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Report Q183

in the name of the Hungarian Group
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Employers' rights to intellectual property

Questions

1. The State of positive Law

1.1 *The Groups are invited to present the legal framework governing relations between employers and employees in the field of intellectual property rights.*

In particular, the Groups are invited to state whether these rules arise from provisions concerning labour law or whether these rules arise from provisions concerning intellectual property rights.

In addition, the Groups are invited to state whether these rules may be considered as being public policy rules (i.e. mandatory rules) or whether, on the contrary, they may be modified by contractual relations between employees and employers.

The provisions relating to the rights of employers are based on the respective laws on each type of intellectual property.

The provisions are mandatory, with the exception if the employer does not intend to exercise its rights.

1.2 *The Groups are invited to specify, for each of the intellectual property rights (patents, plant variety rights, copyright or authors' rights, patterns and models, and software rights, it being recalled that trademarks and brand rights are expressly excluded from the scope of the study in question) what are the legal solutions concerning ownership of rights over intellectual creations:*

- *Do these rights originally belong to the employer or the employee?*
- *If these rights belong to the employer from the outset, what are the conditions for this attribution?*
- *And if these rights originally belong to the employee, does the employer have the right to have them transferred to it and under what conditions?*

And the Groups are also invited to specify, as far as it concerns patents, if it is the employer who is the owner, from the outset, of the intellectual property rights over inventions made by employees in the context of their employment contract and in the performance of their tasks.

The Groups are invited to give replies both with respect to moral rights and economic rights for each type of intellectual property rights.

a) Patents

Act XXXIII of 1995 on the Protection of Inventions by Patents (**"Patent Act"**) regulates inventions resulting from an employment relationship; within this domain, the Act differentiates between service inventions and employees' inventions.

A *Service invention* is the invention of a person, whose duty - resulting from an employment relationship - is to work out solutions within the domain of the invention.

An *Employee's invention* is the invention of a person, who works out - without it being his duty resulting from an employment relationship - an invention, the utilization of which belongs to the sphere of activities of his employer.

According to the Patent Act, the inventor or his legal successor is entitled to the patent.

Concerning the service invention, the patent claim belongs from the outset to the employer, as the legal successor of the inventor.

An inventor is someone who has created an invention. The inventor is entitled to the right of being indicated the patent documents as such. The inventor may act in accordance with the provisions regulating the protection of personal rights in the Civil Code against any party, who calls into question this capacity as the inventor, or infringes otherwise his moral rights (rights attached to his person) in connection with the invention.

The authorship of the service invention belongs to the inventor, however, pursuant to the Patent Act, the employer is entitled *ex lege* to the patent claim from the time of creation of the invention.

Concerning the employee's invention, the patent claim belongs from the outset to the inventor; the employer, however, is entitled *ex lege* to utilize the invention. The employer's right of utilization is not exclusive.

b) Plant variety rights

According to the provisions of the Patent Act, "breeder" means the person who bred or discovered and developed the plant variety.

Entitlement to the plant variety right shall belong from the outset to the breeder or his successor in title.

Relating to the moral rights of the breeder, claims for entitlement to a plant variety right, and the service or employee's inventions as inventions of plant varieties, the provisions on inventions are applicable.

c) The protection of utility model and the industrial designs

The protection of utility models is regulated under *Act XXXVIII of 1991 on Utility Models Protection*, and the protection of industrial designs is regulated under *Act XLVIII of 2001 on the Legal Protection of Designs*. According to the references set forth in these acts, the provisions of the Patent Act are governing in the cases of authorship and claims relating to utility models and industrial designs. These legal provisions differentiate between service and employee's inventions as does the Patent Act.

d) Copyright

The Act LXXVI of 1999 regulates copyrights (**"Copyright Act"**).

The author is entitled to all rights arising from the copyright (author's right), including both moral and economic rights, from the time a work is created.

Authors cannot assign or waive their moral rights or have these rights assigned to another person in any other manner.

Economic rights can be assigned or transferred in the cases and under the conditions specified in the *Copyright Act*.

In the absence of any agreement to the contrary, in case of works made in the framework of employment relationship, the employer, as the legal successor to the author, obtains economic rights once a work is handed over if the preparation of the work was the author's obligation within the scope of his/her employment.

