IS THE TIME OF THE PATENT SYSTEM OVER?

By Dr. József MARKÓ

Some people now think that the day of patenting is at an end; it was once vital but its value has reduced.

Generally it is believed that the British "Statute of Monopolies" laid the groundwork for patent laws in the 17th century. The primary intention thereof was: encouragement of new industries in the country by stimulation of inventions.

French and US patent systems had grown from the British law at the end of the 18th century but in quite opposite directions. In the development of the other national patent systems these three basic types have emerged. There are, however, considerable variations between countries' patent systems as to the formal requirements, legal proceedings and substantive law.

Recently patent offices and courts make efforts to set shorter time limits than before which places a great onus on the applicants. On the other hand, the costs of patenting and patent litigation are continually increasing. So nowadays a sole inventor can hardly be able to bear the costs of patenting even in a single country; patents have been converted more and more into "weapons" of firms of solid capital.

It is known that one of the main purposes of a patent is to prevent others from copying an invention. However, if the idea has no technological or commercial value then nobody wants to copy it, so that the patent protection is useless.

Actually it is often easier to obtain a patent on a completely valueless idea than on a real invention, simply because no one previously has been prepared to waste time and money on filing a patent application. On the other hand, even if a patent is granted, the patentee has no guarantee that it is legally valid as well. The examiners cannot possibly know of every circumstance, e.g. prior publications, use or sale, which could undermine the legal strength of a patent application.

Some people think nowadays that the best way of developing the home industries is to apply "know-how" contracts because they provide perfect technology instead of complicated, expensive and unreliable patenting (I would refer in this respect to the Japanese "wonder"). But it is to be noted

that "know-how" as a secret technical knowledge of industrial significance has been built up in one organisation and is not in the public domain, furthermore it doesn't stand under registered protection. On the other hand, "know-how" monopoly is relative because it doesn't protect the owner against the independent competitors developing his own, and possibly the same "know-how". As a consequence, in most cases the "know-how" can not replace a patent much rather; it can effectively complete the patent protection.

It can be said that certain critical symptoms can be detected in the patent system. Its differentiation and autotelism, as well as the speedy technological development have induced a complicated situation, so nowadays you can hardly recognize the classical principles and purposes in the present patent systems.

Is there any hope to reform and revive the patent system under such circumstances? YES, I am optimistic in this question.

In this respect I would refer to some important agreements on international collaboration of patent laws in the last decades such as the Strasbourg Convention, the Patent Cooperation Treaty, the European Patent Convention and to the efforts of WIPO, AIPPI and other organisations, which exercise an influence on the national patent laws in the direction of harmonisation.

A universal Patent Convention embracing all countries of the world would be the top level of the development and harmonisation of the national and regional patent systems. On the basis of such a Convention a single application would result in a "universal patent" carrying identical monopoly rights in all countries of the world. I think, in the most favourable circumstances such a Convention can be reached in the first half of the 21th century.

In order to obtain this "universal patent" it would be necessary to unify the patent practice and establish a universal information system all over the world.

On the other hand, the industrial significance of the inventions should have been taken into consideration in such unified regulations, too. Accordingly, the duration of a patent could be e. g. 5, 10, 15 or 20 years depending on the applicant's choice.

In accordance with the different protection periods the substantive requirements would be more and more stringent. In the first stage "inventive step" should not be examined.

The "novelty criteria" should also depend on the duration:

In the first step: only the prior publications should be considered.

In the second step: the state of the art would comprise everything made available to the public by means of a written or oral description, by use, or in any way, before the priority date.

In the third step: "prior claim approach".

In the fourth step: "whole contents approach" should be applied.

As to the patent claim drafting, applicant should have a free choice to adopt either a "single-part claim" or a "two-part claim" system (see e.g. EPC). As you know, both of them have proved well since centuries.

Anyway, I am of the opinion that the patent system will live still long time. Under free market conditions there isn't any better alternative form of protection. Behind temporary monopoly of a patent the mechanism of extra profit works which stimulate the patentee and at the same time admits his intellectual activity.

So I think the saying of Abraham Lincoln remains valid:

"The patent system added a fuel of interest to the fire of genius".

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