

**UNIFICATION OF LAW  
IN THE FIELD  
OF INTERNATIONAL  
INDUSTRIAL PROPERTY**

**BY  
ENDRE LONTAI**

**AKADÉMIAI KIADÓ, BUDAPEST**

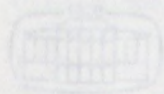






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László Lomai (LL.D.)



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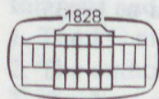


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## Preface

"Habent sua fata libelli"  
(Terentianus Maurus)

The present book was published in Hungarian in 1988 and the revised English manuscript was handed over to the Publishing House in May 1990. The four years spent on the book, dealing mainly with practice-oriented questions posed considerable difficulties.

In the field of industrial property recent years have witnessed important developments both at home as well as internationally. To mention but a few ones: we may refer to the revision process of the Paris Convention which has practically stopped. Some endeavours had to wait till the end of the Uruguay Round. The COMECON has ceased to exist. National legislations, including also Hungarian legislation, developed towards harmonization. The technical development presented new challenges.

It is impossible to reflect all these above changes within the scope of this work. Efforts have been made to deal with the most essential events, being aware of the fact that the proportions of different parts and of the illustrative material are far from being perfect. Nevertheless, I am convinced that by demonstrating and evaluating the major trends in the field of international industrial property, the readers will be offered valid analyses and conclusions.

Budapest, 1994

The Author





## Introduction

### 1. Significance and nature of international economic and scientific-technical co-operation

1. *Main fields of co-operation.* — Apart from some rare and not really outstanding exceptions, the various national economies are in multi-directional and many-hued relations with each other today. It can be observed in several fields that they do not operate in isolation. The oldest traditions of co-operation attach to the exchange of goods and commodities and can be seen in modern economies, too, as we all know, a broad-scale and increasing *exchange of goods* and commodities (implying, of course, important differences in proportions and volumes) is a day-by-day experience, irrespective of the circumstance, whether it is motivated by the elementary interests and conditions of functioning of the economy in question (e.g. the need for raw materials, food, power sources, etc.) or merely by a conscious economic policy (within this, the policy of the standard of living), with a wish to enrich the spectrum of supply, the assortment (e.g. the supply of imported refreshing and other drinks, cosmetics, tropical fruits, etc.).

International economic relations are more and more interwoven with the kind of co-operation which is a product of the *division of labour* and *specialization*, beyond the simple exchange of goods, since the division of labour, a more and more chiselled specialization and market-oriented production are fundamental criteria with relevance not only for domestic economic and social development, but also for international relations. Its forms—of varying intensity, ranging from simple commission work through specialized production to the establishment of joint, multi- or transnational corporations functioning as legal entities—appear also as characteristic figures in international economic life.

The *movement of capital* and its international flow represent a necessity and, increasingly, an initiative and organizational factor in the case of either a simple exchange of goods or a more complicated co-operation. In effect, financial, credit co-operation appears as an important element in international co-operation—sometimes causing unwelcome surprises.

Continuing our survey of factors in economic and scientific international co-operation, we can say that science becomes, indeed, a productive force. Among other points, this is reflected in the circumstance that not only international meetings of scientists and highly spirited theoretical disputes are organized, with a tradition pointing back to ancient times, but also a close co-operation takes place



in the field of practice-oriented scientific activity, thoroughly related to production, including an intensive exchange and *turnover in intellectual products* as well.

Not only goods and commodities, money and science contribute to a rich flow in international channels, but also the *movement of men*. Along with tourism, already representing a worldwide migration of people, the employment of foreign specialists, or 'guest workers' who are simply workers accepting low-esteemed and despised jobs, equally assumes a massive character, and the significance of this phenomenon should not be underestimated from an economic aspect, for both the receiving and the exporting country.

My survey is highly simplified; nevertheless, it may suitably serve to illustrate that international co-operation has an actual significance with an effect on almost all essential factors in productive forces.

2. *Character and levels of international economic and scientific-technical co-operation.* — The typical and primary channel of its flow originates from *bilateral* relations between the individual countries concerned. The legal basis of the latter is formed by agreements of different types, in line with the given case. The development of this kind of co-operation is advanced by various organizational forms. A closer *economic integration*, developing among groups of various countries, is a gradually expanding tendency today, elevating bilateral relations in many cases to a multilateral-regional level. (Other aspects of regional relations are dealt with in Points 109–126 below.) The chain of relations may in certain fields reach the reality of a *universal* multilateral level, possibly also including stable organizational frames of the latter.

Traditionally, the *microsphere* is the more active field of movement in international relations, consequently, co-operation unfolds among enterprises and institutions. However, the significance of *macro-level* relations increases as well. In effect, two opposite tendencies may be observed here which ultimately converge. Namely, it is interesting to note that while State interference becomes more and more intensive in the modern capitalist economy (required, incidentally, by increasing demands in the field of research and development regarding costs, a high degree of risk, a characteristically long-term nature of research and development) that is to say, while among capitalist economies representation on the inter-State level also becomes gradually more intensive in international economic and scientific technical relations,<sup>1</sup> it is the engagement of the enterprising sphere in international co-operation that has become more articulated in the socialist countries. (Let us remark here that, in view of the radical political reforms that took place in 1989–90, the attribute 'socialist' may increasingly be classified as a historical term only.) The shift in trends is closely connected with the economic reform concepts of the European socialist countries. In these—beside the previously predominant macro-

<sup>1</sup> See GYENGE, Z.: Az állam nemzetközi gazdasági feladatai (The State's international economic tasks), in: *Korunk világ gazdasága* (World economy of our age) (ed. Nyilas, J.). KJK, Budapest 1980. Vol. I; BOD, P. Á.: *A vállalkozó állam a mai tőkés gazdaságban* (The State as being engaged in enterprises in today's capitalist economy). KJK, Budapest 1987; *A technológiapolitika intézményrendszere a modern piacgazdaságban* (The institutional system of technological policy in modern market economy), OMFB, Budapest 1990; cf. also Eörsi (1), esp. pp. 215–216.



level relations that had been based, partly, on the proprietary position of the State—the joining-in of the enterprise sphere to international co-operation increased with considerable strength and appears, in fact, not only in the field of relations with western countries, where significant traditions already existed in this respect, but within the ex-COMECON frame as well.<sup>2</sup>

3. *A few of the traits in the trend of development.* — The course of international economic and technical relations does not follow a straight line. From time to time, estrangement, discriminatory efforts, a more or less justified protectionism, etc. cause a sensibly troubling effect and as a result, the exploitation of traditional forms of co-operation becomes narrower in some fields or, at least, their pace of development slackens. The causes of this may be multifarious, and intentional political concepts may not infrequently play a more forceful role in it than do economic considerations. East-West or North-South *conflicts of interests*, or initial troubles of the formation of a new order of world economy make their effects felt in the field of international economic relations. Sharp criticism and suggestions aimed at the transformation of the system of relations have been formulated, especially on the part of developing countries. Nevertheless, *Bognár* was right in concluding: "... proposals in favour of turning inside which imply even a deliberate rupture with world economy may be benevolent but we consider them to be mistaken..."<sup>3</sup>

As a matter of fact, the various segments of the world economy participate in co-operation with different traditions and varying approaches, with unequal weight and proportions of intra- and interregional relations.<sup>4</sup> All these circumstances should not justify, however, efforts aimed at regional autarchy; on the contrary, the formation of an open and offensive strategy seems desirable.<sup>5</sup> (The specific problems of the developing countries will be dealt with in detail in Point 71.) In the long run, notwithstanding *negative tendencies*, temporary setbacks or declines, there is no alternative to the *expansion and development of international co-operation*. I am confident that economic reason and general common sense will reduce the phases of estrangement to an episodic role.

It is a generally observable tendency, presenting itself with an increasing intensity in "crisis periods", that the *rate of development of scientific-technical co-*

<sup>2</sup> In the wake of the so-called Complex Programme of 1971, and based on its encouragement, a certain degree of development—although by no means at a satisfactory pace—can be detected in the formation of micro-level relations. Cf. also KÖVES, T.: A világgazdasági nyitás és KGST-kapcsolataink megújítása (World economic opening and the renewal of Hungary's relations with COMECON), KSZ 1989/6.

<sup>3</sup> *Bognár, J.* (1).

<sup>4</sup> Cf. SZENTES, T.: A tőkés világgazdaság aszimmetrikus viszonyai és a fejlett tőkés és a fejlődő országok közötti nemzetközi munkamegosztás strukturális egyenlőtlenségei (The asymmetrical relations in the capitalist world economy and the structural discord in the international division of labour between the developed capitalist countries and the developing countries), in: *Tanulmányok az új világgazdasági rendről* (Studies on the new world economic order). Note 3 above.

<sup>5</sup> Cf. INOTAI, A.: *A regionális integrációk az új világgazdasági helyzetben* (The regional integrations in the new world economic situation), KJK, Budapest 1980; similarly, KÖVES, A.: *A világgazdasági nyitás: kihívás és kényszer* (Opening in world economy: challenge and pressure), Budapest 1980.



operation surpasses the traditional economic relations. To support this view, it may be sufficient to refer to the dynamic increase in the marketing of licences (i.e. intellectual products in a broad understanding of the term, including the engineering activity in particular). Their increase considerably exceeds that of the exchange of goods and commodities.<sup>6</sup> The data of patent statistics belong here, first of all the applications by foreigners.<sup>7</sup> It should be noted, however, that the respective connections are actually much more complicated, and the technical information has a much broader "lunar halo".<sup>8</sup> As a matter of fact, there are more delicate areas here, too (e.g. the transfer of technology useable also for military purposes) in which the development referred to above is not without interruption. Nevertheless, the *increasing dynamism* can on balance undoubtedly be taken for granted. To some extent, scientific-technical co-operation is a more neutral area and, as a rule, it is easier to penetrate the market of countries where deliberate protectionism is adopted with intellectual products than with goods and commodities. It seems, in fact, that this sphere of co-operation also offers more promising possibilities in the long run. Moreover, it is fairly apt to connect interests in a broad range of relations. It is, actually, a very useful indirect factor of political détente, i.e. also of the broad-scale realization of the spirit of Helsinki.<sup>9</sup>

4. *Role of the system of management of economy.* — Although the evaluation could be—on account of the radical changes of the economic-political regime of the ex-socialist countries in 1989–90—of an extremely relative and rather historical character, it would not be without interest to show some features illustrating—with respect to Hungary—the evolutive preparation of the above changes.

The Hungarian concept of economic mechanism introduced in 1968 secured an important role for commodity and monetary relations, for the market and for

<sup>6</sup> Cf. WOLF, A.: Lizenztransfer aus weltwirtschaftlicher Sicht, *GRUR Int.* 1973/8; MÁDI, Cs.: *Licenc és know-how. A szellemi termékek nemzetközi forgalma* (Licence and know-how. International exchange of intellectual products), KJK, Budapest 1976; *Lontai* (1).

<sup>7</sup> The number of patent applications in Hungary between 1980 and 1988 more than double; within this, in 1988, the proportion of foreign patentees surpassed 50% for the first time. See SZITA KAZAI, Á. (Mrs): Az 1988. évi találmányi tevékenység a statisztikai adatok tükrében (The activity of taking out patents for inventions in 1988, as reflected in statistical data), *SZK* 1989/9. The number of patent applications continued increasing in 1989, and reached 6935 (a historical record of Hungarian patent system; the latter has been functioning since 1895), while the proportion of foreign patentees rose above 60%. See IVÁNYI, I.: Az Országos Találmányi Hivatal 1989. évi tevékenysége (The 1989 activity of the National Patents Office), *SZK* 1990/3. According to recent data the number of patent applications has decreased (the PCT-applications' proportion has increased). Cf. SZARKA, E.: Az Országos Találmányi Hivatal 1993-ban (The Hungarian Patent Office in 1993), *MIE Közleményei*, 36.

<sup>8</sup> So, e.g., it cannot be left out of consideration that also in a 'simple' exchange of goods the exchange of items having greater 'intellectual content' grows more dynamically; in effect, on the basis of licence issuings, commodity exchange will—indirectly—multiply. Cf. KÁDÁR, B.: A fejlődő országok iparcikk-exportja (Exports of consumers' goods in developing countries); BOJKÓ, B.: Tudomány- és technológiáramlás és a fejlődő országok (Flow in science and technology and the developing countries), in: *Tanulmányok az új világ gazdasági rendről* (Studies on the new world economic system) (see Note 3); cf. the Report by J. NYILAS in the MIE published in *UL* 1976/8.

<sup>9</sup> We can only agree with J. Bogndár (2) who points out that "in the interdependent, complicated and dangerous world of today... the basis of survival and development of nations and social systems is lying in co-operation..."



competition.<sup>10</sup> Maintaining the fundamental basis of the socialist economic system, i.e. collective ownership of the major means of production and the planned direction of the economy on this basis, the 1968 economic mechanism deliberately separated the macro- and micro-levels of decision-making from each other.<sup>11</sup> Decision-making rights (together—of course—with risks and responsibilities) were accorded to economic units where receiving information as well as interestedness reached optimum levels. In conformity with this policy, the method of planning was transformed, planning in perspective came into the foreground. The functions of issuing directives in planning were replaced by a kind of indirect economic regulation. The independence of economic units increased, along with the possibilities for initiative, entrepreneurship, and assumption of risk. Market categories were utilized extensively in the regulatory system applied by economic management. Hence, it was acceptable to characterize this economic mechanism as functioning by a “planned influencing of the market” instead of emphasizing decentralization. A reasonable decentralization had to be applied, of course, in the necessary process of structural transformation, as a counter-measure to the former unjustified centralization. With this in mind, *Csikós-Nagy* emphasized ‘monetarization’ as one of the outstanding principles of the mechanism repeatedly.<sup>12</sup>

The concepts of economic policy attached a particular importance to technical development or, more precisely, to innovation-oriented approaches, considered an indispensable condition of economic advance and competitiveness. (The problem will be dealt with repeatedly and in detail in the following chapters.)<sup>13</sup>

Hungary’s sensitivity to foreign trading and consequently her orientation in foreign trade is well known. Considering the poor resources of raw materials and power sources of the country, it presented itself always with great emphasis, and especially deliberately when it entered into a more intensive phase of development. International co-operation has to be promoted, indeed, with all groups of countries, i.e. with COMECON member states as well as capitalist and developing countries. With respect to the latter group, too, we can report on some advancement which mitigates the otherwise valid criticism that Hungary’s foreign trade policy in practice has been extensively Europe-concentrated.<sup>14</sup>

Economic reform has taken a by no means unbroken course of development. The inherited ‘deficit’ had its role here<sup>15</sup> just as well as the unexpected or, more

<sup>10</sup> Concerning an assessment—reflecting also the legal aspects—of the economic mechanism cf. *Eörsi* (2); see also *Sárközy* (1).

<sup>11</sup> Concerning the relativity and difficulties of qualifying the economic problems at macro- or micro-level, see *KÁLMÁN, Gy.: A magyar gazdaságirányítás joga* (The law of Hungarian economic management). KJK, Budapest 1982, pp. 18 et seq.

<sup>12</sup> *CSIKÓS-NAGY, B.: A magyar gazdaság növekedési problémái* (The problems of economic growth in Hungary), *KSZ* 1982/7–8; idem: *Gazdaságpolitika* (Economic policy), KJK, Budapest 1982, p. 47.

<sup>13</sup> Cf. *CSABA, L.: Kelet-nyugati együttműködés és gazdasági mechanizmus* (East-west co-operation and economic mechanism), *KSZ* 1980/4; *NYILAS, J.: A tudományos-technikai forradalom második szakasza* (The second phase of the scientific-technical revolution), Kossuth, Budapest 1987.

<sup>14</sup> *Bognár, J. (3); Csaba, L., op. cit.*

<sup>15</sup> Cf. *KORNAI, J.: A hiány* (The deficit), KJK, Budapest 1980; idem: *Növekedés, hiány és hatékonyság* (Growth, deficit and effectiveness), KJK, Budapest 1982.



precisely, erroneously prognosticated and still more erroneously compensated multiplying effect of worldwide economic crises such as the oil price explosion. The inertia of co-operative practice established in the frame of COMECON also exerted a similar retarding influence. Nevertheless, the fundamental problem arose out of the inconsistencies of reform, its one-armed state of affairs. Thus, the slow pace of an actual change of economic structure, the excesses of monetarism suggested by *Friedman*, and the distorting effects of budget redistribution were justifiably criticized in the literature.<sup>16</sup> This course, covering more than two decades, has, however, a positive balance.<sup>17</sup> It served also as 'model-like' lessons, from which to draw general conclusions in the elaboration or advancement of economic reforms of other socialist countries.

From 1985–86 onwards, the fundamental principles and concepts of a 'new round' of *economic reform* have taken a more marked formulation. The proposed further advancement is based, invariably, upon the basic principles of the 1968 reform, but surpassing them substantially, the declared purpose is to create a real market economy. This requires the modernization of production and product structure, and dismemberment of excessively centralized economic organizations, with their diversification. A further requirement is an increase in small- and medium-size enterprises to assert the assessments of the market (international market) and to ensure that real economic competition may prevail. The establishment of financial and organizational conditions, incentives for enterprises, the further increase of independent enterprises, an important reduction of the redistributive functions of the budget, and a comprehensive reform of property with a reasonable privatization—all these were essential criteria of the success of reform.<sup>18</sup>

The required system of legal conditions has already been set up and extends over a fairly large area; reference can be made here to the reform of the Hungarian law on bankruptcy, on companies, on taxation, on the protection of foreign investments, the facilitation of the transformation of economic organizations, and on the extension of the possibilities of foreign trading activity.<sup>19</sup> The codification program comprises several other draft bills of major importance.<sup>20</sup> Among the conditions of an efficient and competitive economic management accentuated roles are as-

<sup>16</sup> See—among others—CSABA, L.: Mi történt a magyar reformmal? (What happened to Hungarian reform?) *KSZ* 1988/9; ERDŐS, T.: Átgondolt gazdaságpolitikát (Conceptualized Hungarian reform policy is required), *KSZ* 1989/6.

<sup>17</sup> Cf. BALASSA, B.: Az új gazdasági mechanizmus reformja Magyarországon (The reform of the new economic mechanism in Hungary), *KSZ* 1982/7–8.

<sup>18</sup> See *Csaba, Erdős*, op. cit.; MAKÁ, S.—BOBROVSKY, J.: A műszaki fejlesztés és a műszaki alkotó munka a gazdasági szabályozás új rendszerében (Technical development and technical-intellectual work in the new system of economic regulation), *MIE Közleményei*, 30.

<sup>19</sup> A survey (entitled 'International Forum on the Role of Industrial Property in Economic Co-operation Arrangements') of this was delivered by *E. Lontai* at a Conference in Moscow, Oct. 9–13, 1989.

<sup>20</sup> So, especially the modernization of the law of competition (cf. *Vörös* (4)). A Committee of Codification has also been formed for the preparation of a comprehensive reform of the Hungarian Civil Code.



signed to technical improvement, involving innovation-oriented approaches that have effects from science to practical realizations. The indispensibility of a world market orientation, with particular emphasis on Western Europe, is underlined in the reform concepts.

The 'political infrastructure' of a modern social market economy has also been developed or is being developed. The establishment of a democratic State based on the rule of law in a really pluralist, multi-party system—a stage of epoch-making significance of which was marked by the 1990 national elections—ensures a system of conditions favourable for the modernization of Hungary's economy, even if not in the short run and not without pain. All these efforts confirm, at the same time, the view that a successful *modernization* of a country requires the establishment of a complex system of conditions meeting the challenges of the time. By amalgamating new and old values—based on advanced techniques, economic efficiency, a differentiated structure of interests—and by setting up the requisite of political and legal instruments which reflect and promote the above interests, it is possible that the kind of modernization makes that implements and new solutions will be adapted in an automatic and organic way.<sup>21</sup>

## 2. The role of protection of industrial property in international co-operation

5. *Legal sphere of the protection of industrial property.* — The frames, partial fields, institutions, and norms of the legal sphere called the protection of industrial property took shape in a historical course. As will be pointed out in various sections below, this is not based upon an absolutely and convincingly logical concept; nevertheless, it is considered a unified legal area both by theory (education) and practice (codification).

Primarily those legal institutions classified in the sphere of industrial property are those the aim of which is primarily to protect by means of the law the interests attaching to *technical intellectual products* in the broad sense of the term. The law of inventions and patents has the oldest traditions in this field. It also includes rules concerning innovations, possibly discoveries, and—with a bit forced categorization—the protection of industrial design. Along with the instruments for the legal protection of know-how, the legal norms forming the basis for some specific types of contracts (on research, on licences, etc.), are also included in the category.

Both theory and practice also place within this group the legal institutions providing for the legal protection of *company marks* and *commodity marks*. The law of trademarks has the greatest significance and tradition among them, but the rules designed for the protection of trade names and companies and those applicable to the legal entrenchment on interests linked to geographical signs are also dealt with under this heading.

<sup>21</sup> See KULCSÁR, K.: *A modernizáció és a jog* (Modernization and the law), KJK, Budapest 1989, esp. pp. 10 et seq.



The above enumeration continues with the rules of the *law of competition*. These are legal prescriptions, equally protecting the interests of the competing parties and the general public (the particular interests of consumers included). Moreover, they support the fight against distortions which trouble the functioning of the structure of the national economy.

6. *Some theoretical problems.* — One of them is related to the placement of the legal sphere in question within the branches of the legal system as a whole.