In this case, the delivery of the work to the employer is considered as the author's approval for the publication. If the author issues a statement withdrawing the work, the employer is obliged to delete the author's name from the work. At the same time, the author's name must be deleted if the employer alters the work by exercising its rights as employer and the author does not agree with the changes.

e) Software and databases

According to the *Copyright Act*, the regulations set forth under point d) apply to the acquisition of employer's rights regarding software.

According to the *Copyright Act*, databases if recognized as compilation of works are subject to copyright protection, and the regulations of the *Copyright Act* apply with respect to the employer's acquisition of rights.

1.3 The Groups are also invited to provide information on procedures concerning potential disputes concerning the ownership of intellectual property rights over employees' creations.

Are these disputes within the jurisdiction of labour courts or, on the contrary, are they within the jurisdiction of the courts which are usually competent for intellectual property disputes?

Is there a prior conciliation stage and if so, does it take place before the same court as the one having jurisdiction over disputes concerning the ownership or conditions for use of intellectual property rights over creations made by employees?

Does the termination of the employment contract have an influence on the action which an employer can bring to obtain the attribution of rights over an employee's creation?

Is there a limitation or statute-barring of the exercise of an action concerning the attribution of ownership rights over an invention or creation made by an employee in the context of an employment contract?

Can the employee require the filing of a patent application in order to protect his invention or his other creations (registering patterns and models, etc.)?

Disputes arising in connection with service or employee's inventions and other intellectual properties, or in connection with remunerations thereto, fall within the jurisdiction of the ordinary courts, more exactly the county courts, and not the labour courts.

There is no mandatory conciliation stage prior to the commencement litigation.

The termination of the employment relationship does not result in the expiry of the employer's right to exercise his rights over service or employee's inventions.

The general provisions of the Civil Code apply to the statute of limitation relating to employee's claims regarding creations; ownership claims shall not lapse.

The inventor or the creator of the model/design shall make known to the employer the service invention, the employee's invention and/or the model/design, immediately following its creation. The employer shall make a declaration, within ninety days commencing from the receipt of the information, about whether it wants to claim the service invention, or whether he wishes to utilize the employee's invention.

The inventor may dispose over the service invention if the employer consents thereto or if the employer fails to make the aforesaid declaration before the deadline set forth. In this

case, for the employee's invention, the patent belongs to the inventor without any encumbrance arising from the utilization right of the employer.

These provisions accordingly apply in the cases of utility models, industrial designs and plant varieties worked out by the employee.

1.4 The Groups are also invited to state whether there is a difference in status between employees in the private sector and researchers in universities or research institutes which receive public funding from the point of view of the employers rights.

The employee's acquisition of rights is not influenced by the circumstances as to whether the inventor is employed in the private sector or by universities and other research institutes that receive public funding.

1.5 An important question in practice is whether compensation is due to employees in return for the rights of employers over the creations made by employees.

Moreover, it is in this field that the greatest disparities are currently observed in the world.

The Groups are therefore invited to specify whether their domestic laws provide employees with a right to compensation (financial or in nature) in return for the transfer of rights over their creations to their employers.

How is this compensation calculated?

What is the time limit for prescription or statute-barring of a claim for payment of this compensation?

In the case of the realization of the service or employee's invention, the inventor shall be entitled to remuneration.

The utilization of the invention, including the omission of utilization in order to create or maintain an advantageous market position, licensing of utilization to another party and a full or partial assignment of a patent claim or of a patent shall be deemed as a realization of a service invention.

The remuneration of the inventor shall be governed by the remuneration contract. In the case of the utilization of the patent, the remuneration due for utilization shall be proportionate to the fee, which should be paid by the employer for a license to utilize the invention on the basis of a patent license contract, with regard to the licensing trade practice developed in the technological field, in accordance with the subject-matter of the invention.

The provisions that regulate the remuneration for inventions shall be applied to the service plant varieties or employee's plant varieties.

The provisions of the *Civil Code* shall be applied to matters not regulated in the Patent Act relating to remuneration contracts.

The royalties for copyright works.

