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Report Q 158

in the name of the Hungarian Group
by László BELICZAY, Dr. Tamás BOKOR (Head of the Working Committee),
Dr. Erzsébet FARKAS and Dr. Tivadar PALÁGYI

The patentability of business methods

II. The legal situation in the country

II.1: The question of the patentability of business methods cannot be isolated from the problem of the protection of intellectual and abstract methods.

The groups are therefore invited first of all to indicate the exclusions from patentability, as provided for by the law of their country, based on the abstract nature of the invention:

- *statutory exclusions;*
- *and exclusions arising from case-law.*

The Hungarian Paten Law fully conforms to the EPC, at least regarding the subject-matter of the protection. The relevant Sections of the Patent Act (Act XXXIII of 1995) reads:

Article 1(1): Patents shall be granted for any inventions which are new, involve an inventive activity and are susceptible of industrial application.

Additionally, traditional interpretation of the Act also requires that the invention should be of a technical character. This requirement was also a part of the previous Patent Act (Act II of 1969). However, the present Patent Act only repeats the same statutory exclusions as the EPC. The relevant section reads:

Article 1(2): The following in particular shall not be regarded as inventions within the meaning of paragraph (1):
(a) discoveries, scientific theories and mathematical methods,
(b) aesthetic creations,
(c) schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers,
(d) presentations of information.

A provision corresponding to EPC Article 52(3) is also included in the Hungarian Patent Act, to ease the strictness of Article 1(2).

Article 1(3): Patentability of the subject matters referred to in paragraph (2) shall be excluded only to the extent to which a patent application or a patent relates to such subject matter exclusively as such.

It is noted that the wording of the Hungarian Act (" ... exclusively as such.") makes it even more clear than the EPC that protection should be denied only if the subject-matter falls completely within one or more of the excluded categories. If the subject-matter also contains at least one technical element, the protection is normally granted by the Hungarian Patent Office.

Though it is not directly related to business methods, it must be mentioned that medical methods ("Methods for treatment of the human or animal body by surgery or therapy and diagnostic methods practiced on the human or animal body") are also excluded from patent protection ex lege (Article 5(2) of the Patent Act).

Besides the statutory exclusions, there are no other exclusions arising from case law.

II.2 Are business methods patentable or, on the contrary, are they excluded from patentability in the legislation of your country?

Since it is a statutory exclusion, business methods per se are excluded from patentability in Hungary.

II.3 If business methods are excluded from patentability, does this exclusion concern only the methods in themselves, or does it also apply to any invention applying business methods?

The practice of the Hungarian Patent Office is to reject applications only if clearly no technical feature is claimed in the claims. Though there are relatively few applications filed and examined so far in this field, generally it may be stated that the exclusion concerns only the business methods themselves. Otherwise, inventions which also include elements of business methods are not excluded for this reason.

II.4 If business methods are not patentable, are there other means of protection of business methods, particularly copyright?

Theoretically, the Hungarian Civil Code (Act IV of 1959) provides protection for intellectual property of all kinds, including business methods. However, this protection is of very little practical value. The Civil Code prohibits the expropriation of intellectual property of others. There are no exceptions concerning the contents of the intellectual property, any idea or mental creation qualifies for this protection. The sheer difficulty of proving that a business idea was actually taken from someone else would preclude the application of this provision of the Civil Code in most cases. This protection does not provide a monopoly, competitors are free to "invent" the same business method for themselves.

Similarly, the Act on Unfair Market Practices (Act LVII of 1996) provides protection for "business secrets". A business method may well be a business secret, but mostly this is not the case. Any competitor is also restricted from conducting business in an unfair manner. However, the value of this protection form is also insignificant for business

methods. It is theoretically possible, but practically very difficult to prove that taking over of a business method from a competitor is an "unfair" act, particularly since it has been the normal way of doing business in the competitive environment of traditional businesses. As before, it must be supported by evidence that the business method constituting a trade secret was unlawfully taken from the competitor.

Copyright protection is mostly not applicable for the protection of business methods, because it protects a created work, but not the underlying idea. Copyright may only be useful if the business method in question necessarily manifests itself in a work, e. g. in a computer program, which may be copyright-protected.