The differentiation in and *internal division of the legal system* has been dealt with intensively by various theories of law, including Hungarian research. Several ingenious concepts have been formulated. Here the classification of the so-called *complex* spheres of the law constitutes the fundamental problem, and in this regard the theoretical (and codification) dispute concerning civil law vs. economic law.<sup>22</sup> Beyond doubt, the law of protection of industrial property is a sphere of this kind. In fact, the relations in real life forming the subject matter of the legal regulation of industrial property protection are many-layered, of complex character, and can hardly be considered a “monopoly” of a specific branch of the law. According to certain approaches, applied—not independently of the economic law approach—mainly in the ex-Soviet and ex-East German literature,<sup>23</sup> the traditional field of law on the protection of industrial property is to be considered an organic part of a so-called scientific-technical “branch of the law”. In Hungarian literature, *J. Bobrovsky* in particular approached the question in a comprehensive way, principally from the side of the management system and came to the conclusion that “... here the issue is not so much a legal branch but... the formation of a definite model of thinking and regulation...”. From his comprehensive picture of the situation the contours of a new science branch, i.e. patentology, come to the mind.<sup>24</sup> Based upon the traditional division of the legal system, the overwhelming majority of those engaged in the research of Hungarian civil law consider this field of the law as *part of civil law*. They often do so, more from pragmatic thinking supported by the inertia of tradition than from considerations of principle. Within this context, they place it to the *legal field of intellectual property*, together with the rules of copyright.<sup>25</sup> In general this opinion is characteristic also of the concepts of other legal systems.<sup>26</sup>

The internal coherence of this legal area is not free of problems, even if the basic civil-law preference is accepted. It is evident *prima facie* that, contrary to the field of copyright, the areas of industrial property referred to above are of highly diverse character, showing a considerable *heterogeneity*.<sup>27</sup> In particular, the common qualification reading “intellectual products” can be questioned. Distinguishing marks (trademarks, etc.) may appear in a given case, as the result of creative activity, too. As regards, however, their legal functions, this element is irrelevant.<sup>28</sup> The law of competition taken in its modern sense, i.e. the “law of market conduct”, raises justified doubts not only in respect to its placement within the range of intellectual products but its placement in the civil law can definitely be questioned as well.<sup>29</sup>

<sup>22</sup> Cf. esp. *Eörsi* (3); *Sárközy* (2). ASZTALOS, L.: *Polgári jog* (Civil law), I. *Általános rész* (General part); II. *Személyek* (Subjects). Tankönyvkiadó, Budapest 1982.

<sup>23</sup> So especially in the GDR and Soviet theory (e.g. *Ring, Pogodda*). See for detail, *Bobrovsky* (1). Recently, MAMIOFA, I. E.: *Izobretatelskoe pravo i grazhdanskoe zakonodatelstvo*, VI 1987/7; ZHUKOV, V. I.: *Grazhdanskoe zakonodatelstvo i institut intellektualnoi sobstvennosti*, VI 1989/8.

<sup>24</sup> *Bobrovsky* (1), esp. pp. 89 et seq.

<sup>25</sup> Cf. *Világhy* (1).

<sup>26</sup> Cf.—among others—MARTY, G.—RAYNAUD, P.: *Droit civil*, Sirey, Paris 1980. (Les biens), pp. 544 et seq.; IOFFE, O. S.: *Sovietskoe grazhdanskoe pravo*, *Juridicheskaya Literatura*, Moscow 1967, pp. 35 et seq.; *Eminescu* (1); *Dozortsev* (1); ZENIN, L. A.: *Nauka i tekhnika v grazhdanskom prave*. Moscow 1977.

<sup>27</sup> The copyright area is undoubtedly more homogeneous, but it is not fully exempt from problems characteristic of industrial property (e.g. in relation to neighbouring rights). Cf. *Boytha* (1).

<sup>28</sup> Cf. to this *Bobrovsky* (1); *Világhy* (3); *Lontai* (2); *Kopff* (1).

<sup>29</sup> Esp. *Vörös* (1).



The formulation of a unified *basis of principle* relating to the institutions of industrial property constitutes an additional theoretical problem—not irrespective of their classification within the branches of law.

Several attempts were made at developing theoretical concepts on the unity of industrial property and that of intellectual products, resp. on the coherence of the underlying societal relations and interests. Some of them laid emphasis exclusively or primarily on the property aspects of these relations, while others had first in mind—again, not only once with an idea of exclusivity—the personality interests of the creative man. Moreover, other authors attempted to synthesize the viewpoints on property and personality interests in their concepts.<sup>30</sup>

The theories preferring the property elements (called as property theories) are based on the oldest traditions. The partisans of this theory equated the legal relations coming into existence in connection with intellectual products (distinguishing marks) and proprietary rights relations. The ‘direct’ concept based on property has hardly any adherents today.<sup>31</sup> Nevertheless, in the usage of the legal terminology—not irrespective of the international institutional system’s influence—the terms “intellectual property” and “industrial property” are still prevalent. The further refinement of the property theory is reflected by the concept of immaterial goods which still has a considerable camp of partisans with influential representatives of the principle,<sup>32</sup> and it appears in codification.

In the Hungarian jurisprudence of civil law, both the property theory and the concept based upon immaterial goods had, in general, been rejected even earlier. In the critical approach by the subsequent Hungarian concept, the negation of these theories received even stronger exposition.<sup>33</sup> In effect, it needs to be pointed out that this critical approach is closely related to the property theories, that is to say, to the concept, based upon the physical things model, a theory which is not without problems either.<sup>34</sup> Notwithstanding this fact, the unity of the field of law in question is admittedly better served by putting the emphasis—even if exaggerated to a certain extent—on material elements rather than by referring to the exclusivity or priority of personality elements. The so-called competition law approach (*Elster*)<sup>35</sup>—in spite of the fact that it receives well-founded criticism—offers, similarly, a relatively solid basis for the unity of this field of law. The competition law theory is built upon the undoubted fact that technical development (as reflected by technical products, inventions, etc.) may constitute an advantage in the competition just as well as the distinguishing marks relied upon in the case of goodwill. (The specific interests of the creative man are thrown here, again, into the background.)

Turning now to the *Hungarian concepts* relating to intellectual products, one is bound, actually, to agree with the views claiming that, for the time being, it is only the contours of a comprehensive theory that are visible.<sup>36</sup> The relevant viewpoints are concerned only with the criticism of previous theories and, within that, with the rejection of the concepts based upon property rights, and on those of immaterial goods, rather than with a positive and detailed expounding of a theory proper. Let us examine the essential inferences that can be drawn here concerning the law of intellectual products.

Since the relevant rights are primarily of a personality character—albeit with forcible property implications—the point of departure for legal protection is not labour law. It should be assigned to the civil law instead. The protection of personal rights is guaranteed by a legal relationship of an absolute structure, so for the protection of the attaching property interests there should be created—similarly—an exclusive form of protection, based on the sort of the goods concerned. In Hungary, the problems of principle and theory of the protection by law of intellectual products have been analyzed so far

<sup>30</sup> A useful survey of various theories is provided by Világhy (1), and Boytha (2).

<sup>31</sup> Such is, e.g., RECHT, P.: *Le droit d'auteur, une nouvelle forme de propriété*. Paris 1969.

<sup>32</sup> Especially Troller (1), Vol. I, pp. 18–114.

<sup>33</sup> So, KOLOZSVÁRY, B. in: *Magyar magánjog* (Hungarian private law), Ed.: Szladits, K., Grill, Budapest 1942; Boytha (2); Világhy (1).

<sup>34</sup> Cf. Lontai (2).

<sup>35</sup> ELSTER, A.: *Urheber- und Erfinder, Warenzeichen- und Wettbewerbsrecht*. Berlin–Leipzig 1928; LEHMANN, M.: *Eigentum, geistiges Eigentum, gewerbliche Schutzrechte—Property Rights als Wettbewerbsbeschränkungen zur Förderung des Wettbewerbs*. *GRUR Int.* 1983/6–7.

<sup>36</sup> Boytha (2).



mainly within the jurisprudence of civil law. According to the most elaborated theory (Világhy),<sup>37</sup> the property relations attaching to intellectual products are basically relations of distribution, and this circumstance could form well a basis, in principle, for a regulation by labour law; nevertheless, a kind of regulation serving as an incentive for the creative man, and ensuring a more efficient harmony between individual and societal interests, can reasonably take place by means of civil law methods, by setting up a position of exclusive rights. Admittedly, the latter concept does not give a wholly reassuring reply either, as to the problems resulting from the heterogeneous character of the protection of industrial property (so e.g. the drawing into what kind of regulation the protection of the marks, or as to the law of competition), and the attaching property aspects are thrown into the background exaggeratedly.

As a recent development in Hungarian legal literature, it has emerged that the grounds for a modernized version of property concept have developed.<sup>38</sup>

As regards the problem of categorization of the protection of industrial property within the legal system and the theoretical problems of internal structure, the author's intention is only to indicate them—and to emphasize the tasks which constitute a challenge for modern jurisprudence—without pretending by any means that a final and consequent solution will be offered. In effect, it can be stated—by acknowledging the necessity of a complex approach to this complex question—that a reasonable structure of industrial property protection, along with guarantees for the realization of interests in a relatively simple way, can be set up mostly by methods characteristic of civil law, and that the most favourable organizational frames of spontaneous initiatives of the assumption of risks and of co-operation can be provided by the institution of contract, the precisely elaborated instrument of the civil law. In other words, *civil law* plays a *dominant*, essential, even if not a monopolistic role in the field of industrial property.<sup>39</sup>

Irrespective of theoretical concerns, the legal sphere of the protection of industrial property will—in expounding the subject matter of this study—be after all considered such a unit as is based on institutions and part areas explained in Point 5 above.

*7. Relations between industrial property and economy.* — The interdependence between the modern economy and research and development activities is an ever so often proven fact. Innovation-orientedness, ensuring a unity and organic development of economic activities, is considered to be one of the important guiding principles today. Simply put, this requires that all phases of the economic activities and the links between each of phases must be regarded comprehensively, keeping in mind the ultimate purpose. It should be a competitive product of high use-value which is to be imparted to the consumer. Submitted to this purpose, the entire activity must be continually renewed, in order to maintain and increase competitiveness. The subsistence of the product in the market must be prognosticated even in the earliest research phase. Research and development activities, production, and marketing must be adapted to this end.<sup>40</sup>

*An organic part of innovative activities* is the use of the instruments of *industrial property*. A carefully weighed industrial property law, applied in the subsequent phases of the process, is suitable to enhance the efficiency of the course of innova-

<sup>37</sup> Világhy (2), (3); Boytha (2).

<sup>38</sup> See Bobrovsky (5); Lontai (2), (16).

<sup>39</sup> See Bobrovsky (1); Világhy (3).

<sup>40</sup> E.g. BUCSY, L.: Vállalati innováció — idegen fejlesztés a gyakorlatban (Enterprise innovation — foreign development in practice), *KSZ* 1981/7–8; in a broader context KOZMA, E.: Az alkotó munkáról és az innovációról (On creative work and innovation), *TSZ* 1981/11; cf. also the material in *MT* 1981/4: Társadalmi innováció—innovatív társadalom (Societal innovation—innovative society).



tion. It cannot, of course, replace the respective technical, organizational, and economic methods but an expedient and *modern regulation by industrial property can increase an economy's competitiveness.*

As regards innovation and the relationship between innovation and industrial property, more details will be given in Points 137–139. It will suffice to illustrate the issue here only with a few examples. When the variants of setting research goals are considered, patent information may be of important help. By such information the trend of research and development activities of the competitive companies can be ascertained with a high probability. Moreover, on the basis of the information it can be decided whether or not it is reasonable to try to outrun competitors or, in the case of poor chances, to turn the research to another direction, resp. to attempt to acquire the rights to use some forms of realization which had already been elaborated, e.g. by means of a licence or co-operation contract. In fact, a well-considered patent policy may ensure a more solid basis for the marketing of own achievements—either through own channels, in the form of intellectual products, or that of commodities or material products. A higher price may be obtained, as a rule, for a product comprising also the form or forms of realization protected by patent. To achieve this, and in order to ensure legal protection in due time, e.g. by making use of Union priority, it is necessary, of course, to have actual ideas or information (e.g. of the targeted export markets already at the time when patentability is considered). An attractive, fashionable appearance is a potential advantage in the competition of products with identical use-value. Furthermore, attractiveness or competitiveness achieved by exterior design may be put on a solid legal basis by acquiring industrial model protection. The protection of efficiently introduced goods labels—which, relying on favourable experience, can spark and maintain a consumer's interest—as trademarks are able to promote the effectiveness of acquiring and preserving a good position in the market as well as the attainment of favourable sales conditions.

The importance of the relationship between the institutional system of industrial property and innovation activity requires recognition. Their relation needs efficient realization in the process of micro-level *enterprise* activity, but by no means only there. It is a fundamental task of the State-run *economic management* in this field to create or promote an appropriate institutional system of innovation relations, based on the respective organizational, economic, informative, and legal conditions, with particular emphasis on the priorities of industrial property protection. Recognition of all the implications of the above criteria is characteristic of the *economic policies* of several countries.<sup>41</sup>

8. *Internationalism of industrial property.* — A favourable attachment of the institutional system of industrial property to the development of the economy, and innovation activities in particular, are well founded not only with respect to the above considerations. Industrial property is, indeed, a *traditionally international* field of law as is plentifully confirmed by the development of its history.<sup>42</sup> (The

<sup>41</sup> See the OMFB compilation referred to in Note 1.

<sup>42</sup> See *Lontai* (3)–(16); PLASSERAUD, Y.—SAVIGNON, F.: *L'État et l'invention; histoire des brevets*. Paris 1986, esp. pp. 73 et seq.



pragmatic approach, resulting from the recognition of internationalism is, in fact, one of the factors of the heterogeneity of the legal area.) Industrial property protection can contribute efficiently to solidify the *legal basis of international economic and scientific-technical co-operation*.

Also the fact that the institution and norm system of industrial property show such solutions in individual legal systems as are in many respects identical with, or very close to, each other is not to a small extent attributable to the considerable role played by the agreements of universal character that came into existence in the field of industrial property—such as the outstandingly weighty Convention for the Protection of Industrial Property, signed in Paris on March 20, 1883. The specialists engaged in industrial property speak, more or less, the same language. It would be a mistake not to duly exploit this advantage when developing international relations. Some degree of legal unification is already a reality in the course of co-operation in the field of industrial property. Moreover, co-ordinated solutions, similar in several aspects, can also be observed in addition to the afore-mentioned reality. The *chances of law harmonization or unification of law are above average* in this field. With regard to the promising relations between unification of law and scientific-technical and economic co-operation, it seems to be more than desirable to develop and improve the trend of unification.

### 3. Objectives of the study

9. *Subject matter and aim of the study.* — The practical timeliness of the problem is highly underlined by the *revision of the Paris Convention* now being effected. Problems concerning the entire field of industrial property protection, considerably influencing its long-term chances of development, and concerning also a broader range, present themselves more pointedly in this course. The timeliness is supported by the work connected with the reform of other international conventions or the elaboration of other agreements, respectively, as well as the intensive development of regional co-operation in the field of industrial property protection.

The role of the system of industrial property in the development of international economic relations and the usefulness of this contribution are in general assessed favourably. However, critical comments, cases of negative criticism, and objections occur as well, qualifying the institutional system and the traditional norms of industrial property as impediments to its development. Condemning assessments are declared by organizations or “speakers” of the developing countries or some groups of them in particular, proclaiming the whole field as useless in an extreme case or demanding at least a radical reform.<sup>43</sup>

The given conditions in Hungary with the specific *interests of development* command a close link to *international co-operation*, suggesting its *extension* with a many-sided and dynamic development. With a view to promote Hungary's nation-

<sup>43</sup> For a detailed survey, see Parragh (1).



al interests, it is not without significance to look for a balance between the pros and cons of international co-operation in the field of industrial property, and to delineate the guidelines and leading principles of a desirable development.

Taking this into consideration, the fundamental objective of the present study is to investigate and reveal the character of international co-operation in the field of industrial property, to assess its advantages and possible setbacks, to analyze the tendencies and efforts unfolding in this range, *to give a theoretical basis of principle to the decisions of economic and legal policies* related to them, keeping in mind national interests and aspects from a broader context as well. Decisions of the said kind are necessary, indeed, in the revision process of the Paris Convention or when the views affecting the long-term development of its system will have to be formed, and also for the concepts to be enforced within regional co-operation. Evidently, the viewpoints in question, affecting international co-operation, may partially influence the main tendencies of improvement in the Hungarian system of industrial property law.

10. *Method of elaboration.* — *Comparison* on a broad scale is evidently the method applicable to the present subject. An international system of industrial property law comprises, in effect, not only the principles and norms as laid down in international (both universal and regional) agreements, but the complex of more detailed solutions as regulated and applied in various national legal systems as well. In fact, international agreements are only suitable to establish the most important principles. An actually unfolding co-operation can be analyzed more efficiently within the frame of national rules of industrial property protection. In line with this, the comparison and evaluation of the arrangements by individual legal systems and investigation of the existence or chances of harmonization play a predominant role in this study.

The analysis of *historical* development is also justified to the extent necessary by the presentation of the institutional system of industrial property and its international framework. Nevertheless, because of the primary importance of concentration to the topical problems, the historical approach is not a predominant method of this work.

The selection of *sources of material* in this study is also limited by a consideration of timeliness. Since it is rare that the approach chosen here is reflected in monographs, support could only be drawn, first and foremost, from legislation, the court practice, the documents or papers of international organizations or articles and essays affecting some aspects of the subject matter, usually of shorter volume. Taking into consideration the intensive connection between institutions of industrial property and the economy, it was unavoidable to refer to the economic aspects of individual problems, apart from the primary approach from the side of jurisprudence, even if the present study does not qualify as having an actually interdisciplinary character. In particular, this is true of the evaluation of various solutions and the comparison of their pros and cons. Evidently, the necessity of conformity with the concepts and the purposes of Hungarian economic policy influences the formulation of the suggestions laid down here, e.g. the harmonization with the legal system of the EC.



A deeper analysis of some theoretical problems, the confrontation of views, and evaluation and accentuation of arguments were considered to be beyond the target of the present study. As reference was made to the point, the institutional system of industrial property raises several *problems of systemization* as well. The fundamental purpose of this work and its marked *practice-oriented* character in particular would hardly have submitted to give a differentiated analysis of the respective problems, at least not without the risk of upsetting the proportions judged to be desirable. Accordingly, the actual institutional system of industrial property is regarded as a potential starting point, and the theoretical concerns of principle are, in fact, merely indicated.

The elaboration of the subject matter made necessary an *approach from several directions*, i.e. an investigation relying on the frames of given legal solutions, along with analyses and assessments from the point of view of interests and their confrontations, as well as the presentation of tendencies which partly arise within the individual institutions concerned, and partly pass through the latter so as to permit an abstraction. This method cannot avoid some repetitions or *overlaps*. As a result, given spheres of problem are dealt with repeatedly, although in different contexts, from various approaches, and with changing emphases.

Finally, the practice-oriented nature of the chosen subject matter made it imperative not to restrict its treatment to the analysis and assessment of principle of the respective tendencies but also to attempt to formulate *concrete proposals* concerning the topical problems of international co-operation and the solutions that may be utilized in the field of Hungarian legislation and application of the law.

11. *Structure of this monograph.* — In Chapter II the *international institutional system* of industrial property is introduced, i.e. the Paris Convention, the subsidiary agreements attached to it, and WIPO, serving as the organizational and functional frame of the unions. The course of the historical development of the Convention and the achievements of its efforts towards universality are outlined, and fundamental principles and rules of the Convention are addressed. A survey is given of the subsidiary agreements of various character, attached to the Convention, describing their specific features. The disputed problems that occurred in connection with the due revision of the Convention are analyzed. (This chapter is principally of a descriptive character, partly because I wanted to give a relatively comprehensive picture of the Paris Convention—partly because it furnishes a brief summary of the illustrative material to be found in the explications constituting the subsequent chapters.)

In Chapter III, the *interests and conflicts of interests* are examined which are to be considered in the regulation of industrial property protection. The character of the Paris Convention's traditional model, basically built upon the relations of competitors, is evaluated and criticized with special regard to individual countries, along with regional and universal interests. By illustrating the variants of regulation of some institutions of industrial property, this chapter presents the interests of the respective authors, competitors and consumers, the possible conflicts between partial and general interests, and moreover, the specific interests. It is



emphasized that the promotion of a correct harmonization of interests by means of industrial property is also necessary.

In Chapter IV the *timely tendencies* prevailing in the field of *industrial property protection* are analyzed—namely, the centripetal effects working for the strengthening of unity and universality, and the centrifugal elements eroding the traditional system of industrial property protection. For confirming the argumentation, a detailed proof is provided from individual areas of industrial property protection. The development of the scale of protection, and the increase in forms of protection, as well as the types of contracts applied in the field of industrial property, the growing role of the regional element, traditional principles, and new, specific approaches in respect to e.g. environmental protection, consumer protection—are all scrutinized.

Based upon the statements of the preceding chapters, Chapter V deals with the aspects of the *unification of law*, its chances and desirable methods of law-harmonization. Finally, some *conclusions* and *proposals*—favourably like theses—are formulated in Chapter VI. Positions to be shaped on problems relating to universal and regional integration of industrial property, and the tasks of Hungarian legislation, are outlined.



## International System of Institutions for Industrial Property; the Paris Convention

### 1. The legal framework of co-operation in the field of international industrial property

12. The development of the economic and scientific-technical co-operation outlined in Chapter I, and the fact that co-operation becomes increasingly more international in nature, requires a stock of adequate legal instruments, and a suitable legal framework.

The institutions of individual legal systems that existed in *national frameworks* could not possibly guarantee the unobstructed conditions of a desirable international co-operation,—or could do so only to a lesser extent. Even though—as a result of a traditional internationality of given social relations—it was that certain common principles, rules, had developed relatively early, the patent systems and those of industrial property law showed (and show even today) considerable differences concerning conception as well as legislation in various countries. In relation to the evaluation of technical products and to the legal fate of marks used in economic competition, the differences mentioned above led to chance solutions only, to disadvantageous discriminations, and resulted in unjustifiable injuries to interests, in clashes of interests; consequently, they hampered the spread of technical products and marks used in competition.