In the cases of copyright works, the author is not entitled to payment if the work was created in connection with the employment relationship and if the employer uses it in his sphere of activities. Authors are entitled to a remuneration if the employer authorizes a third person to use the work or assigns the economic rights in connection with the work to a third person.

The claim for payment can be enforced within the general five-year-limitation-period set forth in the Civil Code.

However, the employed author is not entitled to any remuneration for software, databases and films made as his obligations within the employment relationship.

1.6 Finally, the Groups are invited to state whether there is a significant level of dispute in their countries concerning the ownership and use of rights over intellectual creations made by employees, and to give a general opinion on the effectiveness and/or efficiency of the national system.

Generally, the employer's ownership claims are not subject to dispute. Disputes rather arise in the cases where it does not obviously result from the nature of employment that the elaboration of any solution in the domain of the invention is the employee's obligation, however, the employee, in connection with and during the period of the employment, developed an invention or a solution within the sphere activities of his employer in the course of production. Such disputes may be avoided by appropriate contractual practices.

2. Suggestions with respect to International Harmonisation

2.1 Do the Groups think that such harmonisation is desirable on the international level for each of the types of intellectual property rights?

Do the Groups wish such harmonisation to be undertaken through labour law rules or through rules of intellectual property law?

If we commit ourselves to harmonization, in our opinion, it shall proceed with regard to the provisions relating to intellectual property. The provisions arising from labor law should not be recognized as a basis of the harmonization.

There is no doubt about the fact that the acquisition of rights is rooted in the employment relationship, and with respect to creations made in the course of the employee's work, either the law or the employment contract establishes the rights of the employer.

It is our opinion that the idea should not be accepted, which would oblige the employee to create a protectable intellectual creation. Accepting this idea could lead to the following situation wherein if the creation of the employee did not receive patent protection then it would mean that the employee failed to fulfill his obligation arising from the employment. Based on this, the employer could apply the sanctions of labor law against him.

Harmonization based on the provisions of the labor law would also not be reasonable because the inventor is entitled to certain moral rights (rights attached to the person of the inventor), and accordingly, the issue is closely related to the personal rights and intellectual property law.

Indeed, if the inventor has any claim arising from the realization of the invention by the employer during the entire or only a shorter period of the patent protection, then this claim would become independent from the employment, and the inventor or his legal successor would be entitled to a remuneration even in the event of the termination of the employment relationship.

2.2 The Groups are requested to state whether as a general rule it is the employer who is to be the owner, from the outset, of the intellectual property rights over creations made by employees in the context of their employment contract and in the performance of their tasks, or whether, on the contrary, it is the employee who must conserve his rights, but with the possibility for the employer to have them attributed to it under certain conditions.

The invention has its roots with the inventor, however on the basis of the law, the employer is entitled to the ownership of such invention through a derivative acquisition from its time of creation, and the inventor may exercise his right attached to the creation only in the event of and to such an extent if the employer does not wish to dispose over the creation or gives his consent to have the invention put at the employee's disposal.

2.3 *If the employer was to be considered as owner from the outset of the intellectual property rights over creations made by employees, do the Groups think that the employee should receive a particular reward, in addition to his salary, for these creations, or do they think that such a reward is not justified?*

If, on the contrary, the employer is not vested from the outset in the intellectual property rights over creations made by employees, what would be the conditions for the attribution of these rights and, in particular, what could the remuneration be, corresponding with the possibility of having the intellectual property rights in question attributed to the employer?

Do the Groups consider that the adoption in principle of a reward could have an influence over the general system of intellectual property rights and if so, what would that influence be?

As we mentioned in Point 2.1., the employee cannot be obliged under the employment relationship to achieve the creation of any patentable invention. However, through his invention he may create a monopoly in favor of the employer. Otherwise, the employer could obtain an adventageous market position on the basis of a creative invention only if the employer acquires rights to such creation at a fair market price. For this reason, payment to the inventor is justified.

If the employer does not acquire - based on law - rights over the intellectual creation from the time of its creation, then providing him exclusive or non-exclusive utility rights arising from the creations, developed in connection with the employment, in the field relating to the employer's activities is justified. The basis of the payment may be the customary license-fee in the given field. Accordingly, the remuneration shall be proportionate.

i) to what extent does the creation reflect the employer's research, plans, expenses arising from the research,

ii) based on the employment contract, to what extent it was the employer's obligation to participate in the development of the creation of the invention, and

iii) to what extent does the invention reflect an initiative step and how significant was the creative activity of the employee.