Summing up, there is no effective protection for business methods in Hungary.

II.5 If business methods are patentable, is there a distinction in the grant of protection between business methods used in the context of traditional business and business methods used in the context of the Internet?

As far as the statutory exclusion allows their patentability, theoretically no difference exists in determining the patentabilitity of an Internet-related or traditional business method. Simply because of the fact that for Internet-related business methods the use of some minimal technical hardware is inevitable, and therefore this technical hardware may be included in the claims, it makes their allowance easier for the examiners.

II.6 If business methods are patentable in the country, have the national courts already had the occasion to decide on the extent of the protection conferred by patents concerning such methods? In the affirmative, have the Courts applied specific rules or, on the contrary, the normal rules governing the patent system?

No Hungarian Court decision is available concerning the extent of a business method patent.

III. Opinion of the groups

III.1 Do the groups consider that business methods, as defined above (see I (f)), taken in themselves, constitute inventions?

Opinions within the Hungarian Group do vary significantly concerning this question. For the time being, a unitary opinion of the Group may not be formed. It is clear that in the present legal situation and with hitherto applicable practice, business methods per se are not inventions in the legal meaning of the word. However, the Hungarian Group recognises that the creation of a new business method may be considered as inventive activity. The Group also recognises the possibility that the present legal interpretation of inventions may change, and business methods may also be considered as patentable inventions.

III.2 In the opinion of the groups, is the exclusion of patentability for business methods in conformity with the provisions of Article 27 of the TRIPS agreement?

Article 27 of TRIPS does not provide any guidance in this respect. Firstly, no provision of TRIPS may be interpreted as prohibiting the exclusion of business methods. In this respect, this exclusion would conform to TRIPS, since there is no prohibition to the contrary. Secondly, no provision of TRIPS suggests or infers the exclusion of business

methods either. The requirement that "patents should be available ... in all fields of technology" suggests that business methods should be patentable, if they fall within some field of technology. It is not possible to deduce from TRIPS whether business methods per se should enjoy patent protection or not.

III.3 If national legislation does not currently provide for the possibility of protecting business methods, taken by themselves, by invention patents, do the groups think that their patentability is desirable?

Again, the Hungarian Group is not able to form a majority opinion for or against business method patents. It is not considered as inherently impossible, but the situation is still premature to speak of express "desirability". There is a general agreement in the Group that business methods in combination with technical solutions may be accepted in the patent practice without serious problems. Particularly, if the general European patent practice will also turn that way, it can be expected that the Hungarian Patent Office will follow the trend.

If a patent right is to be granted to a business method, it is probable that an increasing number of patent rights will be granted to industries and companies which used to enjoy patent rights to lesser extent. Parallel with this trend, it is expected that an increasing number of patent applications will be filed in the field of software-related inventions, also by companies which were rarely seen in the position of a patent applicant earlier.

It is critically important, how this trend would influence the competitive power of the companies, and their balance in the future. This means that as long as the purpose of the patent system is to promote industrial development by providing incentives to create novel inventions, the reduction of the competition due to an excessive monopoly would contradict the purpose of the patent system itself. Therefore, it is presumed that caution should be required to avoid inducing excessive monopolies, e. g. by granting a patent right to a business method.

III.4 If the answer to III.3 is in the affirmative, can the groups specify whether patentability should solely cover business methods used on the Internet, that is to say which directly implement technical means present on this network or, on the contrary, whether patentability should be accepted for all business methods without distinction?

Provided that business methods will enjoy protection, the Hungarian Group is of the opinion that there is no reason to limit the protection to Internet-related methods. Such a limitation would make the limits of the possible protection unnecessarily indefinite, and would be the cause of new problems, e. g. the definition of the Internet itself could be problematic. It should be noted that though an answer is submitted, we maintain our neutral answer Question III. 3.

III.5 If the answer to III.3 is in the negative, the groups are invited to express their opinion on other means of protection of business methods, such as copyright. In this case, it is requested that the groups present the respective advantages and disadvantages of patents and other means of protection of business methods. On this point, the groups may also refer to the aforementioned resolution (see I (c)) on computer programs.