Consequently, it has become indispensable that the national framework had to be overstepped, that minimum safeguards had to be secured on an *international plane*, and that an international system of institutions had to be developed for the promotion of co-operation. Even if not always with a claim to perfection, but basically in an instrumental way—this has been carried out through the functioning, for more than one hundred years now, of the Paris Convention (PC). We can say that the latter is the “Magna Charta” of international industrial property.<sup>44</sup> In our days, the legal framework of co-operation for the latter is based on the Paris Convention which—together with the various subsidiary agreements joining it in the course of development—constitutes a set of legal instruments, being, naturally, in close connection with the industrial property law of the individual countries. In effect, these legal norms have been strongly influenced by the Paris Convention.

<sup>44</sup> Cf. the representative publication of WIPO (Publ. No. 875), in *Paris Convention Centenary*, 1883–1983.



The aim of the present Chapter is to explain and evaluate the particular features and development of the Paris Union.

Let us mention here that in the field of co-operation in relation to industrial property, *regional connections* have an increasingly greater part to play. An investigation into questions related to these, that is to say, the analyses of the relationship and possible conflicts between universality and regionality will have their turn in another place of the present discourse (see Chapter III).

## 2. The origin and development of the Paris Convention

13. *The origin and economic-legal environment of the Paris Convention.* — Succeedingly historical forerunners (Venice Decree, Statute of Monopolies), it was in the end of the 18th century that the first patent codification (namely the patent law of 1790 in the USA, as well as that of 1791 in France) which can be qualified as modern even by present-day standards, had their turn. In the 1860s and 1870s in a number of European countries, the codification of patent law had taken place, the nations thereby establishing the framework of industrial property law—even if not without conflicts.<sup>45</sup>

The rapid industrial development in the 19th century had a stimulating effect on the creation of new mechanical devices as well as on the birth of inventions. The widespread and efficient use of these in economic competition had been urged by the interests of the monopolies, which established themselves in a characteristic way of the period of late capitalist development, and by the world market, which had been enlarging through the monopolies' intensive participation. The establishment of an international system for industrial property became a 'recognized necessity'.

The initial action for a comprehensive international regulation set out—not accidentally—in the USA.<sup>46</sup> A favourable opportunity was provided by the 1873 Vienna World Exposition. Using this opportunity, the Austrian Government arranged a diplomatic conference to prepare an international convention.

After the 1873 *Vienna Conference*, further conferences had their turn (1878, 1880), this time in Paris, and in the end the Paris Convention for the protection of industrial property was signed in 1883.<sup>47</sup>

14. *The fundamental principles and regulations of the Paris Convention (PC); the legal character of the Convention.* — The prescriptions of the Convention partly establish such principles and norms as aim at the direct promotion of international

<sup>45</sup> So especially in Switzerland and Holland the patent codification faced practical obstacles by the representatives of free trade doctrine. Cf. Bobrowszky (1).

<sup>46</sup> KRONSTEIN, H.—TILL, T.: A re-evaluation of the International Patent Convention. *Law and Contemporary Problems*, 1947/4.

<sup>47</sup> To the general problems of PC, see BODENHAUSEN, G.: *Guide to the Paris Convention*, Genf 1968; *The International Patent System as an Instrument of Policy for National Development*, UNCTAD TD/B/C.6/AC. 2/3 (1975); SUNSHINE, R. B.—BUXBAUM, R. M.: *Industrial Property Law*. University of California, Berkeley 1977. Vol. II (The International Patent System); Bogsch (1), (2).



co-operation and partly serve the unification of national law-making—or at least the creation of a unified basis in the field of industrial property. The prescriptions can also be grouped on the basis of the institution of industrial property to which they relate (e.g. patent, trademark, etc.), or whether they touch upon macro-level tasks (international public law issues) or on substantive legal norms which concern persons.

The basic principle of the Paris Convention is that of *national treatment* (*régime national*).<sup>48</sup> This basic principle—in any event typical in international relations<sup>49</sup>—reflects the requirement of discrimination-free treatment. To that effect, each Convention-member State is bound in the field of industrial property (obtainment, maintenance and enforcement of protection) to ensure such legal conditions for the applicants or interested persons (citizens or legal persons having headquarters in the country) originating from any other Convention-member State as are equal to those ensured to its own citizens or legal persons. This of course does not mean that the given country's own—either more or less favourable—legal norms will apply to foreign applicants, but that in principle they can start with a chance equal to that of nationals in the competition related to the given country's industrial property protection. In other words, as a result of the more secured position provided by the institution of industrial property, the competitiveness of foreign patentees will become stronger. Equal treatment evidently lays down formal—and not material—reciprocity. This basic principle of the PC promotes to a considerable extent the international development of relationships in the field of industrial property.<sup>50</sup>

Compared to the original conception, the PC basic principle has been realized on a broader scale, by its Art. 3. The latter provides that the principle of national treatment is to be applied also to citizens who—although they do not belong under the jurisdiction of the given Convention-member State—reside in the country or have some “real and operating industrial or trade premises” there. Moreover, it is to be noted that in practice the *régime national's* sphere of realization is, in general, even broader. Namely, it extends—in the case of presumptive reciprocity—to the natural and legal persons of the non-union-member country, too.

The acceptance of the principle of national treatment was not quite taken for granted. Actually, a choice could be made from three fundamental variants. Namely, there were a number of advocates of

<sup>48</sup> More exactly the principle of equal treatment with *nationals* (national treatment of foreigners), which is not identical with discrimination free treatment of the citizens of various foreign countries, that is to say, with that of foreigners in comparison *with one another*. Further on, however, I shall use the terminology which—even though it is inexact—is shorter and accepted in legal usage. Mention is also to be made of it being called a principle of assimilation (*Bogsch* (1)). It should be noted here that there are legal writers who conceive of the assimilation principle differently, and think of it as the ‘extending’ principle as is comprised in Art. 3 of PC. On the occasion of the 100th anniversary of PC, the representatives of the founding members analyzed the economic-social background and justification of their decisions at that time in several studies (*Prop. ind.* 1984/11).

<sup>49</sup> Cf. MÁDL, F.–VÉKÁS, L.: *Magyar nemzetközi magánjog* (Hungarian private international law). Budapest 1981, pp. 180 et seq.

<sup>50</sup> This is the very principle which in the course of the timely revision of PC is rigorously criticized by the developing countries.



the 'supra-national' concept, which suggested a uniform regulation of the whole legal sphere, extending over the details as well, placing in this way the institution of a kind of 'world patent' as an aim. At the time of the creation of the PC, this concept was qualified as a strongly Utopian endeavour, and even today it has a realistic basis only within a regional frame and even there—as I shall point out later—its potentiality is not without difficulties. Then, there has emerged the possibility of building on material reciprocity, that is to say, such rights would be guaranteed for the foreign subject of law in the patenting country as are available for this country's subjects in the given country. This kind of arrangement reflects the putting into the foreground of State-national interests, and it would have continued with great probability, and in contradistinction to the set multilateral aims, leading to the overwhelming role of bilateral relationships, serving thereby to a lesser extent the universal law approach. Admittedly, the 'founding fathers' of the PC, by their lasting codification of the principle of national treatment, demonstrated such openness of views as were unusual in their time, to profess well-intended liberalism, and pragmatism at the same time, thereby creating valuable precedents for other areas of international co-operation.<sup>51</sup>

15. A hardly over-appreciable institution of co-operation has been introduced by Art. 4 of the PC, namely, the *union priority*. On the basis of this institution, the date of filing in some Union-member country (the so-called basic application) for the protection of industrial property (patent, trademark, etc.) is relevant in respect to the judgement on a later filing produced in any other Union-member country, insofar as the applicant refers to that date (claims for union priority), and insofar as the later filing takes place within the 'grace period' reckoned from the date of filing the basic application in the country concerned. (This priority date is 12 months in the case of patents and utility models, but only 6 months in relation to trademarks and industrial designs.) Within the priority period applications can, in principle, be filed in all Union-member countries. In practice the circle is, of course, more restricted than that. Nevertheless, the applicant has a certain period at his disposal for deciding—after weighing the export possibilities, the chances of marketability of the product to be protected, by comparing these and the costs required—whether he wishes to make use of the advantages based on union priority. In case he realizes the priority, the date of the basic application is directive with respect to protection criteria; furthermore, he enjoys preferential treatment in the course of the assessments concerned with other filings following the basic application; no reference to events succeeding the basic application (for example, prior use) is available.

It is not a condition in the assertion of the union priority that, on the basis of the basic filing, the protection should be granted; more exactly, the legal course of the basic application is irrelevant (revocation of the patent, nullity etc.). This follows also from the principle of independence of protection (to be touched upon later on).

In the course of the enforcement of Union priority, the principle of *convertibility* also prevails in a certain sphere. For example, an application for utility model protection can be built upon an application for a patent, and *vice versa*, priority with respect to a basic application for utility model protection can be asserted in the course of applying for industrial model protection. As regards Union priority

<sup>51</sup> Cf. to this, in detail, *Beier* (1). With a certain scepticism, *BALLREICH*, H.: Ist "Gegenseitigkeit" ein für die Pariser Verbandsübereinkunft massgebliches Völkerrechtsprinzip? *Ibid.*



enforcement, Art. 4. I, inserted at the time of revision in Stockholm, provides that filing for an author's/inventor's certificate is to be judged on an equal basis with patents.

16. With respect to the various institutions for industrial property, the Convention formulates several provisions which are general in nature, establishing thereby as it were the minimum standard of protection. I shall touch upon these in the following point; here I refer to only a few of the regulations that have *common validity*.

The *principle of independence of protections* is laid down in the Convention. Legal protection for technical products, commodity marks, etc. is guaranteed by the legal norms of individual countries, on the basis of the parties complying with criteria determined in those norms and with an effect extending over the territory of the country concerned. In fact, the protections are territorial in nature. Following from this, and this is set forth also in the Convention, the differing regulation, or changes in the legal course of the applications with identical subjects, resp. protections, do not have an automatic influence upon one another. The protection obtained in one country does not guarantee that the protection will be available in another country as well (either as a result of differences in the protection criteria, or because their requirements in practice are different). At the same time, cessation of the protection granted in one country does not effect the validity of the protection obtained for an identical subject in other countries.

A common rule worth mentioning relates to the so-called *exhibition priority*, or preferential treatment. The sense of this regulation is that inventions, trademarks or models put into public view at international exhibitions announced in compliance with the relevant rules enjoy temporary protection (Art. 11). The advantage of this measure appears partly in the realization of the priority. Partly it generally prevents the novelty-spoiling consequences that may accompany the product's public-view appearance in case this is produced in the claimant's own arrangement.

Finally, Art. 12 of the PC contains an important prescription. Each of the Convention countries is obliged to set up a separate *authority of industrial property*. In Hungary it is the National Invention Office, which in its official gazette, 'Szabadalmi Közlöny és Védjegyértesítő' (transl.: Patent Gazette and Trade Mark Bulletin), publishes the granted patents, and registered trademarks, etc.

17. The Paris Convention is a *universal, open international treaty*, law-making in nature.<sup>52</sup> The openness of the PC founders must also be emphasized in this respect. In fact, we can also find among international treaties such as—even though they are supposed to be open—have variants, degrees, and—not only once—requirements that bind the possibility of joining the Union to 'pre-screening' politically or 'entrance exam' while the system of joining the PC emphatically expresses the principle of an 'open gate'.<sup>53</sup> The Union does not qualify as an independent international legal entity; rather, it is a union of the community of Union-member

<sup>52</sup> Bobrovsky (2), (3); Pálos (1) and Mádl-Vékás, op. cit.; cf. also BALLREICH, H.-KUNZ-HALLSTEIN, P.: Zur Frage der Reform des für Revisionen der Pariser Verbandsübereinkunft geltenden Einstimmigkeitsprinzips, *GRUR Int.* 1977/7.

<sup>53</sup> Cf. Beier (1).



countries, co-operating in administrative and financial matters. (WIPO, which provides for the Convention administration, is an international legal entity, as described below.) The realization of the PC regulations generally needs a domestic legal transposition, that is to say, the ratification of the agreement, and its promulgation in the form of a national legal norm.<sup>54</sup>

18. *The revision of the PC.* — Industrial property is characteristically a legal area that is extremely sensitive to changes resulting from technical development. Evidently, along with the possibilities for guaranteeing the realization of interests related to stability and legal security, the possibilities related to modernization or modification should also be ensured in the Convention; Art. 14 of which serves to meet this requirement. It provides that regular supervision and revision of the Convention are indeed necessary, consequently, they should be made possible.

The Convention has so far been revised *six times*,<sup>55</sup> viz. at Brussels in 1900, Washington in 1911, The Hague in 1925, London in 1934, Lisbon in 1958 and Stockholm in 1967. (The questions of a timely revision will be touched upon below, in Points 38–47.)

The task of the revisional conferences was to carry out modernizations, which was basically accomplished. We can state that the PC system has become refined; it has tended to enlarge the scope of protections (see a more detailed treatment of this in Chapter IV), and that the methods for solving various problems have received more elaboration. In what follows below I shall refer—without endeavouring to give a full account and assessment—to the fairly significant provisions inserted into the Convention in the course of individual revisions.<sup>56</sup>

The *Hague Revision* (1925) amended the Convention by adding the principle of patent independence (Art. 4<sup>bis</sup>); the regulation relating to the minimum period of grace for the payment of prescribed fees for the maintenance of industrial property rights (Art. 5<sup>bis</sup>); exemption of devices used on broad vessels from the effect of the patent (Art. 5<sup>ter</sup>); the specific protection of well-known trademarks (Art. 6<sup>bis</sup>); the possibility of denunciation of the Convention (Art. 17<sup>bis</sup>).

In the course of the *London Revision* (1934), the questions of unity—relevant from the viewpoint of Union priority—regarding patent applications, the obligation to exploit the inventions as well as the rules of compulsory licences receives a more detailed explanation. One of the fundamental personal rights of the inventor is also laid down in the London revision, stating: "... inventor has the right to be mentioned as such in the patent" (Art. 4<sup>ter</sup>).

<sup>54</sup> The effective—Stockholm—text of the PC was proclaimed in the 1970 Law-Decree No. 18 in Hungary. Cf. recently to the problems of the question: BODNAR, L.: *A nemzetközi szerződések államon belüli alkalmazásának főbb kérdései* (The main issues of in-country application of international treaties) (Dissertation, MS). Szeged 1983.

<sup>55</sup> The first two revisional conferences (Rome, 1886 and Madrid, 1890) were actually unsuccessful, so they are not kept on the record officially.

<sup>56</sup> For a survey of another viewpoint of the revision results, relating to the individual institutions of industrial property, see *Bogsch* (1).



In the *Lisbon* Revision Conference (1958) amendments were inserted to the Convention on the regulations of the compulsory protection of industrial designs (Art. 5<sup>quinquies</sup>) and on service marks (Art. 6<sup>sexies</sup>).

An essential amendment of merit in the *Stockholm* Revision (1967) is that, with respect to priority, it places author's certificates and patents on equal footing (Art. 4.I).<sup>57</sup> Otherwise, the *Stockholm* Revision introduced modifications first of all in procedural-organizational questions (for example, the ban on joining the Convention on the basis of earlier texts and the restriction of denouncement), with special regard to the establishment of WIPO at the same time.

Mention must be made here of the characteristic rule related to the revisions, which made—up to the time of the *Stockholm* revision—the accession to the Convention on the basis of any text of the PC possible, resp. in connection with those countries which were members on the basis of some earlier text, assigned to the latest 'common' text of a directive character. Hungary, like the overwhelming majority of the member countries, ratified the *Stockholm* text; there are, however, Union-member countries which still base their membership on the text of The Hague Conference (Brazil, Dominica); the London text (Canada, Indonesia, Iceland, Lebanon, New Zealand, San Marino, Sri Lanka, Syria, Turkey); the Lisbon text (Argentina, Bahama, Cyprus, Haiti, Iran, Malta, Nigeria, Philippines, Tansania, Trinidad and Tobago, Zambia). Thus, in our connections with respect to industrial property, The Hague text is directive for our relations with Brazil; the London text for those with Canada; the Lisbon text for those with Argentina.<sup>58</sup>

The revision conferences—in addition to the modernization of the PC—also provided opportunities for the conclusion of one or the other of the so-called *special agreements* (see Points 23–33 below). These include, in connection with The Hague Revision Conference, the agreement on depositing industrial designs at the so-called international depositary organs; in the course of the Lisbon revision, the agreement on appellations of origin; most recently, the Nairobi agreement relating to the protection of the Olympic badge.

### 3. The universality of the PC

19. While indicating the distinctive features of the PC, we indicated its open, many-sided, universal character. Let us now examine the results in practice of this endeavour to be universal, from two aspects, namely, the changes in membership rates and the comprised sphere of regulation.

20. *The number and composition of member countries.* — When on 20 March 1883, the Union Convention was signed, the number of 'founding fathers' was 14: Belgium, France, Great Britain, Italy, Holland, Portugal, Serbia, Spain, Switzerland, Brazil, Ecuador, Guatemala, El Salvador, Tunisia. The USA, the initiator,

<sup>57</sup> On behalf of the socialist countries, a motion for recognizing the institution of author's certificates was already lodged as early as the Lisbon Conference (cf. WIPO Doc. PR/GE/III/9), but it led to success only in Stockholm, not irrespectively of the fact that the Soviet Union joined the PC in 1965.

<sup>58</sup> Cf. Pálos (1) for some of the related problems of principle and practice. Incidentally, this is why the following Hungarian Law Decrees are still in force: XVIII of 1929, proclaiming the text of The Hague; No. 17 of 1962, for the text of London; No. 7 of 1967 for that of Lisbon.



joined the Convention only in 1887, while Ecuador, Guatemala and El Salvador left the Union within a short time.<sup>59</sup>

In spite of the endeavour for universality, the other countries' enthusiasm for joining the Union proved to be moderate. By the turn of the century, membership increased to 16, while by the outbreak of the First World War, membership increased merely to 22 (Hungary joined the Union in 1909). Between the two World Wars, up to 1945 an additional 17 countries joined, thereby increasing membership to 39; after World War II—with newer members—this number became a round 50, by 1960.

While the first 80 years of the PC show a moderate increase, *growth after 1960 is abrupt*. The great number of new members is closely connected to the decolonization process. Consequently, as a correction of the data on the number of members, care must be taken to note that, not in one case, had the given country—qualifying as a colony—actually been a member of the Union, on the basis of the mother country's right.<sup>60</sup> As of the 1st January of 1994, the PC has 117 countries as members.<sup>61</sup> It may thus be stated that in the course of the Convention's 100 years of development, the endeavour to ward *universality has become a fact*. This result must not be underestimated, even though a certain degree of stagnation can undoubtedly be observed as well.<sup>62</sup>

The *composition of the Union member countries* in 1994 shows a picture as follows; 30 so-called developed capitalist countries; 23 ex-socialist countries (Czech Republic, Slovakia, Bulgaria, Cuba, Yugoslavia, China, Poland, Belarus, Hungary, Mongolia, Croatia, Kazakhstan, Slovenia, Ukraine, Rumania, the People's Republic of Korea, Vietnam, the Russian Federation, Bosnia and Herzegovina, Latvia, Moldova, Macedonia, Uzbekistan); according to a categorization by the UN, China, Cuba, the People's Republic of Korea, Yugoslavia and Vietnam should be listed in the group of developing countries; finally, Convention members include 61 developing countries (if Yugoslavia, China, the People's Republic of Korea, Cuba and Vietnam are listed here, the number is 66). Consequently, the *majority of PC member countries comes from developing countries*. This circumstance has a significant influence as far as the model-changing (concretely, the timely revision) of the PC is concerned.

Besides the pleasing membership data, reference must also be made to the fact that a number of the developing countries are at present not members of the Union. A majority of the Latin-American countries (among them, the three founding members mentioned above), almost 20 Asian countries (among them, India, Pakistan, Cambodia, Laos); more than 20 African countries (especially many Arabic ones) stayed away from the PC framework.<sup>63</sup> This cannot be explained by merely

<sup>59</sup> Cf. *Sunshine-Buxbaum*, op. cit. Following this it was only once that a country used the right of revoking, namely, Laos in 1968. Cf. *Bogsch* (1).

<sup>60</sup> LADAS, S. P.: Some suggestions on the Future of Industrial Property. *GRUR Int.* 1973/6–7.

<sup>61</sup> The source of information also for further data is: *WIPO Doc.* 423(E).

<sup>62</sup> Beier's somewhat sceptical assessment is built on this fact, *Beier* (1).

<sup>63</sup> For a more detailed analysis and assessment, cf. *Ladas, Sunshine-Buxbaum*, op. cit. Incidentally, it should be mentioned that several of such countries which are not members of the Union are members of the WIPO, as e.g. India.



the eventualities of historical development, or by the backwardness of a given country's infrastructure in relation to industrial property;<sup>64</sup> it can be conceived of as a kind of criticism. Often the developing countries think of the PC as a 'club of the rich', which is not suitable for reflecting the particular interests of the developing countries. We shall return to an analysis of the conflict of interests relating to this statement (Chapters III–IV). Here we can only take the risk of inferring that in all probability it to a great extent depends also on the results of the timely revision of PC whether we will have to reckon—in the foreseeable future—with a renewed, possibly abrupt, development or stagnation (should the occasion arise, decreasing) of the number of members.

21. *The sphere of institutions comprised by the PC.* — In its developmental trends and in membership data the PC endeavours to achieve universality not only in relation to its data on membership numbers, but also in extending its own institutional system to as large a sphere of *social conditions* as possible, to the whole institutional system of industrial property.