In our view, remuneration provided for creations encourages developments of such intellectual creations.

2.4 *The Groups are also invited to present their opinions on the organisation of disputes concerning the attribution of intellectual property rights over employees' creations and concerning their use by employers.*

Are the Groups of the opinion that such disputes should be governed by the courts which have jurisdiction in labour law matters, or are they more of the opinion that these disputes should be subject to those courts which judge intellectual property disputes?

It should be recalled that the disputes may concern various aspects of relations between employers and employees: attribution of ownership of such rights; decisions concerning the means of protection and, finally, any compensation as may be due.

Concerning those legal disputes where it is not clear whether the employer is entitled to proprietary rights or utility rights relating to the invention, it would be reasonable to stipulate judicial proceedings, since decisions relating to proprietary rights must be rendered.

With regard to the nature of these cases, it would be practical if judicial panels specialized to such matters would render decisions.

With attention to the fact that these legal disputes arise generally during the existence of employment relationships, it would be practical to establish access to arbitration courts or to conciliation institutions in order to settle the matters without court proceedings.

The requirement of special knowledge of the industrial property rights is far more important than that of general labor law. For this reason, regarding the fact that, in our view, any such legal dispute would not concern employment relationships, it would not be reasonable to bring such cases to the labor courts.

2.5 *The Groups are also invited to give their opinion on the existence of differences, if any, between the status of private sector employees and researchers in universities and in research institutes which are financed by public funds.*

Are there any grounds for providing for a difference in treatment in the hypothesis of international harmonisation or, on the contrary, should all employees and researchers be treated in the same way?

In our view, with respect to the inventions made in the course of carrying out research, when assessing the acquisition of the rights of the employer, it is irrelevant as to whether the employer is a private undertaking or a public institution founded by the state.

Finally, the Groups are invited to make any and all further suggestions concerning a possible international harmonization of the status of employers' rights over employees' intellectual creations.

We regard the examination of the employer's rights as crucial. We shall highlight the fact that AIPPI dealt with the service invention earlier under Q40, but further investigations were ruled out due to the significantly different views.

By examining the rights and obligations relating to creations made in connection with employment, through the finding of an appropriate balance AIPPI shall examine together the contribution to the creation, the rights and obligations relating thereto both of the employer and the inventor. Only such complex manner of examination serves the harmonization attempts appropriately.

Summary

If we commit ourselves to harmonization, in our opinion, it should proceed forth pursuant to the provisions relating to intellectual property. The provisions arising from labor law should not be recognized as a basis of the harmonization.

There is no doubt about the fact that the acquisition of rights is rooted in the employment relationship, and with respect to creations made in the course of the employee's work, either the law or the employment contract establishes the rights of the employer. The inventor may exercise his right attached to the creation only in the event of and to such an extent if the employer does not wish to dispose over the creation or gives his consent to have the invention put at the employee's disposal.

It is our opinion that the idea should not be accepted that the employee is obliged under the employment relationship to achieve the creation of any patentable invention. Accepting this idea could lead to situation wherein if the creation of the employee did not receive patent protection then it would mean that the employee failed to fulfill his obligation arising from the employment. Based on this, the employer could apply labor law sanctions against him.

Harmonization based on labor law provisions would also not be reasonable because the inventor is entitled to certain moral rights (rights attached to the person of the inventor), and accordingly, the issue is closely related to the personal rights and intellectual property law.

The inventor may create a monopoly in favor of the employer. In the lack of the employee's invention, the employer could obtain an advantageous market position on the basis of a creative invention only if the employer acquires rights to such creation at a fair market price. For this reason, payment to the inventor is justified.

Concerning those legal disputes where it is not clear whether the employer is entitled to proprietary rights or utility rights relating to the invention, it would be reasonable to stipulate judicial proceedings, since decisions relating to proprietary rights must be rendered.