Here we refer to the answer submitted to Question II. 4, and repeat that no other effective means of protection for business methods can be identified by the Hungarian Group. The greatest disadvantage of all other protection forms is that they do not provide a monopoly similar to patents. This is particularly important, because business methods are difficult to keep secret, due to their inherent character of an "interface" between a large number of people. Copyright protection in its present form is not applicable for business methods, because generally there is no physical creation ("artwork") which is the result of the business method.

III.6 If the business methods are the subject of invention patents, the question arises as to the scope of the protection conferred by a patent concerning such methods.

Would this be protection limited to the method itself, or would it be necessary, following the example of the process patent, to provide for protection in addition for products or services marketed through such methods?

The protection may be extended to products only if there is a tangible product that is the direct result of the business method itself. Known products produced by an other method would obviously not be eligible for protection. It appears probable that no protection should be granted to products whose sole connection to the method is that they were marketed through the method. In this manner protection could be obtained for goods that were otherwise in the public domain already, and that would clearly contradict existing patent law. However, this should not prevent law enforcement, and seizure of such products in specific cases should be possible, when the infringement of the business method is otherwise established. On the other hand, if a product is not in the public domain yet, it is possible to protect it with a product-category patent claim directed towards the product itself. Such product claim could be included in the specification of the business method patent as well.

III.7 Should the rules for assessment of the scope of patents covering business methods be the same as for traditional method or process patents or, on the contrary, should specific rules be applied by the courts, and in this latter case, which rules?

For example, if the courts of a country generally apply the theory of equivalents, should this theory also apply to business methods patents?

If business methods enjoy protection within the legal system for patents, there is no reason to establish specific rules for them. Particularly, the large number of Internet-related patents show that it would be very difficult or impossible to decide whether a certain application should be considered as business method or traditional technical method. This would lead to unnecessary legal uncertainty.

III.8 Do the Groups consider that the inventive activity of an invention concerning a business method may arise as a result of the simple fact of adapting a known method to new means of communication, such as the Internet?

It is possible to adapt a known method to a new means of communication in an inventive, non-obvious manner. However, if the adaptation is made with known methods within the expected problem-solving ability of a person skilled in the art, the simple fact of adaptation should not be considered as inventive, and therefore no patents should be granted either. Generally, adapting a known business method onto the Internet in a straightforward manner should not be the basis of a business patent. In order to be patentable, at least

some non-obvious "twist" of the method should result from the adaptation. On the other hand, it is also possible that the single action of the adaptation itself may be considered as involving an inventive step.

III.9 With respect to acts of infringement, should the usual rules in patent law be applied: direct or indirect infringement, infringement by incitement, supply of means etc., or on the contrary should special rules be applied to patents covering business methods?

Thus, the US Act of 29 November 1999 provided a new defense in the event of alleged infringement of a patent with process claims. And the question arises in interested circles as to whether these new legislative provisions apply to all patents including process claims or only those where the claims concern business methods.

Similarly to Question III. 7, the Group is of the general opinion that if business methods enjoy protection within the legal system for patents, no specific rules should exist for them. The usual provisions of indirect infringement, supply of means, etc. should be applicable for business method patents as well.

III.10 Should rules concerning compensation for loss as applied to the infringement of patents covering business methods be the same as are applied to patents covering inventions in traditional fields, or should these rules be modified for the infringement of patents covering business methods, taking account of the fact that these methods are not used, in principle, for the manufacture of products but solely for the sale of products and services?

Again, the need for legal certainty dictates that similar rules should apply. The fact that no products are manufactured does not make the calculation of explicit damages or loss of profits any more difficult.

III.11 Should the rules of evidence concerning the infringement of a patent covering business methods be the same as those concerning process patents or patents for traditional methods? In particular, do the groups consider that the provisions of Article 34 of the TRIPS agreement concerning the burden of proof should apply to patents covering business methods?

The provisions of TRIPS for the process patents should be applicable only if the business method has a well-defined product, which is clearly linked to the business method itself. Otherwise, the simple possession of a known product should not serve the basis for the reversal of the burden of proof.