In the above sense, the terminology '*Gewerblicher Rechtsschutz*', or 'industrial property' is immediately showing itself to be a narrow one. Article 1, para 3 of the effective PC text—in a slightly different formulation, but in its content identical to the original text of the Convention—states: "Industrial property shall be understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manufactured or natural products; for example, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers, and flour." This listing, which is of an illustrative character, is haphazardly casual. Nevertheless, it is unambiguously clear, even in this way, that the targeted field of application of the industrial property institutions comprises the *whole of the economic activity*, every region and sector of it. Perhaps one remark may be made here. Considering increased role of scientific activity, its becoming 'industry-like', the close relationship between science and practice and the broadening of the 'frontier area' between them, we can state that the *area of science* has become the field of application of the institutions of industrial property to such an extent that its separate enumeration in the PC text deserves consideration, even though—admittedly—in the emphatically broad interpretation of today, the fact receives expression, without any special scruple.

The *institutional sphere of industrial property* is also broadly designed—in the mark of universality—by the PC. Paragraph 2, Art. 1 states: "The protection of industrial property is concerned with patents, utility models, industrial designs,

<sup>64</sup> This, of course, is not necessarily an obstacle. For example, Serbia was a founding member of the PC, in spite of the fact that up to 1918 it had no independent patent law. Still, we can say that—partly in connection with the Union obligations, too—in general, a material condition of joining the Union is the existence of certain minimum institutions for the protection of industrial property. It is, evidently, more founded if we take as a basis for a comparative assessment of the level of universality, for example, the countries (about 140) that have patent laws, than if we take all of the independent States (more than 180). Cf. *Bogsch* (1). China's joining the Union in 1985, e.g., was strongly influenced by the fact that in 1984 its patent law was codified. Cf. KUNYI, HUANG: Naissance de la première Loi sur les brevets de la République populaire de Chine, *Prop. ind.* 1984/4.



trademarks, service marks, trade names, and indications of source or appellations of origin, and the repression of unfair competition.” The listing of the institutions of protection of industrial property—also reflecting the *inertia* of traditions—bears the marks of practical purposes, not those of principle, and it does not provide a scientific categorization. Following from this, the designated categories refer sometimes to the object of protection, sometimes to its legal form, and they are not homogeneous or logically consistent.

Let us now survey in brief the PC regulations in relation to the individual institutions of industrial property.

It is the issue of *inventions* which is discussed in greatest detail in the PC prescriptions. True, by approaching from the side of the typical traditional form of protection, the Convention states provisions first of all with respect to *patents*. Considering however, the regulations of *utility models* and—since the time of the Stockholm Revision—*authors’ certificates*, we can justifiably say that these prescriptions are concerned with inventions, with the protection of inventions.

Beside the regulations bearing interest in Union and exhibition priority, resp. in patents’ independence (discussed earlier in Points 14–16), the PC prescriptions listed below are worth mentioning. Paragraph (4) of Art. 1 (Lisbon Revision) provides: “The term ‘patents’ shall include also the various kinds of industrial patents recognized by the laws of the Union countries (such as patents of importation, patents of improvement, patents and certificates of addition, etc.).” The PC does not prescribe the conditions of patent application. The determination of the so-called substantive criteria belongs in the competence of individual legal systems. However, the PC contains a few general prescriptions, with an aim to unify the rules of substantive law ensuring a minimal protection of interests attaching to inventions. Such is, namely, the rule of Art. 4<sup>quater</sup>: “The grant of a patent shall not be refused, and a patent shall not be invalidated on the ground that the sale of the patented product or of a product obtained by means of the patented process is subject to restrictions or limitations resulting from the domestic law.” In the case of abusing the exclusive right granted in the patent, especially in cases of failing to work the patent, sanctions are prescribed by several legal systems. The ‘restriction’ of these restrictions is set forth in Art. 5.A of PC, namely, by stating the principle of unlimited importation of articles and by determining the criteria for granting compulsory licences and for the revocation or forfeiture of a patent. Here belong finally, the provisions concerned with the grace period to be allowed for the payment of the prescribed fees for the maintenance of industrial property rights, and—as has been indicated above—with the transit means as well as the prescription related to the implications of importation of product patents and process patents (Art. 5<sup>quater</sup>), and the rule (also indicated above) that the inventor shall have the right to be mentioned as such in the patent.

With respect to the other central institution of industrial property—*trademark*—there are also relatively more detailed rules included in the PC. In addition to the rules of priority, also referred to above (Union priority or that of exhibition), and to the principle of independence of protection, mention must be made of a few prescriptions of general validity which need to be transposed to the trademark law



of the individual legal systems. Provisions relevant here are, for example, those which prescribe: the period of grace to be ensured in the cases of sanctions to be applied for failures in using the trademark (revocation) (Art. 6.C); the protection of well-known (so-called notorious) trademarks (Art. 6<sup>bis</sup>); the prohibition by appropriate measures the use of State emblems, flags, etc. as trademarks (Art. 6<sup>ter</sup>); conditions of the transfer of the business or goodwill to which the trademark belongs (Art. 6<sup>quater</sup>); the special conditions of 'telle-quelle' protection of mark (Art. 6<sup>quinquies</sup>); the protection of service marks and of collective trademarks (Art. 6<sup>sexies</sup> and Art. 7<sup>bis</sup>); the sanctions for fraudulent imitation of trademarks or trade names (Arts 9–10).

With respect to *industrial designs*, the PC contents itself merely to prescribe that they shall be protected in all the countries of the Union<sup>65</sup> (Art. 5<sup>quinquies</sup>); and that the protection of industrial designs shall not, under any circumstances, be liable to any forfeiture either by reason of failure to work or by reason of the importation of articles corresponding to those which are protected (Art. 5.B). Naturally, the general provisions related to Union and exhibition priorities apply also the industrial designs.

With respect to *trade names*, the PC merely lays down that they shall be protected in all countries of the Union without the obligation of filing or registration (Art. 8).

For the protection of the *indication of the source* and of the *appellation of origin*, the PC contains only indirect provisions prohibiting the use of a false indication of the source of the product (Art. 10).

Finally, the protection against *unfair competition* is served also by rather laconic rules (Art. 10<sup>bis</sup>), prescribing that the countries of the Union are bound to assure to persons entitled to the benefits of the Union effective protection against unfair competition and emphasizing a few states of fact which in particular shall be prohibited, namely, to create confusion by any means whatever with the establishment, the goods or the industrial or commercial activities of a competitor; false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the commercial or industrial activities of a competitor; indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of the goods.

As can be seen, the PC provides—whether more detailed or less detailed, occasionally moving only on the level of declaration of principle—prescriptions on every essential institution of industrial property, satisfying thereby—in principle—the requirement of universality with respect to the sphere of regulation encompassed.

22. It seems that this sphere—first of all in relation to scientific-technical products—can be further broadened, or—more exactly—should be broadened. For

<sup>65</sup> The Convention does not prescribe in what form the protection of industrial design should be guaranteed. Consequently, the Union obligation of countries in whose legal system the protection is guaranteed by means of copyright norms is also met.



example, the PC does not mention—not even at the level of declaration in principle—the discoveries, the know-how, the innovations (technovations).

*Discoveries* receive special, institutional, legal protection in the legal systems of a few of the ex-socialist countries, and what is more, an international agreement has been created on the international registration of discoveries.<sup>66</sup> The character of discoveries—which follows from their definition as scientific recognitions not utilizable directly in practice—makes it impossible for us to unambiguously determine in which one of the numerous fields of intellectual products they should be included. For example, there are a great number of arguments advocating their qualification as author's rights. Still—considering the close connection between natural scientific discoveries and the inventions built upon them, the model of solution in the legal systems recognizing the institution of special protection—the position is strongly supportable which places the legal institutions serving the protection of discoveries into the region of industrial property and, in conformity with this, judges as desirable that the circumstance should be reflected also in the PC.

It is a characteristic feature in the ex-socialist legal systems that the solutions surpassing the routine ones, but not reaching the levels of inventions, the *innovations* (technovations), receive particular legal protection, although it is not without precedent that other legal systems also regulate (and, even more so, apply—without regulation)<sup>67</sup> the innovations. The importance of innovations in practice and also the justification of the strengthening of their regulation by civil law makes it desirable that innovations become consistently built into the institutional system of industrial property. This deserves to be acknowledged also on the PC level. (It should be mentioned that the practice does reflect this concept of a broader approach. Let it suffice to refer here to the example of model laws elaborated by WIPO, which contain provisions also for innovations.)

A more difficult question is the protection of *know-how*. The debates which are taking place—hardly to be considered as closed—testify to the fact that in this respect no such statement can as yet be made that could refer to crystallized concepts or unambiguous legal qualification. The practical importance of know-how, its growing economic role on the one hand, and its close relationship with other kinds of technical products, on the other hand, especially with inventions (as concerns innovations, mention can also be made about certain overlapping), support the consideration that know-how should also be listed among the institutions belonging to the field of industrial property. It is not unimaginable that such—abstract—formulation would be suitable to register know-how into the PC system.<sup>68</sup>

<sup>66</sup> Convention of Geneva, 1978, on the international registration of scientific discoveries.

<sup>67</sup> Cf. REISSINGER, L.: Az üzemi újítási rendszer az 1972-es üzemi alkotmány-törvény életbe lépése után (The system of innovations in workshops after the 1972 workshop constitutional law entering into force), *MIE Közleményei*, 13; RÖPKE, O.: *Der Arbeitnehmer als Erfinder*. Stuttgart 1966; SZILVAY, G.: Újítási tevékenység Svájcban (Innovational activity in Switzerland). *UL* 1982/8.

<sup>68</sup> A favourable model for this may be the solution applied by the Hungarian law-maker in the course of reforming the Civil Code [Paras (3), (4) in § 86]. For its assessment, cf. *Troller* (2).



Not irrespective of the shifts in emphasis in the theoretical approach (referred to in point 6 above), we can say that the PC regulatory model places proprietary aspects to the fore. In accordance with this, the rights attaching to persons, to the *interests of the creative man*, practically fall out of its sphere of interest. Article 4<sup>er</sup>, providing that the inventor shall have the right to be mentioned as such in the patent, can hardly be considered as an epoch-making result. Even though the institutional system of industrial property is obviously not an isolated field of law, and a number of its interests requiring protection may also be reflected in other norms of the legal system, in my judgement the creators (inventors, etc.) of the products protected by the institutions of industrial property have particular interests which are not satisfactorily honoured by the general protection of personal rights<sup>69</sup> which justify the development of particular legal guarantees. Here I refer only to the legal problems of products which are created in connection with service (employment) relations (cf. in detail, Points 52–55). In comparison with the other large field of intellectual products, that of copyright,<sup>70</sup> it can be stated that the PC neglects the creative man, the interests and rights of creative men. In my judgement, the fundamental principles and norms can be formulated and accepted also on universal levels.

Finally, let us remark here that what appears as a propensity of the codifications in the field of traditional patent and other industrial property is characteristic of the PC regulations as well. Namely, the PC regulations concentrate almost exclusively on the legal protection of the products which are brought about, and leave out of consideration the legal instruments, the *various kinds of contracts*<sup>71</sup> which could reasonably be used for the purpose of serving the creation of the products, the promotion of the turn-over in the products. It is to be taken into consideration whether it is or is not justifiable to overstep this narrow approach and—by following the solutions occurring, even if only in a way of using some indications, in the codifications of a few countries—to ensure a place also for the contracts of industrial property, among the PC rules.

An acceptance of the above—of course, debatable—suggestions, would hasten the expression of the universal character of PC in a more consistent and up-to-date way.

#### 4. The system of subsidiary agreements

23. *The creation of subsidiary (or special) agreements; their characteristics.* — As has been seen in the foregoing sections, the PC endeavours to comprise fully the institutions belonging in the field of industrial property. This endeavour follows from the requirement of universality, but occasionally it leads only to laconic declarations in the nature of principles. In the course of the development related to international co-operation for industrial property protection, a more detailed

<sup>69</sup> To this, comprehensively, *Sólyom* (1).

<sup>70</sup> Cf. recently, *Boytha* (3).

<sup>71</sup> Cf. *Lontai* (1), p. 230; (4), especially pp. 50, 187, 201.



regulation of certain issues, a greater intensity of unification, harmonization of law have become necessary. These endeavours have only partly led to supplementing the PC prescriptions. For a more detailed regulation of the various part areas there have come about unions of a narrower sphere, the so-called subsidiary (or special) agreements.

The latter are closely *connected with the basic agreement*, the PC. This is illustrated not merely by the historical circumstances of their coming into existence, namely, that they established themselves—in general, but not without exception—on the events of some of the PC Revision Conferences, but also by the fact that the necessary legal touchstones can be found among them. According to Art. 19 of the PC, the Union-member countries are entitled to conclude subsidiary agreements among themselves concerning the field of industrial property, but the agreements cannot be contradictory to the PC provisions.<sup>72</sup> The individual subsidiary agreements usually stipulate that the adhering country must be a PC member,<sup>73</sup> and they refer to the basic agreement.<sup>74</sup> More exactly, they provide that the prescriptions of the subsidiary agreements cannot be interpreted contrary to the PC provisions and shall not injure them.<sup>75</sup>

The subsidiary agreements are also of a *universal character*, since in principle, they aim at the adherence of all PC members, even though their membership number stays far behind that of the PC. This is partly explained by the fact that the more detailed regulation necessarily presupposes a closer identity of interests, partly by the circumstance that the subsidiary agreements are relatively 'young' as yet.<sup>76</sup> Of the 17 subsidiary agreements which exist at present, three had come about before 1957 (two in Madrid and one in The Hague), while their number increased by leaps and bounds after 1957. This is partly explainable by the international relations' favourable trend and pace, partly by the improvement in the institutional system of industrial property. Hungary's active participation in the co-operation of international protection of industrial property is well illustrated by the fact that this country is an original or adhered member or signatory to 12 of the 17 subsidiary agreements.

The subsidiary agreements can be *classified* according to various viewpoints. On the basis of the character of the agreement we can differentiate among those containing provisions which are principles in nature or from the field of *substantive law*; those of *procedural-technical character*; and those of *documentary-technical character*.<sup>77</sup> We can also group them according to the kind of *institution* (e.g. patent, trademark, industrial design), concerning which industrial property prescription are provided. Let us present here the subsidiary agreements and their most important provisions on the basis of the last criterion.

<sup>72</sup> This PC provision applies not merely to special agreements but in general also to agreements of a regional character.

<sup>73</sup> E.g., Art. 1 of Lisbon Agreement.

<sup>74</sup> Para (2), Art. 5 of Madrid Agreement.

<sup>75</sup> E.g., Para (2), Art. 1 of PCT.

<sup>76</sup> This is why I only partly share Beier's (1) slightly pessimistic evaluation in this context.

<sup>77</sup> Cf. Bobrovsky (2).



24. *Subsidiary agreements in the field of technical products.* — The basic provisions related to the content of patent protection—as has been seen—are included in the PC itself. As regards the unification of the criteria of patentibility on a universal scale, to make them approach each other, only preparatory work has been carried on as yet (see Point 47). Therefore, the subsidiary agreements which are concerned with patents first of all comprise *basically technical* issues, facilitating, simplifying the procedure.

The thoroughful, quick examination, assessment of the patent applications sets the examination authorities in the face of increasingly more difficult tasks, considering the rapidly growing volume of documents to be taken as a basis for the examination and considering the inflation of informational data. A comparison with granted (or already published) patents is especially important; this, however, is a gigantic (or an Augean) task in itself. To facilitate the compliance with the task, the *Strasbourg Agreement* was concluded in 1971, with an object of international *patent classification*. (The IPC Union reckons at present with 28 members, but in practice more countries apply its prescriptions, including Hungary.) This uniform classification (which can be used by the given countries either exclusively or—by maintaining their own national classification system—complementarily) enhances informational research and examinations significantly. The International Classification of Patents contains 8 sections—within this there are further classes, sub-classes, main- and sub-groups with some altogether 50 000 call-members.

It is common knowledge that, in the course of elaborating such solutions as are of an invention level, the use of micro-organisms (bacteria, fungi, etc.) is of ever-growing importance. Indeed, a majority of the legal systems makes the registration of the relevant procedures (possibly, that of the product obtained in this way or even the stock of the micro-organism itself) for a patent possible. It is requested by a number of legal systems that, in the course of the procedure for receiving a patent, the micro-organism should be deposited—with due regard to the specificities of the micro-organism. This requires complicated and costly solutions, as well as the establishment of institutions suitable for the treatment of the deposits, etc. That is why the 1977 Budapest Treaty, concluded for desirable co-operation in this field, for the international recognition of the *deposit of micro-organisms* for patent procedures, is of great importance (at present, it has 31 members).<sup>78</sup> The importance of the Treaty is that it saves the applicants from repeated parallel depository procedures.<sup>79</sup> The member countries' authorities are liable to recognize the deposition of patent objects at such institutions of other countries (so-called international depository authority) as complying with certain conditions; namely, they undertake to accept the deposition of micro-organisms from persons under the jurisdiction of any member-country, and to keep them for at least 30 years, to produce a certificate of vitality, and to provide samples for persons entitled to obtain them.<sup>80</sup>

<sup>78</sup> Promulgated in Hungary by Decree No. 1, 1981.

<sup>79</sup> On the assessment in detail of the Budapest Treaty cf. esp. *Palágyi* (1), *Parragh* (2).

<sup>80</sup> On 1 January, 1994, altogether there were 26 institutions of 15 States possessing the rank of international depository authority. See *WIPO Doc.* 423(E).



25. Probably the most important result of the international co-operation of basically procedural character related to patents, is the agreement concluded in Washington, 1970, namely, the *Patent Co-operation Treaty* (PCT). It has 67 members at present, so—considering also its ‘young age’—it can be qualified as one of the most popular subsidiary agreements.<sup>81</sup>

An essential factor of PCT is that it makes the patent application procedure cheaper and simpler (and more grounded) in case the patentee wishes to obtain the protection of his invention in several countries.<sup>82</sup> Because of the territorial character of the protections and of the principle of protection independence, in principle as many patent applications have to be lodged (possibly, by being based on union priority) in as many countries as the patentee wishes to obtain protection for his invention. Evidently, in the cases of truly high-standard inventions, which are presumably marketable on a broad scale, parallel procedures, increasing costs would be needed. Besides, it would involve even risks, depending on the patent rules and the practice of assessment by the given country. On the basis of the PCT rules, it is possible that by filing one application (in one language and in one place, complying with one set of formalities), the patentee may obtain protection in as many countries as desired. The PCT is an *agreement of a procedural nature*, it does not guarantee that the patentee will actually obtain the patent in each of the designated countries. In the last analysis, the decision in this matter depends on the patent authority and patent prescriptions of the given country. Thus, the PCT does not promise an international patent, but facilitates the procedure before the ‘national phase’ and provides information for the decision-making.

On the basis of the international application—in accordance with the unity in formalities—two kinds of testing may take place. The first, the so-called international search, must be carried out; the second phase, making use of international prior examination is facultative. The task of the international research organ that carries out the international research (these are such national or regional organs that can dispose of the prescribed personal or material conditions)<sup>83</sup> is to survey the known solutions and the state of the art relevant to the object of the application. The research report does not assess the protectibility of the invention forwarded; it merely gathers the documents relevant to the later, actual assessment. On the basis of the knowledge of the report, the patentee decides whether to revoke his application, or to send it to the designated countries, to let the procedure in the ‘national’ phase run its course. Preceding the decision-making, the patentee may

<sup>81</sup> Promulgated in Hungary in Law-Decree No. 14 of 1980. Cf. *Parragh* (3).

<sup>82</sup> According to experience in practice, in case the PCT filing is directed towards 3–4 countries, the procedure is already cheaper than that of applying parallel, national, procedures. Cf. to this LEBERL, O.: A szabadalmi rendszer nemzetközi fejlődése (International development of the patent system): PCT—EPÜ—KGST, *MIE Közleményei*, 16. — For example, in 1989, there were 15 000 PCT filings, 25% more than in 1988. About 30% of the Hungarian filings in 1989 were also of PCT procedure. The number of PCT applications in 1992 was 25 917 (16.5% more than in 1991). *Prop. ind.* 1993/3.

<sup>83</sup> The PCT executive regulation stipulates the minimum conditions in relation to the international research organ (Rule 36), namely, at least 100 technically qualified specialists in principal occupation; appropriate technical and other conditions (language, translation), minimal documentation, etc.



have access to the international procedure, also in its non-obligatory phase, to the *international prior examination*. The organ of the latter (essentially, the circle of these organs is identical—although not completely—with that of the international research organs) examines the application from the viewpoint of patentability, although not with regard to the degree that it meets the requirements of the criteria of patentability in the countries designated, but on the basis of the criteria generally accepted, abstracted by international standards. Thus, the prior examination report gives either a positive or a negative answer to whether the filed invention is of novelty or not, whether it is industrially (in the practice) applicable, and whether it reaches the level of an invention (i.e. whether the idea is not obvious). On the basis of the information thus received and by now founded also from the viewpoint of patentability, the patentee may apply in the designated countries to begin the patent procedure.

The procedure, which is carried out in accordance with the PCT, has advantages for the patentee. It is *simpler* and *less expensive* than the other kinds; moreover, on the basis of the pre-information (research and prior examination reports), the chances for obtaining patents can be weighed satisfactorily. Besides, practically, the priority time also increases.<sup>84</sup> PCT is advantageous also from the viewpoint of the national patent offices. On the basis of the research report and prior examination, further investigations with respect to a number of applications can be spared at most supplementary examinations need to be carried out, to comply with the particular conditions of national patent legislation. Thus, PCT results in a serious *easing of burden*; moreover, it can be stated with great certainty that the patents granted in the course of such procedures will be 'strong' ones—surpassing the examination standards prevailing in a large proportion of the member countries.

The PCT promotes the unity in formalities as concerns the application for patents as well as the—indirect—harmonization of the material criteria with one another. The informational function of the PCT cannot be underestimated either, namely, the requirement that the application and research report must be publicized after 18 months have passed their realization. (In the majority of the legal systems, the publication results in temporary protection as well.)