In the course of adjudicating such legal disputes relating to the ownership, the requirement of special knowledge of intellectual property rights is far more important than that of general labor law. For this reason, regarding the fact that, in our view, any such legal dispute would not concern employment relationships, it would not be reasonable to bring such cases to the labor courts.

We regard the examination of the employer's rights as crucial. We shall highlight the fact that AIPPI dealt with the service invention earlier under Q40, but further deliberations were ruled out due to the significantly different views.

By examining the rights and obligations relating to creations made in connection with employment, through the finding of an appropriate balance AIPPI shall examine together the contribution to the creation, as well as the rights and obligations relating thereto both of the employer and the inventor. Only such complex manner of examination would serve the harmonization attempts appropriately.

Résumé

En ce qui concerne la titularité des droits attribués à l'employeur, si on prend parti en faveur de l'harmonisation, cela devrait se faire relative aux dispositions concernant les droits de propriété intellectuelle. Les dispositions relatives au droit de travail ne peuvent pas être prises comme base de l'harmonisation.

Il est incontestable que la titularité des droits de l'employeur résulte du rapport de travail, du fait que l'employeur devient titulaire des droits des créations réalisées par le salarié au cours de l'accomplissement de ses obligations d'emploi, en vertu de la loi de brevets ou du contrat de travail, et que l'inventeur salarié ne peut faire valoir ses droits sur la création que dans le cas et dans la mesure où l'employeur ne revendique pas cette création ou si celui-ci consent à ce que le salarié s'en attribue.

Il faut exclure qu'il soit considéré comme l'obligation du salarié que celui-ci réalise des créations intellectuelles susceptibles d'être protégées en tant que "prestation de résultat". Il résulterait d'une telle position qu'en cas de refus de la protection du brevet par l'Administration demandée pour la création intellectuelle du salarié, ce dernier violerait son obligation résultant du contrat de travail et que l'employeur pourrait faire valoir des sanctions prévues par le droit de travail à son égard.

Un autre argument contre l'harmonisation au travers des règles de droit de travail est que l'inventeur salarié reste toujours en plein exercice des droits morales attachés à sa personnalité et, par conséquent, ce problème est en rapport étroit avec les droits de la personnalité assurées également par le droit de propriété intellectuelle.

Par sa création, le salarié produit une situation monopolisée au bénéfice de l'employeur qui en défaut de cette activité créatrice du salarié, ne pourrait obtenir une telle position compétitive que par l'acquisition des droits concernant la création moyennant la valeur marchande de celle-ci. Par conséquent la récompense de l'inventeur salarié paraît justifiée.

Par rapport aux litiges relatifs à la titularité ou au droit d'exploitation de l'employeur concernant la création, il faudrait prévoir de saisir les juridictions compétentes en matière de contentieux de propriété intellectuelle.

Pour pouvoir trancher les litiges de ce genre, les connaissances spéciales concernant la propriété intellectuelle sont beaucoup plus importantes que celles en matière de droit de travail. Par conséquent et puisqu' il n'est pas question des rapports contractuels de travail, il ne serait pas opportun de saisir la juridiction compétente en matière du droit de travail.

L'examen des problèmes de la titularité de l'employeur est bien important. Nous faisons observer que l'AIPPI a étudié déjà la question des inventions d'employés sous Q 40, mais étant donné que les conceptions formulées étaient très divisées, cette question n'a jamais été discutée depuis 1969.

En examinant les droits et les obligations concernant les créations réalisées dans le cadre d'un rapport contractuel de travail, l'AIPPI doit apprécier d'une manière équilibrée et complexe non seulement la question de la titularité de l'employeur mais également la participation à la création et les droits y attachés de tous les réalisateurs des créations intellectuelles, notamment ceux de l'employeur et de l'inventeur salarié. C'est sur une méthode complexe de ce genre et de l'analyse que pourrait partir une étude d'harmonisation.

Zusammenfassung

Für den Fall, dass man sich in der Frage des Erwerbs von Rechten durch den Arbeitgeber für die Harmonisierung ausspricht, vertreten wir den Standpunkt, dass dies dann unter Berücksichtigung der rechtlichen Regelungen für geistige Schöpfungen erfolgen muss. Arbeitsrechtliche Bestimmungen können nicht als Grundlage für eine Harmonisierung dienen.