Summary

For the time being, Hungarian Patent Law excludes business methods from patenting, similarly to the EPC. Internet-related business methods may obtain some level of patent protection, if some technical aspects of the method are patentable. Other legal tools to protect business methods do exist, but their practical value is very limited. It is expected that Hungarian legislation will follow the general European approach towards business method patents.

There is no majority opinion within the Hungarian Group, whether business methods should be patentable. On the other hand, the Hungarian Group recognises that business methods may involve inventive activity, and therefore, in theory, they may qualify as inventions. The provisions of TRIPS do not suggest and do not forbid their exclusion. It is more or less clear, however, that once their patentability will be established, business method patents should follow the same rules which exist for patents with a more traditional subject-matter. Particularly, previously known products marketed by patented business methods should not have an own title for protection, but their seizure should be enforceable if infringement of the method is established.

Résumé

Pour le moment, les méthodes d'affaire sont exclues d'(tre brevetées par le droit hongrois des brevets, tout comme c'est le cas à la Convention sur le Brevet Européen.

Les méthodes d'affaire ayant des rapports avec l'internet peuvent obtenir une protection d'un certain niveau si quelques aspects technique en sont brevetables. Il existe aussi d'autres moyens légalux pour obtenir une protection pour les méthodes d'affaire, mais leur valeur pratique est tr(s limitée. Il est présumé que la législation hongroise adoptera les points de vue généraux européens en ce qui concerne les brevets des méthodes d'affaire.

La majorité du Groupe Hongrois doute que les méthodes d'affaire soient brevetées.

D'autre part, le Groupe Hongrois admet que, les méthodes d'affaire peuvent comporter l'activité inventive, et pour cette raison, théoriquement, elles peuvent (tre considerées comme inventions. Les dispositions de l'Accord TRIPS ne proposent ni ne défendent pas leurs exclusion. Néanmoins, il est plus ou moins évident qu'une fois leur brevetabilité sera établie les brevets de méthodes d'affaire devront suivre les m(mes r(gles qui sont en vigeur pour les brevets ayant un sujet plus traditionnel. Plus particuli(rement, des produits devenus connus auparavant et qui sont distribués au marché par des méthodes d'affaire brevetées ne doivent pas avoir un titre de protection indépendant (eux, mais leur saisie doit (tre enforcée si la violation de la méthode est établie.

Zusammenfassung

Zur Zeit sind Geschäftsmethoden von Patentierung durch das ungarischen Patentgesetz ausgeschlossen, ähnlich zum EPÜ. Internet-bezogene Geschäftsmethoden können einen gewissen Grad von Patentschutz erreichen, falls irgendeine technische Aspekte der Methode patentfähig sind. Andere juristische Mittel stehen zum Schutz von Geschäftsmethoden zur Verfügung, aber ihr praktischer Wert ist sehr begrenzt. Es ist zu erwarten, dass die ungarische Gesetzgebung bezüglich Geschäftsmethode-Patente den allgemeinen Europäische Standpunkt aufnehmen wird.

Die Ungarische Landesgruppe konnte keine Mehrheitstellung einnehmen, ob Geschäftsmethoden patentfähig sein sollen. Trotzdem kennt die Ungarische Landesgruppe an, dass auch Geschäftsmethoden erfinderische Tätigkeit benötigen

könnten, und deswegen könnten - mindestens theoretisch - auch als Erfindungen anerkannt werden. Die Regelung des TRIPS impliziert nicht und verbotet nicht ihr Ausschließen von Patentierung. Es ist doch mehr oder weniger eindeutig, dass Patente für Geschäftsmethoden auf dieselbe Regeln bezogen sollten, welche auch für Patente von mehr traditionellen Gegenstand gelten. Insbesondere, bekannte Produkte, die mit einer patentierten Geschäftsmethode vermarkt sind, sollten kein eigenes Schutzrecht haben, aber eine Durchsetzung von ihrer Beschlagnahme sollte möglich sein, wenn eine Verletzung des Methodes festgestellt wurde.