It should further be remarked that the patentee cannot only determine the countries (designated or chosen countries) in which he wishes to institute the patent procedure but may also choose from among the various forms of protection. His application may be directed for patent (possibly, for regional patent), for author's certificate, or for utility models (possibly, alternatively).

26. As a matter of fact, the International Convention concluded in Paris, 1961, for Protection of *New Varieties of Plants* (UPOV—see our List of Abbreviations) does not qualify formally as a subsidiary agreement to the PC. Rather it is in a kind of real union with the PC. Nevertheless, on the basis of analyzing their content, we can without hesitation list the Plant Varieties Convention (UPOV) among the organic elements of the system of industrial property hallmarked by the PC. The

<sup>84</sup> This is indirectly ensured by the fact that the national authorities cannot begin the procedure earlier than 20 or 25 months following the time of filing.



protection of new plant (and, possibly, animal) varieties is guaranteed by a number of legal systems. Some of these draw the new varieties into the circle of patentable inventions, while others grant them particular variety protection. Since the variety—even though there are substantial identities of content—is not a patent conform institution, UPOV keeps a certain distance from the PC. The essential prescriptions of UPOV (which has 19 member countries at present,<sup>85</sup> and which was revised three times, in 1972, 1978 and 1991) are as follows:<sup>86</sup> With respect to the new plant varieties coming into existence as a result of plant breeding, the member countries are liable to grant protection—either by patent, or by special title—which, in principle, applies to all botanical genera and species, the circle of these are to be drawn into the sphere of protection gradually, the minimal circle to be determined in 13 varieties. The protection period is at least 15 years; with respect to certain varieties it is 18 years. The protection is exclusive in nature, and on its basis the entitled person has the exclusive right to produce, sell and put on the market seed and propagating material. The agreement determines the material criteria of granting the protection in the novelty (or distinguishing mark), in the homogeneity and continuity of the variety, and in the suitable nomenclature. In comparison with other industrial property agreements, the UPOV contains more detailed substantive law prescriptions, and forcefully endeavours to achieve closer uniformity. (The relative rigorousness of access to the Union is partly the result of the above circumstances, namely, that the pre-declaration of the Union Council is required with respect to the UPOV-conformability of the norms of the country wishing to join the Union.)

27. Finally, within the agreements concluded in the circle of, in connection with, technical (scientific) products, mention must be made of the 1978 *Geneva Treaty* (referred to above) on the international registration of scientific *discoveries*. (The Treaty has been signed by five States so far, among them Hungary, but it has been ratified only by two of them, so it has not yet entered into force.) The Treaty has first of all an informational importance, such as emphasizing personal rights. The member countries have not assumed such obligation as would entail that the discoverers should share in any kind of particular legal protection or material recognition. Decision on the latter belongs in the competence of national legislation. In a few of the ex-socialist countries there is indeed institutional protection for discoveries. On the basis of the Treaty, anybody may apply for an international registration of his discovery, to which the declaration of some scientific institution (Academy, University) authorized for that is needed. Registration provides a basis for the—contestable—presumption of the person-discoverer, resp. priority.

28. *Subsidiary agreements in the field of commodity marks.* — The international co-operation that can look back on the richest tradition of the broadest circle with

<sup>85</sup> Hungary joined the UPOV in 1983. Partly this was the reason why the patent law was also modified—not radically—in 1983 (Law-Decree No. 5). Cf. Pálos (2).

<sup>86</sup> In detail, esp. cf. Pálos (2), (3); PECHMANN, E. v.—STRAUS, J.: Die Diplomatische Konferenz zur Revision des Internationalen Übereinkommens zum Schutz von Pflanzenzüchtungen. *GRUR Int.* 1991/7; materials of the Budapest Seminar on the Nature of and Rationale for the Protection of Plant Varieties under the UPOV Convention, *WIPO Doc.* 697(E).



respect to commodity marks worthy of protection has led to results in the sphere of *trademark*.<sup>87</sup>

Similar to the Strasbourg Agreement referred to above, a basically technical-informational co-operation is realized by the *Nice Agreement* concluded in 1957, for the *international classification* of goods and services which can be provided with manufacture or commercial trademarks. (This Agreement—which was revised in Stockholm in 1967, and in Geneva in 1977—has 39 members.)<sup>88</sup> The member countries of the Agreement are liable—either in the form of a principal or an auxiliary system—to apply the international classification in their procedures of trademark, registrations, etc. The agreement enumerates the trademarkable goods in 34, the services in 8 classes. The internationally uniformed classification enhances—from the viewpoint of both the examining authorities and the applicants, or any other interested persons—the registration and examinations related to trademark protection. The Nice Agreement is further developed by the classification from another approach of the *Vienna Agreement*, concluded in 1973, on the *international classification of figurative elements of trademarks*. (This agreement has been signed by 19 countries, but—since only five have ratified it as well—it has not yet entered into force.)

29. The oldest and at the same time the most intensive agreement in the line of global agreements, realizing a co-operation on the merits of the case, is the *Madrid Agreement* of 1891, on the *international registration of manufacture and commercial trademarks*. (The Agreement has 41 members at present; it was revised in Brussels in 1900; Washington 1911; The Hague 1925; London 1934; Nice 1957 and Stockholm 1967; amended in 1979.)<sup>89</sup>

In connection with the PC it has been pointed out above that in the Convention the international co-operation contented itself with the establishment by providing information on an appropriately high standard—as a basis for the decision-making, but it does not have an effect upon the prevalence of individual national patent norms. The system established by the Madrid Agreement may lead to the attainment of a *protection* on an 'international' level. It provides a possibility for the applicant obtain a kind of trademark protection with validity in all of the union-member countries. Eliminating in this way the necessity of parallel procedures, it offers a simpler and cheaper procedural possibility of receiving the protection. The validity of the international trademark is identical to that of the national trademark of the member country. The dissolution of possible contradictions of parallel 'double decking' is served by the regulation according to which if the trademark owner had already been entitled to a trademark in the individual union countries, the latter becomes converted into an international one.

The individual rules of the Agreement ensure the *linkage to the national legal systems*. Namely, the precondition of applying for the registration of an international trademark is the applicant's procurement of protection first in the country of

<sup>87</sup> For these, esp. *Bognár* (1), (2).

<sup>88</sup> The text which had been revised in Stockholm was promulgated in Hungary in Law-Decree 18 of 1970.

<sup>89</sup> The Stockholm text was promulgated in Hungary in Law-Decree No. 29, in 1973.



origin. The linkage to the protection obtained in the country of origin prevails in the first five years of international protection. Any changes that occur within this period (for example, the lapse of the protection) have the same effect on the fate of the international trademark. However, following this, the latter becomes independent of the original one. The effect of the international registration prevails—in principle—automatically with respect to the member countries. If, however, a country has made a reservation (Art. 3<sup>bis</sup> provides a possibility of this), it extends to that country only in the case of a definite request for it, and—usually—of the payment of an extra fee for it.

Furthermore, the possibility also exists that a country will revoke or refuse the protection. This may occur only if the protection which is applied for does not meet the domestic requirements, the latter being in accordance with the provisions of the main Agreement (PC), and also reflecting the principles of national treatment. The authorities of the given country possess the right of refusal within one year, and in this case suitable remedial possibilities must also be ensured. The period of protection of the international trademark is 20 years, which can be extended repeatedly. The Agreement contains rules on transferability of the international trademark as well.

The Vienna Trademark Registration Treaty (TRT), concluded in 1973, is considered as essentially the continuation of the Madrid Agreement. The Vienna Agreement has to date been ratified by five countries altogether, although it entered into force in 1980.

The *basic conception of the TRT is*, in effect, *identical* to that of the Madrid Agreement. Accordingly, such trademark protection can be obtained by way of one single application as is international in nature, effective and identical in validity with the national trademarks with respect to all member countries. Thus, all the advantages that have been referred to above in connection with the Madrid Agreement, are realized in relation to the TRT as well.

*Differences* arise, first of all, in respect to its linkage to the protection received in the country of origin. The system of TRT does not stipulate as a precondition that the trademark applied for under international protection must have already acquired it in the country of origin. Similarly the trademark granted by the TRT is from the beginning independent of the national protections, thus, possible changes in the national protections do not have any effect on the international one. A further difference is that—considering the fact that there are legal systems which link the trademark protections not to the registration but to its actually being used—the TRT provides three years as a grace period for the realization of effective working. Within the grace period, the protection cannot be refused in the absence of actual working. The individual countries are incidentally entitled to refuse the recognition—similar to the Madrid Agreement—within 15 months (in the cases of the so-called certification marks, within 18 months). The 10 years of protection period established in TRT can also be extended repeatedly; the procedure for that is however essentially simpler here. It can be carried out by the entitled owner's 'indicating attitude' of paying a renewal fee at every tenth anniversary of the international registration.



TRT has not come up to expectations (the Assembly of the Union decided in 1992 to suspend the application of the Treaty), and the increase in the number of members of the Madrid Union has also stagnated (but this is not so in the case of international trademark filings). Consequently, there has arisen the justification for a new agreement, global in nature. Toward this end—on the basis of the WIPO Director General's Memorandum—repeated consultations of experts' committees were taking place.<sup>90</sup> As a result, the Madrid Agreement was eventually made more up-to-date, or more exactly, it was supplemented with the 1989 Madrid Protocol.<sup>91</sup> The latter has been signed by 27 countries (Hungary among them), but ratified only by Spain, has not yet entered into force. In comparison to the Madrid Agreement, it contains the following essential modifications: the international application can be based not only on the national protection obtained in the country of origin but also on that obtained in any country; the term of rejection is extended to 18 months; there is a possibility to transform the international application into a national one—preserving the priority of the original. The synchronization of the Agreement and the Protocol is the task of the coming years. In due course, the universal and the Common Market trademark systems may also adjust to each other.

Two other drafts are further worth mentioning. An experts' committee is dealing with simplifying and synchronizing the common procedural rules for both the *Madrid Agreement* and the *Madrid Protocol*. Another experts' group is preparing a draft treaty on the harmonization of trademark law. These drafts may be finished in 1993–1994, the diplomatic conference for the conclusion of the *Trademark Law Treaty* is envisaged for October 1994.

30. As is known, the prescriptions of both the PC and of the national legal systems built on the PC prohibit or strongly restrict—to a large extent, in the interests of the consumers—the use of emblems, flags, etc. indicating various countries, authorities, international organizations as trademarks or as elements of trademarks. In effect, it is in this circle where we must mention the 'newly born' of international industrial property, namely, the 1981 *Nairobi Treaty*, which aims at the protection of the *Olympic Symbol*.<sup>92</sup>

31. While the protection of trademarks reflects individual interests, the relationship between goods and enterprises, the adequate legal *protection of indications of source or appellations of origin* (collectively they appear also as geographical indications) expresses the 'collective' interests of countries or regions. International

<sup>90</sup> On the individual working scenes of the experts' committees, see *Prop. ind.* 1986/6, 11; 1987/11, 1989/2.

<sup>91</sup> For the text of the Protocol, see *Prop. ind.* 1989/2. Cf. KRIEGER, A.–MÜHLENDahl, A. v.: Die Madrider Diplomatische Konferenz zum Abschluss eines Protokolls zum Madrider Abkommen über die internationale Registrierung von Marken, *GRUR Int.* 1989/10.

<sup>92</sup> No small role is played in this also by the 'material interestedness' of the International Olympic Committee. The latter, obviously, does not wish to eliminate the permission of the Olympic Emblems in the future either; it is only that the Committee will share in the profit of that, and to an extent which cannot be underestimated at that. On the Treaty in detail, cf. BAEUMER, L.: Der Vertrag von Nairobi über den Schutz des Olympischen Symbols, *GRUR Int.* 1983/6–7.



industrial property co-operation cannot claim outstanding results in this field, as yet. The 1958 *Lisbon Agreement* for the protection of appellations of origin and their international registration (revised in Stockholm in 1967 and amended in 1979)<sup>93</sup> has a total of 17 members at present.

Each of the member countries of the Lisbon Union is liable to effectively protect such appellations of origin to which the rest of the member-countries are entitled, on condition that the protection is ensured also by the legal system of the country of origin, or the appellation is internationally registered. The name of the country, region, or town is to be considered as appellation of origin (Art. 2) insofar as it is used for the denomination of such a product, originating from there, "... the quality or character of which is—exclusively or essentially—determined by the geographical environment, the natural or human factors included". First of all, agricultural or food industrial goods play a part here but several industrial products (mainly those belonging in the circle of folklore, and industrial arts) may also be worthy of protection.

The requirements relating to applications for international protection, or registration of the appellations of origin, etc. are similar to those of the Madrid Agreement, including also the stipulation that the authority of some country may announce, within one year from the date of registration, that it does not guarantee the protection of the appellation concerned. Incidentally, the protection prevails not only with respect to the use of marks identical with that applied for registration but it sanctions indirect infringements, too (for example, the application of kind, -type, -like, etc. indications). The effectiveness of the international protection is increased by its—in essence—reciprocal effect. Accordingly, if before the registration the protected mark had already been used in some of the member countries, that does not guarantee a right of 'prior use'. It only involves that a two-year period of grace shall have to be granted to the user.

From the viewpoint of trademark the provision of the Agreement (Art. 6) is extremely significant; it excludes the chance that the internationally registered mark may become the denomination of a species (thus, a free mark, which can practically be used by anybody), for as long as the protection in the country of origin prevails.<sup>94</sup>

32. While discussing the Lisbon Agreement it should be mentioned that although in general it is assigned to the legal territory of marks of goods, it may actually be considered also as a *subsidiary agreement of 'competition law'*, all the more so, because in the individual legal systems the protection of appellations of origin are guaranteed first of all by the instrument of competition law rules; only a few of the legal systems have special regulation in this respect.<sup>95</sup>

This 'border-line' character, i.e. qualification in trademark or in competition law, is even more relevant to the 'other' *Madrid Agreement*, which was concluded

<sup>93</sup> Promulgated in Hungary in Law-Decree No. 7 of 1967.

<sup>94</sup> For the significance of this rule from the viewpoint of consumer's protection, see *Lontai* (5).

<sup>95</sup> So, e.g., the Bulgarian legal system. See in more detail, *Bognár, M.* (3). Cf. also *BERG, G.-TAUSCHER, H.*: Nationaler und internationaler Schutz von Herkunftsangaben, *N* 1986/9.



also in 1891, on the *repression of false or deceptive indications of source on goods*. (The Agreement was revised in Washington in 1911; The Hague in 1925; London in 1934; Lisbon in 1958 supplemented by an Additional Act in 1967 in Stockholm; at present it has 31 members.)<sup>96</sup>

The member countries of the Madrid Agreement must inhibit the trade of such products that bear false or deceptive marking in respect to the country of origin. To prevent the circulation of such products, *seizure* should be applied first of all; if the given country's legal system does not have this remedy, then barring of importation should be used. Minimally, the trademark law or the application of the rules relating to trade names are obligatory; moreover, these should be applied with sanctions identical to those applicable to nationals. Seizure may be carried out either in the country of manufacture, or in the course of importation (transit goods are exceptions). The trader is entitled to put his own name and address on the commodity articles even if the product was not made in his country of origin, but must use such marks "as are satisfactory for the elimination of all kinds of misunderstanding as concerns the real place of origin" (Art. 3). The member countries must inhibit not only the actual turnover of the product which is provided with a false marking of the place of origin, but also the use of such indications for activities in advertisement and publicity.

33. *Subsidiary agreements related to industrial designs*. — A classification agreement—similar to the Strasbourg, resp. Nice Agreement—promoting the registration, examination and research in the field of industrial designs has also been formulated. The 1968 *Locarno Agreement*<sup>97</sup> (with 22 members at present) *on the International Classification for Industrial Designs* compels its member countries to use the international classification in their registrations, or documents related to design protection, either as a principal or subsidiary system. The Agreement has 31 classes which contain subclasses.

On the *international deposit* of industrial designs, the *The Hague Agreement* was concluded in 1925 (revised in London, 1934; The Hague, 1960; supplemented in Monaco, 1961; Stockholm, 1967; Geneva, 1975, amended in 1979). This Agreement is related to the Madrid Agreement and to the Lisbon Agreement (with 24 members at present), and provides the possibility of international protection for industrial designs. For the latter, two systems of regulation exist, depending on which of the texts the given country adopted. The differences consist partly in setting the terms of years of the protection, partly in the circumstance of whether the international deposit can be effectuated directly, or—similar to that used in the Madrid, resp. Lisbon Agreements—only through the agency of the authorities competent in the country of origin.

Finally it is in this circle where we should refer to the 1973 Treaty of Vienna (it has 11 members;<sup>98</sup> among these there are only two who have ratified the Treaty,

<sup>96</sup> The Stockholm text of the Agreement was promulgated in Hungary in Law-Decree No. 18 of 1970.

<sup>97</sup> Promulgated in Hungary in Law-Decree No. 29 of 1973.

<sup>98</sup> Hungary is also a signatory to the Treaty.



so it has not entered into force as yet), which was established for the *protection* and international deposit of *printing marks*. Similar to the case of industrial designs, here also we can state that the strengthening of international protection and the development of co-operation are concerned with such products as fall into the borderline cases between industrial property and copyrights.

A further borderline field is worth mentioning, too. In 1989 in Washington the Treaty of Intellectual Property in Respect of *Integrated Circuits* (chips) was concluded. The Treaty has been signed by 8 states, but has not yet entered into force (in detail see Point 87).

## 5. The organization and operation of PC; the WIPO

34. *The establishment of WIPO.* — As indicated above, neither the PC nor the individual subsidiary agreements have created an organization which is a legal entity in international law. The 'bringing into operation', further development of the individual agreements as international treaties is a direct task of the member countries creating the Union. The agreements state the necessary conditions, the *mechanism* and the forum system of *decision-making*, by and large in an identical way. The general assembly, representing the totality of the Union members, decides essential issues, while for the carrying out of the petty tasks or those of the preparatory, suggestion-forwarding functions, the general assembly elects an executive committee (the number of committee members in the case of PC is 1/4 of the members).<sup>99</sup> Considering the fact that these elected bodies gather together only periodically (the general assembly every three years, the executive committee annually), the necessity arises that the performing of the operative *administrative tasks* should also be organized. In the individual union agreements, such administrative functions were commissioned to *international offices*, secretariats.

The members to the agreements concluded in the field of industrial property co-operation were—even if they established certain connections as is referred to above—organized into *independent autonomous unions* (and they are such in principle even today). Considering the close connections among the Unions, the unity of administration developed relatively early, in a way that the offices of the individual Unions were practically amalgamated,<sup>100</sup> and the Bureaux internationaux réunis de la protection de la propriété industrielle, *BIRPI*, saw to the secretarial-administrative care of all the Unions. Supervision of the amalgamated offices belonged in the competence of the Swiss Government; at the beginning, its seat was in Berne, while since 1961 it has been in Geneva.

The increased number of the Unions and the expansion of the sphere of tasks made it desirable to improve the organizational frames. The turn of this came on

<sup>99</sup> In the original agreements, a detailed regulation was by no means established on the questions of decision-making or inner forum system (cf. especially, *Bodenhausen*, op. cit.). The organizational forms prevailing at present took shape in the course of the Stockholm revision (cf. *Bogsch* (1)).

<sup>100</sup> This already had its turn practically in 1893.



the occasion of the Stockholm Conference of Revision, when the statutes of the PC and of other supervised agreements were built out in more detail. The Revision Conference provided the opportunity of establishing a new international agreement, on the World Intellectual Property Organization (WIPO; in French: OMPI).<sup>101</sup>

35. *The organization and operation of WIPO; its characteristics.* — The administrative tasks formerly performed by BIRPI for the individual Unions were thus inherited by WIPO, although the latter's sphere of activity is broader. The relationship between the Paris Union and its subsidiary unions regarding WIPO is peculiar. This is reflected—among others—by the composition of WIPO membership. On one hand, WIPO members can be all such countries as are members of the PC, or of its subsidiaries, resp. the members of the Berne Union—in the copyright area with a significance similar to that of PC—on the protection of literary or artistic works; on the other hand, its members may be those of UNO, or of some specialized UN agencies, resp. those who are specially invited by the WIPO general assembly. Therefore, WIPO has such members who are not PC members, while all PC members are at the same time WIPO members as well. Membership in the WIPO is at present 147.<sup>102</sup>

WIPO possesses international legal personality and *legal capacity* (Art. 12), it may also establish connections with non-member countries; it may conclude agreements with governments and intergovernmental or non-intergovernmental organizations (Art. 13).

In the internal *decision-making* system of WIPO there are three fora which have a part to play. A basic role belongs to the general assembly, which is constituted from the representatives of those member countries which are simultaneously members to either the PC or the Union of Berne. On the other hand, the Conference members are member countries of the WIPO Union, irrespective of whether they are members to the unions referred to above. Finally, the co-ordination committee is constituted from the countries which also appear as members of the executive committees of the (Paris and Berne) Unions. It is obvious that the composition of these fora, and especially the mechanism of their operation, and the connections between their spheres of competence, etc. indicate the fairly complicated character of their activities.<sup>103</sup> Because of this, and the autonomous legal personality, the role of the secretariat, resp. the director-general and the weight of their operative (and not only operative at that) activities have increased considerably.

From the viewpoint of international co-operation in industrial property, the establishment of WIPO can be evaluated as a *significant phase* of development. Especially two elements are worthy of emphasis in this respect.

First of all, WIPO strengthens the *unity of the international system of institutions*, whose foundations were laid down by the PC and its various subsidiary agreements. In this context, it provides a good likelihood of solving the problem, which

<sup>101</sup> Promulgated in Hungary in Law-Decree No. 18 of 1970.

<sup>102</sup> Cf. *WIPO Doc.* 423(E); for example, India is not a member of the PC, but is one to WIPO.