Es ist unbestritten, dass der Erwerb von Rechten durch den Arbeitgeber seinen Ursprung im Arbeitsverhältnis hat. Grundlage ist, dass der durch den Arbeitgeber erfolgende Erwerb des Rechts an einer Schöpfung, die vom Arbeitnehmer bei der Ausübung seiner im Rahmen des Arbeitsverhältnisses ausgeführten Aufgabe erschaffen wurde, entweder auf gesetzlicher Grundlage oder auf Grundlage des Arbeitsvertrages erfolgt und dass der Erfinder seine mit der Schöpfung verbundenen Rechte nur dann und in dem Masse geltend machen kann, wenn der Arbeitgeber keinen Anspruch auf die Schöpfung erhebt oder seine Zustimmung erteilt, dass der Erfinder darüber verfügen kann.

Unserer Meinung nach kann sich keine Auffassung durchsetzen, die es zur Pflicht des Arbeitnehmers macht, quasi als Erbringen eines Ergebnisses eine patentierbare geistige Schöpfung zu erschaffen. Daraus würde nämlich folgen, dass der Arbeitnehmer, wenn der Patentschutz für die von ihm erschaffene Schöpfung nicht erteilt wird, seine Arbeitspflicht verletzte habe und der Arbeitgeber auf dieser Basis arbeitsrechtliche Sanktionen gegen ihn verhängen könnte.

Gegen eine Harmonisierung auf der Basis arbeitsrechtlicher Bestimmungen spricht weiterhin auch, dass dem Erfinder die mit dem Erfinder verknüpften Persönlichkeitsrechte zustehen und infolge dessen ist diese Problematik eng mit den Persönlichkeitsrechten und dem Recht bei geistigen Schöpfungen verbunden.

Im Wege der Schöpfung bringt der Schöpfer den Arbeitgeber in eine Monopolstellung und ohne seine schöpferische Tätigkeit würde der Arbeitgeber in die auf diese Weise geschaffene Wettbewerbssituation nur dann gelangen, wenn er die Rechte an der Schöpfung gegen Entrichtung deren Marktwertes erwirbt. Aus diesem Grunde ist für den Erfinder eine Vergütung gerechtfertigt.

In Rechtsstreits, bei denen umstritten ist, ob dem Arbeitgeber das Eigentum oder das Benutzungsrecht an der Schöpfung zusteht, ist es gerechtfertigt, den Gerichtsweg zu ermöglichen, da in gegebenem Falle über Eigentumsverhältnisse entschieden werden muss.

Bei der Entscheidung über Rechtsstreits sind spezielle Kenntnisse zum gewerblichen Rechtsschutz in viel höherem Masse gefordert, als die Kenntnis allgemeiner arbeitsrechtlicher Fragen. Deshalb ist es unter dem Aspekt, dass es sich unserer Meinung nach nicht um ein arbeitsrechtliches Rechtsverhältnis handelt, nicht zweckmässig, wenn hierfür die Arbeitsgerichte zuständig wären.

Die Frage der Untersuchung des Erwerbs von Rechten durch den Arbeitgeber erachten wir für sehr bedeutsam. Dabei sei darauf hingewiesen, dass sich die AIPPI unter Q40 bereits mit der

Frage von Arbeitnehmererfindungen befasst hatte, eine weitere Untersuchung dieser Frage jedoch angesichts der beträchtlich unterschiedlichen Auffassungen von der Tagesordnung genommen hatte.

Bei der Untersuchung der Rechte und Pflichten bezüglich der im Rahmen von Arbeitsverhältnissen entstandenen Schöpfungen muss die AIPPI parallel zur Frage des Erwerbes von Rechten durch den Arbeitgeber die Mitwirkung aller Erschaffenden von geistigen Schöpfungen, d.h. sowohl des Arbeitgebers als auch des Erfinders am Schöpfungsprozess und deren damit verknüpfte Rechte sowie deren daraus erwachsende Pflichten ausgeglichen und gesamtheitlich untersuchen und nur diese komplexe Untersuchungsweise kann als entsprechende Grundlage für eine Harmonisierung dienen.