkeiten, die Fähigkeit, Anweisungen oder Instruktionen Anderer auszuführen und zu realisieren, sie kann auch bekannte oder übliche Experimente durchführen und Kombinationen von Informationsteilen vornehmen, die Routine sind auf dem gegebenen technischen Gebiet. Sie hat eine begrenzte Phantasie und keine Intuition. Die Fähigkeiten der über Fachwissen verfügenden Person sollen zum Prioritätszeitpunkt bewertet werden, dies ist jedoch in der Praxis schwierig.

Résumé

L'homme du métier est, selon la loi hongroise sur les brevets et selon la pratique, une personne ou un groupe des personnes hypothétique qui connaît tout l'état de la technique relatif au domaine technique de l'invention, possède une connaissance limitée dans les autres domaines techniques, et possède aussi des connaissances techniques générales de base. Il/elle n'a qu'une expérience moyenne, a la capacité d'accomplir ou d'exécuter les ordres ou instructions reçues d'autres personnes, peut aussi accomplir des expérimentations communes ou usuelles et peut combiner entre elles des informations, de façon usuelle dans le domaine particulier. Son imagination est limitée et il/elle est dépourvu d'intuition. L'évaluation des capacités de l'homme du métier devrait être faite au moment de la date de priorité mais ceci est difficile à réaliser en pratique.