<sup>103</sup> As is wittily remarked by Pálos (1), "... the legal and organizational construction of the British Empire, in its Golden Age, was essentially more simple and comprehensible than the present-day legal and organizational linkage the WIPO and the Unions of industrial property..."—Similarly, Karlóczi (1).



originates from the circumstance mentioned above, that with respect to a portion of the member countries it is still the texts preceding the Stockholm texts which are directive. In connection with this, Para (2) of Art. 14 of the Agreement is important; it makes the accession of such members as are simultaneously members of the PC or of the Berne Union possible only if they adhere to the most recent, Stockholm text of the Union mentioned above and its transitory provisions guarantees five years as a 'period of grace'.

WIPO's *sphere of activity*, its profile, has *widened*, partly due to the circumstance that it has become the organ of unified control over the whole legal area for intellectual property; thus, both the industrial property and copyright in a wider sense of the term. For example, when defining the sphere of intellectual property (VIII in Art. 2), its text touches upon such borderline issues as that of scientific discoveries; furthermore a sufficiently abstract formulation ("... all other rights originating from activities in the fields of industry, science, literature or arts"... ) makes a further broadening of its 'sphere of interests' possible. This is indicated also by the definition in the agreement of the purpose and sphere of tasks of the organization (Arts 3-4).<sup>104</sup>

The WIPO Convention came into force in 1970; the active period of its activity can be counted from that year. A further phase of development is represented by the year 1974, when WIPO became a *specialized agency* of the UNO. Preparations for this—on the basis of negotiations with ECOSOC—entered into an intensive phase in 1973 and were realized on the basis of the agreement concluded in 1974 (approved by the WIPO in the General Assembly of September, 1974, and by the UNO in December, 1974). The agreement concluded with the UNO—in accordance with the goals described also in the WIPO Agreement—determines as the most important task of WIPO the furtherance of creative intellectual activity, resp. the promotion of the transfer of technology to the developing countries.

The fact that WIPO has become an agency of the UNO has increased the respect accorded WIPO, widened its scale of possibilities, and transformed to a certain extent its character as well. The essence of this transformation can briefly be formulated by stating that the formerly 'neutral-professional' organization has become noticeably '*more political*'. This is reflected—beside certain direct actions<sup>105</sup>—first of all in the fact that the particular interests of characteristic groups of countries (capitalist, socialist, and developing countries) became formulated more openly and even led to certain practical organizational consequences (to this, in more detail, see Point 44).

36. *The activity of WIPO.* — It follows from the twofold activity of WIPO, namely, from its liability of administrative-secretarial management of the Union agreements, resp. from its general function surpassing the former, and being in connection with intellectual property and industrial property, that its actual activ-

<sup>104</sup> See for an especially detailed orientation on the organizational-operational questions *Bogsch* (1), (3).

<sup>105</sup> Such is, e.g., practically the suspension of exercising the membership rights of the South African Republic, or recently the question of participation of Yugoslavia.



ity covers the performance of traditional tasks on the one hand, better organized and co-ordinated and the organization of new 'services' on the other.

The *traditional* activity comprises a number of such tasks which are characteristic of those performed by national authorities in the protection of industrial property. So, e.g. a widespread task of WIPO is the *registrating*-recording activity. The registration functions of WIPO are in connection with international trademarks, industrial designs and appellations of origin. Its activity has especially increased—also in volume—in connection with PCT entering into force; it is the depository of authenticated copies of applications; it sees to the organization of relationships between the applicants and the national, resp. the international organs operating in various functions and to the publication of the applications, etc. In connection with registration, it issues Official Gazettes as well. WIPO is a depository of the agreements concluded in the field of industrial property, it organizes and prepares the union fora, the revisions of the treaties, etc.

The functions surpassing the traditional tasks<sup>106</sup> cover a fairly large sphere and in this regard WIPO plays an active, initiative role. An outstanding importance attaches to the *educational activities* of WIPO in those areas, and also in relation to securing the supply of trained professionals whose part is decisive, first of all, in the infrastructure of industrial property relevant to developing countries. On the basis of comprehensive educational programs, by means of pre-elaborated topics, WIPO organizes various educational forms, courses and seminars, both general and special in nature. It also organizes the education of scholarship holders.<sup>107</sup>

By means of regular *consultations* and issuance of so-called *model rules of law*,<sup>108</sup> WIPO facilitates the development, in many cases the establishment, of infrastructure for industrial property in the individual—here again, first of all developing—countries. WIPO also elaborates practical *guides*<sup>109</sup> which provide assistance in a large sphere. Its activity which is deployed in the interests of international development and unification of the *documentation and information* service for industrial property is also of significance. Practically, ICIREPAT,<sup>110</sup> resp.

<sup>106</sup> The expansion of the sphere of activity, the overstepping of the traditional authoritative functions, are characteristic features in the operation of Patent Offices in the ex-socialist countries; this phenomenon can even be considered as a general tendency. Cf. VIANÈS G.: Le rôle des Offices de brevets en matière d'information et de diffusion des connaissances. *Prop. ind.* 1976/5.

<sup>107</sup> In detail, see Parragh (4).

<sup>108</sup> For example, *WIPO Model Law for Developing Countries on Inventions* (1979, 1980); *WIPO Model Law for Developing Countries on Appellations of Origin and Indication of Source* (1975). BIRPI have already also published similar model laws for the areas of industrial designs, trade marks, trade names, unfair competition.

<sup>109</sup> For example, *Guide to the Application of the Paris Convention for the Protection of Industrial Property* (1968); *Licensing Guide for Developing Countries* (1977); *Industrial Property Glossary*, etc. It should be noted that WIPO deploys similar activities obviously also in the area of copyright protection; here, however, I restrict myself only to industrial property.

<sup>110</sup> A narrower circle of PC member countries unless the Committee for International Co-operation in Information Retrieval among Patent Offices (ICIREPAT) operates: Cf. KINCSES, I.: WIPO tanulmány a szabadalmi információ felhasználóiról és azok igényeiről (A WIPO study on the users of patent information and their demands). *MIE Közleményei*, 23.



INPADOC, based on the agreement concluded with WIPO, perform their activities also in linkage with WIPO. (INPADOC is increasingly popular in Hungary.)<sup>111</sup>

WIPO lays emphasis on international co-operation in industrial property, the furtherance of union activity, and preparations for timely revisions, by providing necessary information, by analyzing the relevant theories, and organizing the latter activities. So, in its official publications (Industrial Property), it often presents—along with information on organizational life, and relevant national legislation—studies which are *theoretical* in nature. WIPO was also the initiator of the establishment of International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP), whose members are engaged in the legal areas concerned with intellectual products. WIPO created expert committees in special subjects (software, consumer protection, etc.), and commissioned studies in laying down the foundations of the specialized projects. We can make the statement that the WIPO's sphere of activity is substantially larger than what the PC system can afford. (This is obviously in connection with the fact that WIPO is the holder of provision for not only industrial property but also for copyright, consequently it may provide for such 'borderline' questions in relation to which, occasionally, we may be witnesses to 'negative conflicts of competence', as concerns these two legal areas.) So, for examples—as has been indicated in Point 22 above—the problems of discoveries playing a relatively negligible role in the PC system are by no means alien to WIPO.<sup>112</sup>

Relying partly on its own team of specialists in its widespread and expanding activities,<sup>113</sup> WIPO reckons to a great extent also with the assistance granted by the individual countries. In accordance with her possibilities, Hungary also takes part in specialists' training, mainly in that carried out for developing countries.

WIPO's co-operation with other *UN agencies*—especially since 1974—has become increasingly closer. So, for example, in the field of copyright, the administration of certain agreements is carried on jointly with UNESCO, resp. ILO. With respect to industrial property, an especially close connection is maintained—sometimes not even without conflicts of competence<sup>114</sup>—with UNCTAD, UNIDO, GATT and several regional UN committees. (Some features of its relationship with UNCTAD will be touched upon in Point 38 below.)

Finally, WIPO has built a fairly good relationship with certain education-scientific centres (Max-Planck-Institut; Centre d'Études Internationales de la Propriété Industrielle—CEIPI), furthermore, with non-intergovernmental organizations, as well with '*social*' organizations which are active in the areas of industrial property. Concerning the latter, an outstanding part is played by AIPPI (Association Internationale pour la Protection de la Propriété Industrielle).

37. *The social basis of international industrial property, the AIPPI.* — Partly the coming into existence of PC, partly the model of International Association for Literature and Arts inspired the circles that initiated the establishment of such an international society whose task would be propagating and popularizing of the

<sup>111</sup> The International Patent Documentation Center (INPADOC) has been established and operates on the basis of an agreement between the Austrian Government and WIPO.

<sup>112</sup> Let us refer in connection with this to the Conference held in May 1984, on the state of inventors; the Conference was convened jointly with International Federation of Inventors' Associations (IFIA) by WIPO.

<sup>113</sup> The number of WIPO employees is 427 at present.

<sup>114</sup> Cf. Pálos (1).



culture and knowledge of industrial property; the promotion of co-operation in the international co-operation for industrial property, especially by encouragement to join the PC. This concept assumed concrete outlines at the 1896 Austrian-Hungarian Conference on Industrial Property. (At that time, especially in the German and Austrian territories, national societies with similar functions already operated.) As a result, shortly after the Conference, the International Association for the Protection of Industrial Property (AIPPI) was established in Brussels, in 1897. Hungary was an active participant from the beginning.<sup>115</sup>

AIPPI unites not the representatives of countries but physical persons; obviously within them, the so-called national groups assume a kind of closer unity. The members were recruited first of all from the circles of patent agents and the representatives of companies which had recognized the importance of AIPPI. In this way—even if only indirectly—they endowed AIPPI with a kind of *professional-representative* character. Of course, from the beginning, significant theoretical forces, representatives of the sciences (discoverers, professors, etc.) also participated in the work of the AIPPI. In 1902 it already had 45 members from Hungary (occupying third place in number of members after Britain and France), among them such personalities of science and technology as Ottó Bláthy, András Mechwart, etc. The importance of Hungary's participation is indicated by the fact that AIPPI held its 1930 conference in Budapest.

AIPPI has at present 7570 members; of these 7300 are active within the framework of the 47 national groups; 140 members are in 3 regional groups; in addition, 130 so-called individual members from 30 countries, are registered.<sup>116</sup> Practically, the AIPPI's circle is identical to that of the PC members. Hungary renewed her membership—having been first among the socialist countries—in 1963.<sup>117</sup>

AIPPI's regular three-yearly *congresses* represent the organization's most significant form, where the most important issues of industrial property are discussed. The congresses generally put items on the agenda that are synchronous with those waiting solution within the framework of PC. For example, the XXXI Buenos Aires Congress (1980) dealt primarily with the timely problems of PC revision; the XXXII Paris Congress (1983) was of a jubilee character, with regard to the PC's centenary; at the XXXIV Amsterdam Congress (1989) the questions of harmonization were discussed.

AIPPI includes issues into its *working schedule* which are aimed at broadening the co-operation in industrial property and solving the conflicts that may occur. The solutions which are adopted in the course of revisions in PC and its subsidiary agreements are in general discussed first in the frame of AIPPI.<sup>118</sup> The 'social' character of the organization provides the possibility of investigating the debated issues more intensively, free from restrictions and in more detail, moreover, while

<sup>115</sup> Cf. *Karlóczi* (2).

<sup>116</sup> Cf. AIPPI *Annuaire* 1981.

<sup>117</sup> Even presently, with its more than 120 members, it is the most numerous among the AIPPI groups of East-Central European countries.

<sup>118</sup> Cf. *Palágyi* (2).



revealing, in a more direct way, the conflicts of interests. At diplomatic conferences this possibility is relatively rare. We cannot say that the discussions always led to unified standpoints, or that in the course of PC revisions it was always the standpoint formed in AIPPI that won the day. It is, however, undoubted that for the unfolding of the arguments, preparing well-founded inter-state decisions, promoting, by particular means, co-operation in practice—for all these AIPPI offers a very useful framework—even if not free from contradictions—a forum.

Let us see only a few of the problems, the debating and investigation of which were put on the AIPPI agenda in the past years. Such are, namely, the topic of know-how, the questions of employee's inventions, the importance of authors' certificate, the collective and certification marks, the role of industrial property in the technical development of developing countries, the interpretation of the claims, etc.<sup>119</sup>

## 6. Debated questions in the field of PC; the timely revision

38. *The history of the present-day revision of PC.* — As is the case with all viable international agreements, PC has endeavoured from the beginning to amalgamate and harmonize the requirements of stability and flexibility. It can be stated that the revisions have essentially solved the problems of adapting PC to the requirements of development, those of the conflicts of interests, by maintaining at the same time the basic concept, essential principles of the PC. The present-day revision is nourished by more radical endeavours to reform its system.

Even if we only consider the setting of the present day revision we can state that it was timely—merely on a basis of numerology. The average period between previous revisions was about 14 years.<sup>120</sup> So, 13 years after the Stockholm revision, it appeared 'justified' to hold a new, revisional conference. The deeper causes, however, are of course rooted in the *changes of the international political situation*.

Even though the principles and norms of PC reflect—in our view—the interests of universal co-operation, in general, and also at present, it should be pointed out that PC has been built upon the *model* of industrially developed countries on basically identical levels with conditions and interests close to one another; briefly, upon that of countries with a *capitalist* economic-social system. It did not reckon (partly it could not even do so) with those particular differing interests which have come to the fore with the increasingly more unified and conscious appearance of countries or groups of countries at different levels of advancement, building another kind of economic-social system, and with the growing role of these countries in international life.

<sup>119</sup> In the current working schedule of AIPPI there appear the following more important questions: the influence of legislation relevant to the restriction of competition, and to the transferring of technologies, on know-how contracts; the protection of computer programmes; legal and economic importance marks and consumer protection; the protection of biotechnological inventions; economic and legal importance of utility models; questions of international trademark protection.

<sup>120</sup> The intervals between the individual revision conferences were 9–17 years, irrespective of the 26-year period between the London and Lisbon conferences, which became longer as a consequence of World War II and the cold war following it.



After World War II the *socialist world order* became established and in the comprehensive integrated relationship among the socialist countries a dynamic development began. In addition, the decolonization process which took place like an avalanche descending in the 1960s, significantly increased the *developing countries'* number, unity and the weight of their conscious political presence.

The demands for radical transformation of the traditional order of international (economic) relations were defined by the developing countries. The PC—or, in a broader context, the existing system of international protection of industrial property—became one of the frontal areas of the fight, relatively early. It was in UNCTAD—which can justifiably be qualified as the UN organization that is playing a most important role in the representation of developing countries—where the demands of the latter for more favourable access to modern technologies, and their criticism of the system of international industrial property as one of the obstacles of the above demands, were first sounded.<sup>121</sup>

The endeavours of the developing countries were honoured by the *UN Assembly* in its Decisions Nos 3201 and 3202 brought in the 1974 Special Session, on the new world economic order, and in the Decision brought in its 1975—also special, and called economic—Session on the international economic development and co-operation. Article 3, Chapter III of the latter Decision definitely provides that the international agreements on patents and trademarks must be supervised.

Simultaneously with UNCTAD-UN actions—but not independently of those—similar initiations took place within the framework of *WIPO*.<sup>122</sup> During the June 1974 Session of the Co-ordination Committee, on the basis of the suggestion by the British and Indian Delegations, an *ad hoc committee* of specialists was established to investigate of the revision issue. At the first session of the *ad hoc committee*, 14 issues were formulated which needed to be studied; at its second session (December 1975) a declaration was accepted on the goals of the PC revision.

On the basis of the recommendation of the *ad hoc committee*, the 1976 PC Assembly elected a *Committee of Preparations* for the Revision Conference. In spite of initial optimism,<sup>123</sup> the work proved to be rather complicated. In the interest of thorough preparation, four working committees were established;<sup>124</sup> distinguished specialists were commissioned to work out studies and analyses; the

<sup>121</sup> For the assessment and criticism of the international patent system, cf.—in addition to those referred to in our Note 47—the following UNCTAD documents: *Promotion of National Scientific and Technological Capabilities and Revision of the Patent System*, TD/B/C.6/AC.2/2(1975); *System, Including Industrial Property Systems, for Improving National Scientific and Technical Infrastructures of the Developing Countries*, TD/B/C.6/AC.2/4(1975); further, ERASMUS, M. G.: *The New International Economic Order and International Organizations*. Haag-Herchen, Frankfurt/Main, 1979.

<sup>122</sup> Comprehensively, cf. *Sunshine-Buxbaum*, op. cit.; *Bobrovsky* (2), (3); further, *Parragh* (1); *Basic Proposals* (Diplomatic conference on the revision of the Paris Convention), WIPO Doc. PR/DC/3.

<sup>123</sup> Cf. *Kunz-Hallstein* (1). The Revision Conference had originally been planned to take place at an earlier time and in Bucharest (as the capital of a developing country).

<sup>124</sup> Such working committees were active in respect of author's certificates; transformation of Article 5A of the PC; issues relevant to the particular interests of developing countries; conflicts in areas of trademarks and indications of source.



problems that had arisen were discussed in several other fora,<sup>125</sup> e.g. repeatedly in the AIPPI.<sup>126</sup> Specialized literature also treated intensively the questions awaiting solution in the course of PC revision.<sup>127</sup>

The Preparatory Committee itself held five sessions between 1976 and 1978. On the basis of its suggestion, the Executive Committee of PC convened the Revision Diplomatic Conference for February 1980. Here the point of departure was the document, entitled '*Basic Suggestions*', elaborated by the Preparatory Committee. The possibilities of sharp confrontations could already be felt in the preparatory working phase, and they indeed became reality.

39. *The more important debated questions.* — The Declaration referred to above, which defined the aims of the revision, underlines—in accordance with the relevant UN decisions—the necessity of reducing the economic inequalities among nations, and of the contribution of an effective system of industrial property to the industrial development of developing countries. Furthermore, it emphasizes that sufficient balance should be ensured between the industrial property (patent) rights and social needs; between the rights and duties of the patentee; inventors' activity should be stimulated; the working of inventions should be promoted; abuse of exclusive rights should be inhibited. Assistance should be provided for the improvement of the infrastructure of industrial property, especially in the field of specialists' training and information. While emphasizing the competency of the individual countries in the formation of their inner regulations, the Declaration suggests that the introduction of certain exceptions should be taken into consideration, namely, in place of the principle of national treatment the realization of preferential treatment of developing countries.

The Declaration's abstract formulations and principles were put into fine words in the *concrete suggestions*. The latter aroused heated debates even in the preparatory phase.<sup>128</sup> The repeated open confrontations led to softening of positions, and to extensive revisions to the suggestions. In what follows below, a brief survey will be given of the debated questions which arose, while their more detailed analyses will have their turn in later chapters of the present treatise.

40. In the overwhelming majority of the propositions which were put forward on the part of developing countries, the *principle of preferential treatment* (traitement préférentiel sans réciprocité)—to a lesser or greater degree—received a hearing, and in certain issues this principle emerges directly. The developing countries suggested introducing a new article into the PC that would provide their citizens (and legal entities) a 50% allowance toward the *fees* to be paid in applying or proceeding in any of the union-member countries. The inclusion of another new

<sup>125</sup> So, e.g. at the round-table conference in Mexico, May 1976 (*Prop. ind.* 1976/6).

<sup>126</sup> Cf. BOGSCH, A.—TAKÁTS, E.: Az iparjogvédelem hatása a műszaki fejlődésre és a gazdasági előrehaladásra (The effect of industrial property on the development of technology and on economic advancement), *UL* 1977/13.

<sup>127</sup> Cf. Ladas, op. cit.; Kunz-Hallstein (2), (3).

<sup>128</sup> Especially Bobrowszky (2), (3); Parragh (1); Kunz-Hallstein (2), (3); Pálos (1); furthermore, TASNADI, E.: Az ipari tulajdon oltalmára létesített Párizsi Unió Egyezmény-tervezet felülvizsgálatának néhány kérdése (Some of the questions of Revision related to the PC draft), *UL* 1978/10.



article with a similar content was also suggested, namely, that the extension of the *time of union priority* by 50% should be made possible as well. Finally, it was suggested that provisions should be introduced into the PC text that would specify what endeavours were to be made in order that the infrastructure of the developing countries' industrial property could be advanced, and the program of *support* in training of legal and technical aid, information assistance, together with the material resources, could be established. (At an earlier phase, a suggestion was also pronounced according to which, in the developing countries, in the case of citizens from other—developed—countries, the registration, fees should be higher, and the priority or protection time should be shorter than those applied for the local applications.)

The representatives of the capitalist countries were in principle against the break-through of the PC cardinal principle, and in this respect also the ex-socialist countries were essentially in agreement with them, while pointing out that the extension of the priority time in certain countries would lead to the general extension of the examination time which could not be a desirable outcome. It was also indicated that the fee-allowance which had been asked for could hardly mean a substantial advantage, considering the developing countries' extremely modest rate of representation in patent registrations. As a more reasonable solution the assignment of such possible allowances into the circle of bilateral agreements was suggested. The request for supporting the developing countries' infrastructure in relation to their industrial property was deemed to be honourable.

41. Several concrete suggestions refer to the PC provisions related to *patents*. Such is first of all the transformation of Art. 5.A in the PC in a way that the *sanctions* attaching to failure to work, forfeiture, compulsory licence would be strengthened (this will be touched upon in more detail in Points 45–47 below). This relates also to the suggestion which would not qualify *importation* as working the patent; only the actual utilization, production, within the country would qualify as such. Included here are the suggestion on restricting the principle of *patent independence*; on cancellation of Art. 5<sup>quater</sup> relating to the process patents; on the inclusion of certain *special patent varieties* (e.g. patents of transfer of technology or of industry development), furthermore, on the reform of rules on so-called interim use<sup>129</sup> (within the priority time, but prior to the application).

Although the suggestions were put forward by developing countries, several of the representatives of groups of other countries also agreed in principle on the introduction of restrictions of public interest, respectively on these being severed, concerning the working of the patent. The principle of patent independence was, however, deemed in general—to be such as should be preserved, and agreement prevailed with respect to the fact that during the procedural examinations the developing countries should be assisted by the improvement of their information base. Admittedly, the relevancies of the importation may from the viewpoint of patent working have negative effects as well; nevertheless, the issue should be approached in a more gradual way. For example, from the Hungarian point of view—considering our export-orienteness—a radical transformation of relevant PC rules is not desirable.

42. The socialist countries' suggestion (supported in general by the developing countries) tended to reflect in the PC regulations—on a broader scale than is done

<sup>129</sup> See, in detail, Kunz-Hallstein (4).



at present—the endowment of the *author's* (inventors') *certificates* as the form of inventions' protection of equal rank with the patents.<sup>130</sup> (This issue will be treated in more detail in our chapters below.)

43. Concerning marks, several suggestions were formulated, such as the prescription related to the *obligation of using the trademark*; the introduction of compulsory licence in the case of trademarks and industrial designs; the stipulation of registration for the protection of *well-known trademarks*.

In the course of preparations, considerable problems arose with regard to the suggestions. Namely, the compulsory licence is not consistent with the character and function of trademarks or industrial designs; the introduction of such a sanction does not even promise any economic advantage. The prescription of the obligatory use of trademarks takes place in increasingly more legal systems, but it seems the time has not yet come for the introduction on a universal level of an obligatory norm. The supplementation of the present Article (5/C.-/I) would be desirable in a way that the minimum duration of the grace period (e.g. the five years that can be considered internationally typical) would be determined. The present-day provision relating to the well-known trademarks serves, in effect, to protect substantial consumers' interests; consequently, its preservation—possibly its expansion—is also desirable.<sup>131</sup>

The developing countries formulated a rather significant suggestion for the rules of *geographical indications*, which is actually also in the interest of solving the possible (even real) conflicts between the trademark and the indication of source. The essence of the suggestion is that the indication of the geographical origin—either independently, or as a trademark—be prohibited for any persons other than those who operate in the territory of the given country. The protection of the trademark which contains false indications should be rejected, or, in case it has already been granted, the protection must be revoked. At the same time, it was suggested that every developing country should have the right to indicate initially 200 geographical designations—which may be increased every two years by ten—for which, in case of conflicting trademarks, the above prohibition would be relevant.

Essentially, the suggestion is grounded. A more efficient protection of indications of source has, of course, importance not only from the viewpoints of developing countries, but—with a general character—especially with respect to such countries in exportation activities of which the weight of agricultural, food industrial or folklore products is relatively greater. However, the issue is very complicated, affirmed also by the changes in the membership numbers of the Lisbon Agreement. It is questionable in the course of revision an agreement could be reached in this respect. It is especially troublesome that the suggestion is of a retrospective effect, and that it places on a prohibition list a certain number of *bianco* geographical indications—such as are independent of concrete economic activities—restricting at the same time this possibility to developing countries.<sup>132</sup>

<sup>130</sup> Cf. BOGUSLAVSKII, M. M.: *Mezhdunarodnoe ekonomicheskoe i nauchno-tehnicheskoe sotrudnichestvo i razvitie sovetskovo zakonodatelstva v oblasti izobretatelstva*, VI 1980/1; SCHACK, D.: *Die Aufgaben der Diplomatischen Konferenz zur Revision der Pariser Verbandsübereinkunft zum Schutze des gewerblichen Eigentums*, N 1979/12.

<sup>131</sup> Cf. *Lontai* (5).

<sup>132</sup> Cf. *Bognár, M.* (4). For the time being, the whole sphere of this topic has been taken off the agenda of the Revision Conference.



44. Finally, some *procedural issues* were also debated. First, suggestions directed towards shifting the principle of *consensus* to that of majority vote, and the cancellation of Art. 24 (the so-called *colonial clause*).

In respect to the cancellation of Art. 24, the developing and socialist countries presented a unanimous position, while according to the capitalist countries' views this provision is not political but only technical in nature. The problem of unanimity will be dealt with under the following point.

45. *The results of the first 'Acts'; further chances.* — The *Geneva Revision Conference* called together for 4th February, 1980, had not seemed cloudless even on the basis of the preliminaries but the results of the four-week sessions were even poorer than expected. It was not only that there had been suggestions put on the agenda for rather radical modifications, which played a part in the poor results but also the fact that discussions on the merits of the case were inhibited by procedural debates as well.<sup>133</sup>

Owing to the effect of the UN model reaching the Conference, the committees representing the various groups of countries (Group B — capitalist countries; Group C — developing countries; Group D — socialist countries) shared a substantial role, together with the subgroups existing inside them—and professing sometimes different positions; furthermore, the so-called public affairs' committee, and the main committees according to topics, also played a considerable part. In the developing countries, a relatively lengthy debate went on with respect to the person of officials, but that the delay in time practically inhibiting the substantial debate can be traced back to differences in opinion concerned with the mechanism—appearing in the procedural agenda envelope—of *the decision making*.

Essentially the debate was engaged in finding how decisions could be made on the modification and supplementation of the PC; whether decisions require *consensus*, or a (qualified) *majority of votes*. The developing countries, with reference to the UN terms, to the Vienna Convention, moreover, to the fact that the PC—as against the Berne Convention—does not stipulate consensus, took an unanimous stand for the position that a 2/3 majority of votes is sufficient for decisions. The socialist countries, too, stood for the qualified majority decision, judging the principle of unanimity as being outdated. The opinion of the capitalist countries were strongly divided. Some of accepted the majority principle but on certain issues, suggested that the qualified majority should be set at a rate of 4/5, possibly 9/10, and that the effect of the decision should depend on a certain minimum number (10–13) of the opposition votes. Others accepted a substantially more rigid stand, especially the representative of the US. Incidentally, they referred as regards principle, to the fact that up to that time, unanimous decisions had been made in the course of all the revisions; this, consequently—on the basis of international customary law—is directive. In accordance, the acceptance of the principle of majority vote, qualifies as such a PC modification, the acceptance of which requires the unanimity of votes.<sup>134</sup> By the clever application of the consensus principle, the

<sup>133</sup> Kunz-Hallstein (5).

<sup>134</sup> For a detailed theoretical-historical analysis, cf. Ballreich-Kunz-Hallstein, op. cit.; Bogsch (1).



obstacle in the way of a substantial debate was eliminated temporarily, but the question can hardly be regarded as being settled.

As a result of the protraction of debates on procedural agenda, there was no practical route out of the statements for a debate on the really essential issues. For this reason, the Conference decided *to suspend its activity* and suggested that the PC Assembly should continue the Conference. So that it could show up with something, the Main Committee by theme accepted (this of course does not mean the Conference being included) Arts 12<sup>bis</sup>, 12<sup>ter</sup> of the Basic Proposals, as well as Point (2) (a)XIV of its Art. 13. These articles authorize the examining office to require that the applicant or—in case of necessity, some other office—provide *information* on the fate of identical (analogous) inventions applied for at other offices (this possibility—the independence of protections notwithstanding—assists the possibly less qualified office in uncovering the weak points of the application) on the one hand, and provide—on the other hand—in detail what aid is intended by the Union for the infrastructural development of industrial property of developing countries. As regards the amount of money required for such programs, decisions are brought by the Assembly.

46. There were thus tasks in abundance which awaited for the 'Second Act' of the Conference. It was held in *Nairobi* between 28 September and 24 October, 1981. The preludes of this Conference were not most favourable either, partly on account of the differences in opinions outlined above, partly because the political atmosphere continued to worsen, the positions of the capitalist countries—especially those of the US—had become more rigorous.

The apprehension of the preliminary phases was again justified. The Nairobi Conference was not able to carry out the tasks assigned to it. The two results it could achieve: the acceptance of the convention-suggestion discussed at the same time (on the protection of the Olympic emblem); and the acceptance—on the level of the Chief Committee—of the new text of Art. 5/A.

The *sphere of topics relevant to Art. 5/A* basically includes not only the current revision, but constitutes in general one of the most essential problems related to the substance and economic-legal function of patent protection. It is the question of the content of the legal relationship to be expressed by the patent, whether the exclusive position merely secures rights or whether it includes liabilities as well. In another context, we shall touch upon this issue in much more detail below. It must however be pointed out here that it is a generally acknowledged and in principle a well-founded view, according to which, for the advantages provided by the monopolistic situation, the patentee—in a sense of reciprocity—is debted with the liability of working, that his protected invention should be utilized in practice. As regards the *implications of the invention being applied in practice*, the harmony between economic-social 'public interests' and the patentee's interests is not always perfect; conflict is possible. The historical development of the institution of patent testifies to the circumstance that the individual legal systems place a greater weight on one than the other kind of interests.

The differences in the assessment of the affordable preferences for the above interests are reflected in the PC regulation, and also in the changes that had taken



place in them, in the course of the individual revisions.<sup>135</sup> In the original PC conception interest in this issue did not arise; thus by its silence—indirectly—PC did not restrict member countries in prescribing various sanctions in the interests of patent-utilization. In the course of the revisions, virtually following the Conference in The Hague—first of all on the initiative of the industrially developed large companies, which carried on extended export activities, in effect, on that of the countries representing the interests of those companies, especially the US and Germany—it was the ‘patentee-ist’ conception that gradually came to be reflected in the PC solutions, thereby restricting the more efficient protection possibilities of particular national economy interests of individual countries. The *current terms of Art. 5/A* (established in the course of the Lisbon Revision and not touched upon by the Stockholm Revision) provide essentially, as follows: The patentee can fulfil his liability of working the patent (incidentally, the term referred to above does not pronounce this liability) also by the importation of the product made on the basis of the patented invention into the country of protection, which means that the patentee is not obliged to carry out the production in the territory of the country referred to. The member countries possess the rights of prescribing sanctions for abuse of monopoly rights conferred by the patent. Such penalties can include the compulsory licence, and in case this is ineffective, the revocation of the patent may also be effected. Compulsory licence—in the case of non-working or not satisfactory working—cannot be applied for, or granted before a grace period has passed. The latter cannot be shorter than 3 years after the granting of the patent, or 4 years after the filing of applications (whichever is more favourable for the patentee), and revocation can take place only after 2 years have passed since the failure of the compulsory licence. In the case of an application for a compulsory licence, the patentee may justify his inaction by legitimate reasons. Such a compulsory licence shall be non-exclusive and shall not be transferable, even in the form of the granting of a sub-licence.

From the standpoint of the *developing countries*, this regulation is injurious to their substantial national economy interests; it does not assist, it even—in given cases—hinders the development of their domestic industry and technology, and makes them *not sufficiently protected against foreign patentees* (practically, capitalist multinational companies). For this reason, they qualify the introduction of more efficient sanctions, and addition into the PC institutional system of terms which would restrict importation as one of their key-endeavours, linking their entire interest in participating in the PC institutional system to the issue of whether they can succeed in achieving radical reforms in this respect.<sup>136</sup>

The draft of the *new text* for Art. 5/A was prepared in the preparatory phase—where sometimes dividing lines could be drawn between the capitalist and the

<sup>135</sup> Cf. especially Bobrovsky (2), (3); Sunshine-Buxbaum, op. cit., furthermore Kunz-Hallstein (6).

<sup>136</sup> Especially, PRETNAR, S.: La protection internationale de la propriété industrielle et les différents stades de développement économique des états, *Prop. ind.* 1953/4; ANDERFELT: *International Patent Legislation and Developing Countries*, 1971; VAITSOS, C.: *The Revision of the International Patent System: Legal Considerations for a Third World Position*, 1976.



developing countries only<sup>137</sup>—and it was accepted at the Nairobi Conference—with small textural and structural modifications—by the relevant Chief Committee. The *essential modifications* of the new draft text, compared to the effective one, are as follows: Paras (1)–(7) of the article states *general terms*; in Para. (8) special, preferential exceptions relevant to developing countries are formulated. Regarding the general terms, an amendment specifically provided in the text that the individual countries have the right to prescribe that the actual working, or utilization of the inventions protected by them permanently or provisionally (in case of deferred examination) must take place in the country of registration. As a principal term it provided that providing for the needs by importation cannot be considered the working of the patent, but individual member countries are entitled to pass different measures in this respect. Any country is entitled to prescribe sanctions for abuse of exclusivity; nevertheless, importation in itself—in the absence of other circumstances—cannot be considered to be an abuse. The prescriptions in substantive law relevant to compulsory licence are basically unchanged. However, in the usage of the new text, in place of compulsory licence, we can find the term non-voluntary licence, which has wider sense.<sup>138</sup> Another new rule provides that on the basis of public interests (first of all, for purposes having relevance to health matters, food supply, national security, or ‘the development of a national sector having vital importance’) any patented invention can be expropriated.<sup>139</sup> Finally, the new text provides that in the case of a non-voluntary licence, or of expropriation for public interests, an appropriate compensation is due to the patentee, and that in these cases, as well as in the case of revocation, the possibility of an ‘appropriate’ (high-level) remedy must be guaranteed for the patentee.

Paragraph (8) of the new text establishes *definite exceptions* for the legislation of *developing countries*. Accordingly, the law of a developing country may permit a shorter period of grace for the non-voluntary licence, namely 30 months, calculated from the granting of the patent; moreover, it may permit an exclusive licence, for up to 4 1/2 years. (In this case, however, the revocation or cancellation of the protection may take place at most one and a half years after the expiration of the exclusive compulsory licence.) Finally, lapsing of a patent is also possible—in principle, without a period of grace, and by neglecting an experimentation with a prior compulsory licence—if in the judgement of the relevant national authority the non-voluntary licence would not ensure the appropriate working of the patented invention.

<sup>137</sup> So, several of the developed countries (e.g. Canada, Spain) supported in principle the concept of the developing countries. Cf. *Parragh* (1).

<sup>138</sup> This is not merely a change in terminology. It may occur, namely, that the ‘organ granting the licence’ is ordered by its supervisory organ to conclude the licence contract, and such a case cannot be considered ‘voluntary’ either. Cf. Basic Proposals (Note No. 122), commentary by the WIPO director-general.

<sup>139</sup> Up to that time this had not been expressed by PC; nevertheless, it had always prevailed as a tacitly accepted principle. Cf. *Bodenhausen*, op. cit.



Naturally, the circumstance that the Chief Committee accepted the new wording of Art. 5/A can by no means be interpreted to imply that in the further meetings of the revision conference no sharp debates can be expected in this respect.<sup>140</sup>

From our viewpoint, the modification proposal is in principle well founded. Accordingly, every right, including those of absolute structure, is liable to be practiced in accordance with its social aims. Regarding protection for patents, the viewpoint is generally accepted that the patentee is obliged to utilize the protected invention appropriately, in a way and to a degree that it reflects the interests of the given country's national economy, and neglect of this obligation is actually an abuse of right which may and shall be sanctioned. It is another question that—especially, by taking into consideration our domestic economic interests—some remarks testifying to problems are worthy of attention. So, it is questionable whether the concepts against importation can meet the requirements of specialization, and the international division of labour characteristic of technical-scientific improvement. It is also questionable whether the compulsory (or non-voluntary) licence is a sufficiently efficient instrument, since in the transfer of modern technology, the part played by know-how, the latter being not revealed in the descriptions of the patents, is increasing. Consequently only those users who can reach an agreement with the patentee will have accessed to know-how. Experiences shows that compulsory licence is a kind of sword of Damocles and it occurs only fairly sporadically that its practical use has its turn.<sup>141</sup>

47. The next 'Act' of the Revision Conference (again in Geneva) took place in October, 1982; the fourth meeting (intended as a closing one) in February–March, 1984. What are the chances of a successful ending? If a harmonized compromise of conflicting interests cannot be created, if positions become rigid, thus is a possibility of the disruption of the Union; namely, the developing countries could step out in a large number and possibly bring about a separate union. The developing countries have made concessions; compared to their original suggestions, as their present-day proposals are less radical. From this it can be inferred that they consider the maintenance of the universal system to be basically advantageous. It is hardly doubtful that this interest is decisive also from the viewpoint of the other groups of countries. Doubtlessly, with the disintegration of the original PC model's homogeneity, the various interests confront one another more powerfully; this, however, is a general feature of peaceful co-existence. The existence of the institutional system that secures universal co-operation is of considerable interest, making the insistence to its maintenance desirable for the benefit of all countries concerned—occasionally even at the price of concessions, and in spite of justified worries about whether the accepted compromises are well founded.

At any event, the progress of revision has slowed down, it is noticeable that the standpoints are becoming rigid to a certain degree. This is why the organs con-

<sup>140</sup> For example, at the Nairobi Conference, the US delegate firmly pointed out that, according to his viewpoint, a non-voluntary, exclusive licence is equivalent to 'confiscation of private property, and that the US' ... will not be a party to any treaty which deprives an individual of his right to use his own invention ...', *WIPO Doc. PR/SM/4*.

<sup>141</sup> Cf. *Kunz-Hallstein* (6): according to the statistics given by the document of UNCTAD (Note No. 47), between 1958 and 1963 there were altogether 16 compulsory-licence applications filed in six developing countries (Cuba, India, Israel, Morocco, the Philippines, South Korea), and it was only on two occasions that they were granted. For a detailed analysis, see PFANNER, K.: *Die Zwangslizenzierung von Patenten: Überblick und neue Entwicklungen*, *GRUR Int.* 1985/6.



cerned set a longer 'period of contemplation', developing thereby the mechanism of 'diplomatic seminars'. On the basis of a recommendation by the sixth seminar held in September, 1989, the PC Assembly invited the WIPO Director-General to work out the proposals. There was some hope that the closing of the Diplomatic Conference would take place in 1991.<sup>142</sup> Incidentally, in the specialized literature attention is called also upon the circumstance that—even though the principles, centres of interests and sanctions characteristic of the two organs' activities are essentially different—the recommendations of GATT can be suitable for the motivation of completing the revisionary process.<sup>143</sup>

48. Although we could say that it was put on the agenda as a by-product of the Revision Conference, as if it were a sort of compensation for failure, nevertheless, it already seems today that it is the birth of one of the most important agreements on international co-operation in industrial property which is imminent, namely, the treaty on the *harmonization of patent legislation*.

The basis of discussion at the series of seminars was the 1984 Memorandum formulated by WIPO. At the November 1989 (seventh) meeting, solutions deemed final were accepted. In the interests of harmonizing the substantive patent law, the draft agreement took a position on the following issues: the period of grace related to the inventor's publications prior to the application; certifying the validity of the claim for filing; the course of filing; the legal consequences attaching to the day of filing and the minimum requirements of the latter; how to devise the specification; the issues of unity of invention; the effect of the process patent on the product patent; the reducing effect of earlier priority applications on novelty; the rights deriving from the patent; priority rights. Especially important is the provision of Art. 203, which specifies the criteria of patentibility and the possibilities of exclusion from protection by combining them to the minimum.

The draft solutions were discussed in detail in several other specialized fora, especially by the XXXIVth Congress of AIPPI. The specialists, relying also on comparative analyses, had essentially formulated the draft intended to be final, and at the specialists' meeting in June 1990 (supposedly the last one). They had only the task of carrying out the necessary refinements. The diplomatic conference took place in The Hague from 3 to 21 June, 1991, but it could not accept the draft in a final form. Some questions remained, so the conference could be qualified as the "first act" of the diplomatic conference. The reasons for that were twofold. First, it seemed advisable to be in synchrony with the results of the negotiations within the Uruguay Round of GATT, concerning some intellectual property questions, commonly known as TRIP (trade-related intellectual property), at least as regards

<sup>142</sup> See OMPI—Rapport sur les activités menées et les faits nouveaux intervenus en 1989, *Prop. ind.* 1990/1.

<sup>143</sup> Cf. BALLREICH, H.: Enthält das GATT den Weg aus dem Dilemma der steckengebliebenen PVÜ-Revision? *GRUR Int.* 1987/11.



the system of sanctions.<sup>144</sup> Secondly, it would also be advisable to await the possible reform of the US patent law, namely concerning the first-to-invent principle.<sup>145</sup> The "second act" of the conference was planned for July 1993, but at the request of the USA it has been postponed. So, the Patent Law Treaty will probably be accepted in 1994.

The agreement will be a fairly important step towards the harmonization of legislation desirable in the field of industrial property. It will elevate the so far only rather technical-procedural co-operation to a qualitatively higher degree. The member countries must—within a certain period of grace—harmonize their domestic law with the agreement.

I have to mention some other preparatory works, serving the desirable enlargement of international co-operation in the field of industrial (in general, intellectual) property. A draft treaty is in preparation on the settlement of intellectual property disputes between States, and in a parallel work, an NGO expert group prepared a mechanism (in the framework of the WIPO) for the resolution of disputes between private parties on intellectual property (the arbitration expert body is envisaged working in September 1994).

<sup>144</sup> Cf. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (MTN/FA) Annex 1C.

<sup>145</sup> See SCHÄFERS, A.—SCHEUNER, D.: Der erste Teil der Diplomatischen Konferenz zum Abschluß eines Vertrages zur Harmonisierung des Patentrechts, *GRUR Int.* 1991/12.



# Interests and Conflicts of Interests in the Field of Industrial Property

## 1. The PC model

49. As has been analyzed in Chapter I, innovation activities—requiring and inspiring international co-operation—are unfolding within the framework of multiplying relations and systems of relations. In these (macro- and microlevel, vertical and horizontal) relations of various levels and trends, in the social relations, a harmonized *co-operation of a number of partners*—with different characters and interests—has to be organized. The chain of innovation stretches from research through the preparation for production and actual production to the phase of marketing activities, sale and circulation; in the case of up-to-date economic activities, it usually does not even respect national boundaries. The alpha, the point of departure of the process, is the creative man (although his role cannot be neglected in the later phases of the chain either), while the omega of the process, the end-station, is the one for whom, for the higher and higher level satisfaction of the needs of whom it is a law dictated by social development, that the whole chain-system must move: he is the consumer.

The persons, organizations representing the various phases, and positions of the chain of activities are motivated by their own *particular interests*. To recognize these interests, to solve their conflicts and to bring them into a harmonious synthesis, in the course of which to establish the right hierarchy of interests, occasionally to strengthen and motivate them by particular preferences, by the instruments of—not exclusively, probably not even first of all, but those of—law, within that by the means, institutions, and rules as well, of the industrial property—all these are possible and necessary.

*Regulation by law* necessarily applies abstraction, building thereby upon the most frequent typical variants (which are to be possibly developed or to receive preferences) in given social relations. Legislation takes care in selecting its *model* of regulation. In order to assess institutional systems of industrial property and to justify their modification, we shall have to examine what kind of model it is built upon, namely, what sort of social relations are those which are considered typical, and within these relationships what factors should be given preference.

In Chapter II, the framework, the institutional system of international law related to co-ordination in industrial property have been sketched. Here now, with a certain simplification, it can be stated that the industrial property system,



institutionalized by PC and its subsidiary agreements, wished to reflect basically the *interests* of the relatively strong, expanding *capitalist companies*, which secured the standard of their industrial production also by technical development. The task of the PC was to ensure that the placement of new products on the market and the *extra profit originating from them* would be supported by similar conditions. The *approaches offered by PC facilitate the international circulation of goods in a sense that, by its legal institutions, PC protects inventive technical conceptions*. In effect, the model of regulation was the *relationship among possible competitors*, the capitalist companies of largely equal strength, in possession of patents and trademarks.

Basically, this model—which historically has necessarily developed in this way—is characteristic also of the effective institutional system. This is so even if—usually in an indirect way—the general public ‘interest’ is also given voice in the PC prescriptions on the one hand, and in the disintegration of the homogeneous character of the PC member countries after World War II as well as in the appearance of socialist and of developing countries—hardly having influence in proportion to the number of their inhabitants—in the area of international industrial property, on the other, have had a certain impact on the changes in the PC institutional system or on the prevalence of the latter in practice.

What has been written above is not intended to be a pre-adjudication or preconception that the ‘waistcoat’ of the PC must be completely re-buttoned (or even thrown into the rubbish), because, surely, it unilaterally reflects the interests of the capitalist entrepreneurs. Even, *prima facie it seems*—which may also be due to the fact that its principles and terms have been formulated with proper abstractness, and by securing a great degree of liberty for individual national legislation—that the PC provides such a system of norms as are currently suitable, without essential alterations for the channelling of relationships—having become undoubtedly more complicated and heterogeneous. In order that a value judgement can be well founded, outlining suggestions in relation to the necessity and directions of possible modifications, a more intensive analysis is desirable.

The examination of interests, conflicts of interest, and the assessment of the adequate character of the institutions of law, interested in the reflection and solution of those interests, cannot be restricted to the PC’s institutional system only. In the international system of co-operation in the protection for industrial property, the PC and its subsidiary agreements represent only certain general frameworks. The industrial property institutions and norms of the *individual legal systems* carry identical or greater weight. The solutions offered by the individual legal systems, the different or the identical character of the latter, the causes of the differences, their nature of principle or eventuality—originating, for example, from connections of legal systems or from tradition—the chances of unification or at least harmonization, etc.—all these must be examined to the extent necessary, occasionally only in outlines, by illustrations.

What follows will aim to convey a general idea of the *interests of the representative participants in the innovation process*, possibly in the context of the usual pairs of interests, and to show how these interests are reflected (or can be reflected) in the individual variants of legal regulation. For example, the connections between



competitors' interests; the problems of the creative man's and the consumers' interests; the consequences of characteristic interests on national, regional and universal levels; the interests originating from differences in economic-social systems—all these issues will be treated below.

## 2. The authors' specific interests

50. *General remarks.* — Creative activities and their results have importance not in the whole field of industrial property. It is however evident that in establishing the institutions which serve the protection of technical works (inventions, innovations), in the field of patent law taken in a wider sense, the part played by the creative man is outstanding. Similar importance is implied in the model designer's activity, the results of which are to be protected basically by the regulation relevant to industrial design. (As regards commodity marks, the creative activity has no, or only a very indirect, part to play in the area of legal institutions, e.g. that an effective legal protection for certain geographical signs is also suitable device for the reflection of the particular interests of groups of individuals engaged in the given area and possessing specialists' knowledge.)

It is in the *creative man's* obvious *interest* that his activity, surpassing the general standard and serving the advancement of society, should be honoured properly by the latter. *Social* prestige and moral *recognition* can be most appropriately expressed by legal regulation which codifies entitlements attaching to the person, with an implication about the person.

The honour by law towards *the interests of the person* who produces technical works has received a relatively modest place, belatedly, in the theoretical conceptions which provided the basis for the statutory regulation of industrial property. Especially the theories on proprietary rights, which concentrate on and overemphasize the material aspects constituting an element of technical works—including their refined variety, the theory of immaterial goods—neglected or at least pushed into the background the interests attaching to the person. We do meet some theories revealing most consistently the weight and importance of the personal element, occasionally even overemphasizing it to the detriment of economic implications.

As regards the solutions offered by statutory law, the legal systems of ex-socialist countries provide relatively detailed regulation of the rights of the creative man (inventor, innovator, designer) attaching to his person, especially as regards the recognition of authorship rights (*droit de paternité*), and the right to make the decision on disclosure (*droit de divulgation*).

Not even the *international* system of industrial property can boast of reflecting with proper intensity the interests attaching to the person. It is altogether the PC's Art. 4<sup>ter</sup> referred to above—which was inserted into the PC text in the course of the London Revision—which provides: 'the inventor shall have the right to be mentioned as such in the patent'.



51. *Intermezzo of personality rights.* — The valuation of the human personality is also socially conditioned; man is 'zoon politikon', his individual qualities and values can exist and develop in social surroundings. Law can contribute to the unfolding of the personality with a stock of instruments only to a moderate degree, but law must not abstain from this contribution. The protection of personality is justifiably considered by Hungarian law as one of its essential tasks, and in this almost all of the branches of law can offer assistance by their specific instruments, methods, or sanctions. It is a virtually uniform theoretical viewpoint in Hungarian civil law that it is a task of civil law to protect by its specific means the human personality, the personal interests.<sup>146</sup> This task of civil law is not arguable, even if it is justifiably stated by *Sólyom* that the modern development of personality rights points towards abstraction on the one hand and politicization on the other.<sup>147</sup>

Scrutiny of the issues related to intellectual property raises some problems within civil law. Namely, the norms of civil law wish to protect the 'abstract' personality. That is to say, they formulate the protection of interests which is due to everyone without discrimination, but they want to provide specific protection for a specially valuable 'human kind' the creative man, as well. The interests of the creative man show certain specific features, which are to be honoured in the course of the regulation. As an indication, let us mention the specificity that in the case of protection by civil law for the creative man's personality, there can be no abstraction from his product. As a result, the point of grasping it by legal regulation is in the materialized product, work. In the case of protection by law for the creative man, the law—admitting it by denying it—sets up also a kind of lower standard, even if indirectly only, determining thereby a minimum of the intellectual product. Similarly specific issues are cropping up in relation to the intellectual products from the circumstance that personality interests and property interests (and entitlements) are in the organic unity of a Janus face.

Among the norms serving the protection of general personality rights, resp. that of the specific interests of the creative man, the phenomenon of overlapping is a frequent occurrence. Let us review some of them, only by way of indication. Right to one's name obviously belongs in the category of general personality rights. At the same time, the creative man's right to his name, his interest attaching to the acknowledgement of his quality as a creative man, shows specific features. The protection of good reputation is due to every man, but this appears with special emphasis in trade connections;<sup>148</sup> an injury to the prestige of the creative man and his intellectual product can lead to disadvantages in an increased degree. The sphere of privacy, personal secret, are of personality interests requiring protection even in the abstract, but they appear in specific shades as regards the intellectual products—especially those having utilizable economic values (know-how, rights of disclosure, etc.).

Let us emphasize again that the connections and certain differences between the protections for general personality interests of civil law and those for the creative man's interests have been only indicated above. The building of an adequate stock of instruments for protection requires depth analysis of common and different features. *De lege lata*—from the viewpoint of the Hungarian civil law—no special worries emerge; in effect, the principle of the availability of parallel protections is consistently declared.<sup>149</sup>

In examining the territory of intellectual property, certain distortions in proportion can be noticed. The copyright regulations express the protection of personality type interests with greater emphasis and in more detail than the norms relevant to the kinds of intellectual products falling under the legal category of industrial property. Historical development may play a part in it, but obviously the objective differences in the two kinds of intellectual work also may have an effect. The economic-proprietary aspects come to the fore more strongly in the case of intellectual products, which are protected by the institutions of industrial property. On the other hand, the criteria of patentability make a greater objectivity, a standardization of the quality level possible (and they even require this), than

<sup>146</sup> Cf. *Világhy* (1), (2), (3); *Boytha* (2); *Asztalos*, op. cit.; opp. *Sárándi* (1).

<sup>147</sup> *Sólyom* (1), esp. pp. 13 et seq.

<sup>148</sup> For the characteristic interconnections of trade-name rights and good reputation, personality rights and those of competition, see *Fernández-Nóvoa* (1).

<sup>149</sup> Para (1) in § 87 of the Hungarian Civil Code. Cf. *Lontai* (6).



is the case with the expressly individual copyright works.<sup>150</sup> This notwithstanding, it can hardly be doubted that it is not merely the building of legal guarantees for the possibilities of economic utilization that is required in relation to technical—intellectual—products. The building out in greater detail of legal prescriptions serving the personality and moral interests, social recognition of the creative man—and also serving as incentives to the development of creativeness—is desirable, too.

52. As regards the protection of the creative man's *proprietary interests*, the standpoint of the Hungarian legal literature and of the legislation—in harmony with the international tradition—is that principally the methods applied by civil law regulation are suitable for securing the interests at issue. Theory indicates also that basically the creative intellectual work—even though it is of a higher rank than routine work—is still work. Consequently, protection for the creative man's interests could theoretically be secured by the application of labour law regulation. All these notwithstanding, holds the theory of the Hungarian legal system, considering partly the closely intertwining nature of personality and proprietary aspects, and partly the requirements of a pragmatistical approach—the reasonable solution seems to establish a *protection of absolute structure* as is characteristic of civil law. (It must not be forgotten, of course, that the creative element is an increasingly more frequent attribute of 'routine' work as well, and as an incentive for this type of creative activity the general-normative, labour-law type regulation is also suitable. However, above a certain level, special incentives are desirable, and the drawing of this line of standard depends on the level of development of the given State and society just as much as on the purposeful innovation concepts of the latter.) The exclusive right granted to the creative man with respect to his product is suitable—indirectly and automatically—to establish a proper legal basis for the realization of his interests which are proprietary in nature.<sup>151</sup> The Hungarian legal system brings increasingly more conscious expression to the dominance of the civil-law approach, even in the course of regulating innovations relevant mostly to labour law.

Naturally, among the circumstances of modern industry, the chances of the creative man (the inventor) utilizing directly the economic possibilities of his product (invention) occur increasingly infrequently. It cannot of course be excluded—especially in the cases of individual or small-scale manufacture, e.g. of special instruments—that the *inventor himself sets out on the basis of his invention to manufacture* and put his product in the market. But we can consider as typical only the case in which the inventor aims at realizing his *material interests* by transferring his property or his right to use to someone else for a consideration. He establishes the conditions of realization for the fruit of his intellectual product by applying *special contracts*. It is another question that—again typically—the user, normally a large company which is in a stronger economic position, can exert a

<sup>150</sup> Cf. Troller (1), Vol. II, esp. pp. 704 et seq. Kopff (1), Lontai (2); Knap, K.—Opltova, M.: Das Erfindungswesen der neueren Rechtslehre und Rechtssprechung in der Tschechoslowakei. *GRUR Int.* 1983/5.

<sup>151</sup> Cf. Világhy (2); Boytha (2).



greater influence on setting the conditions of the contracts for utilization, so that the conditions will reflect the user's interests more emphatically than those of the inventor. The principle of partners' equality often covers this economic inequality, that is, power positions more prejudicial to the creative man's interests. (In relation to the improvement of the situation of 'defenceless' users, namely, as regard the stronger protection of the developing countries' interests, we may be witnesses to determined international endeavours directed towards a restriction or prohibition of certain variants of contractual conditions. We can state that energetic intervention in affairs of inventors' exploitation is less intensive.)<sup>152</sup>

In what follows a few questions will be examined in the context of the creative man's interests, the problems of: relationship among the authors of joint intellectual products (inventions); competition between inventor's, resp. applicant's principles; regulation of the legal state of intellectual products, and inventions made by an employee as a result of and during the period of his service, termed 'employee's inventions'.

53. *Employee's inventions.*—Undoubtedly, among the various kinds of invention, the legal questions of employee's inventions are the most thoroughly elaborated. Both in national and international relations; the conflict of interests and the attempts to resolve them can mostly be traced in this field. So, the examination of the questions of employee's inventions will be given greater attention than the specific problems of innovators or those of industrial designers. As a consequence of modern industrial structure, of and company concentration is the obvious fact—illustrated by patent statistics<sup>153</sup> that a great majority of inventions and solutions, responsible for technical development and innovations, come into existence not in the 'small mansard room' of the scholar or scientist, but in the course of systematically directed research and development activities carried out by the teams of companies (big companies), as a result of conscious innovation politics, long-term development strategies, with well-qualified sections for research and development, and laboratories as well. Thus, *significant inventions* are typically *employee's inventions by nature*.<sup>154</sup>

In Hungarian practice attention was repeatedly called to the tendency that, as opposed to the data reflected in patent statistics, in many cases such inventions appear as employee's inventions that are not connected to service obligations. On the other hand, inventions which are actually employee's inventions apply for patent as private ones. The legal basis of the latter—regardless of the employee's abuse—may be constituted by the 'secondary' right of disposition in Hungarian patent law, declared

<sup>152</sup> Cf. HÄUSSER, E.: L'inventeur: le parent pauvre de la nation? *Prop. ind.* 1981/1. These problems received earnest emphasis at the WIPO-IFIA Conference in May 1984. Cf. *Prop. ind.* 1984/7-8.

<sup>153</sup> In 1988, 74.2% of the Hungarian patents were granted for the protection of employees' inventions. See, *Szita* (Mrs), op. cit. Incidentally, the proportion of the individual patents is growing; as regards the number of filings it surpasses that of employees' inventions.

<sup>154</sup> Cf. REIMER-SCHADE-SCHIPPEN: *Das Recht der Arbeitnehmererfindung*. Berlin 1964; as for the key position of employees' inventions in the law of technical development cf. *Eörsi* (1), pp. 264-266; recently the materials of the Bucharest Symposium on Employee Inventions (October 6-7, 1992), WIPO Doc. 720(E).



valid in the course of the most recent amendment.<sup>155</sup> In the former case, we are faced with a non-adequate 'satisfying by law' of a real need. Namely, as indicated above, frequently the inventor searches for a user, a partner for utilization. The partner (company), however—partly on account of legal (industrial property) inexperience, partly for 'psychological' reasons (for the prevention of conflicts between "inside" and "outside" inventors and of disproportionateness of interests)—prefers to manage the "outside" inventor's invention as an employee's invention. 'Qualifying the inventions' in this way is to conclude—in the last analysis—a simulated contract, which in reality disguises the transfer of invention and patent from the private inventor to the company.<sup>156</sup> All this notwithstanding, after admitting the possibility of a two-directional distortion, we think that here the law of great numbers is not basically implicated and the thesis referred to above, namely the dominance of employee's inventions, is not invalidated.

The employers' and the inventors' interests related to the employee's inventions partly coincide, partly conflict with one another. A basic interest of the company that its employees bring in as great a number (of as high a value) of inventions as possible, along with such intellectual products as are usable in the sphere of the company's activities. This, in principle, increases the competitiveness of the company, enhances its profits, and this also serves the inventor's interests—in an indirect way, at least—partly because, together with the increase in the company profit, his income will—with a great probability—also increase, partly because his fruitful inventing activity will also increase his position, his prestige, his chances of a career, his security in the company. However, *joint interests* imply *internal tension*, too. It is in the inventor's interests to share in the economic return of the invention at as high a rate as possible, by disposing of the invention to a full extent, while the employer's interests consist of the possibility of an exclusive disposition by it over the invention, as well as the reduction of the inventor's share to as low a degree as possible. The joint interest and the search for a solution by compromise are reflected in the conceptions and legislation related to employee's inventions.

According to the '*harsh*' capitalist conception related to employee's inventions, the employer can claim against the wages the worker's labour and all the results coming from that labour; and this principle is also relevant to those who carry out 'intellectual' work (the model of master-servant). This conception corresponds to that kind of regulation in which the employer's exclusive right of disposal of the employee's intellectual works, is established, and for the creative man (the inventor) no material or other claim is secured. (This does not prevent the "clever capitalist" from rewarding his employee for carrying out useful work; the latter, however, has no rights under substantive law.)

In the current century, especially in the period since World War II, this rough conception has suffered noticeable erosion. The legal norms relating to employee's inventions have become more chiselled; in them, the *creative man's interests* have become honoured to a certain extent. In this phenomenon, some moral consider

<sup>155</sup> According to the original solution offered by Act II of 1969, the employer inventor obtained the patent right only in the case of the employer's expressed waiver for the inventor. On the basis of the modification of the Act introduced by Law-Decree No. 5 of 1983, this claim may well be grounded also by the employer's silence (omission).

<sup>156</sup> Cf. *Lontai* (1), pp. 188 et seq.; *Bacher* (1).



tions have a part to play, along with well-conceived business interests. (Surely, in modern production, the efficiency of 'human investments' is undoubted, a sufficient stimulation of creative workers serves company interests as well.) Nevertheless, the decisive influence has been exerted by the growth in the qualification of the employees by their conscious, organized attitude towards the matters. No underestimable part was played here by the attractive model of the legal system of some ex-socialist countries, either; in the regulation concept of that system, the recognition of the creative men's interests is emphasized as a principle.<sup>157</sup>

The solutions offered by the individual legal systems show several *variants* in their historical development. There are legal systems which—continuing to adhere to the classical solution—either neglect the regulation of the issue, as a matter of course, or lay down the employers' right of disposal, making it clear in this way that the inventor has no right to claim any remuneration.<sup>158</sup> Some other legal systems—while maintaining the company's right to disposal—refer the inventor's possible claim for honorarium to the field of labour law, to the competence of the concrete (or, more preferably, to the collective) labour contracts, securing by this—not in one case—that the inventor does in fact receive his fee.<sup>159</sup> There are legal systems which provide detailed regulation on employee's inventions. Several varieties are found in this respect. The solution can be considered as typical according to which the right of disposal on the employee's invention is *ex lege* due to the employer, nevertheless, the inventor is entitled to a fee—in addition to his wages; for the realization of his claim, various fora are at his disposal.<sup>160</sup> Again another variety is that the company's right of disposal is not automatically established, but in respect to employee's inventions the company has the right of pre-emption, option, or licence. (It may also be that this is not an exclusive type.)<sup>161</sup>

These solutions are further coloured by how the given legal rule defines the employee character of the invention and by the extent to which the inventor's principal realizes gain (this will be given a closer

<sup>157</sup> Cf. POGODDA, H.—GRABOW, E.: Arbeitnehmererfinderrecht — Instrument der Profitmaximierung, N 1980/12.

<sup>158</sup> A majority of patent laws do not contain any expressed provision on employees' inventions. This does not mean that the practice—based on some connections within the legal system—does not establish certain principles. For example, the Swiss practice is interesting: by combining the taciturn indication of Para (1) in § 3 of the 1976 Patent Law ("... that third person is entitled to the patent in whose possession the invention is by some other entitlement...") with § 332 of OR, it comes to the conclusion that the inventors of employees' invention are not entitled to an extra honorarium. Cf. DOLDER, F.: Nachwirkende Nichtangriffspflichten des Arbeitnehmererfinders im schweizerischen Recht, *GRUR Int.* 1982/3.

<sup>159</sup> For example, § 13 of the 1975 Law of Mexico on Patents and Trademarks; Para (1) of Art. 1<sup>ter</sup> in the French Patent Law, modified in 1978.

<sup>160</sup> E.g., §§ 39–43 of the 1977 British Patent Law; §§ 23–26 of the Italian Patent Law, modified in 1972; § 66 of the 1979 Code on Industrial Property Rights Protection in Sri Lanka. On the solution in British law, see *Cornish* (1), esp. pp. 215 et seq., which affords at the same time a useful survey on the historical development of the common-law concept.

<sup>161</sup> As is found in § 35 of the 1978 Japanese modified patent law. See, comprehensively, for the Japanese practice, YOKOYAMA, M.: Stimulation de l'activité inventive dans l'entreprise.—Les systèmes d'inventions de salarié, systèmes d'appui de l'activité inventive. *Prop. ind.* 1988/10.



review below).<sup>162</sup> In some socialist legal systems where form of protection termed author's certificate was preferred, the inventors' claims for fees—with different varieties—were laid down by legal rules, while the question of their possible rights to disposal did not even arise, because by the given form of protection (see in much detail in Chapter IV) this was not secured, not even for the company.

The legal regulation which honours the creative men's interests is an achievement of recent codification, although it is—primarily in Germany<sup>163</sup>—not without history. An intervening factor in this was the remarkable progress in *regional integration*, as well. In the creation of relevant legal rules in the Common Market countries no small part was played by the circumstance that the intensity of labour-force flow in this field has led to such contradictions for the relaxation of which a close approach to the legal solutions could partly prove to be a suitable instrument.<sup>164</sup>

The prospect of *universal* unification or *harmonization* on a wider scale—in spite of certain undoubted results—is not yet on the horizon. This is confirmed by the debate that took place within the frame of AIPPI.<sup>165</sup> The examination of the question of employee's inventions (Question 40 B) played a part in the AIPPI agenda, but the convergence of the concepts led to such a slight achievement that the issue had to be taken off the program on the one hand, and the majority position developed, on the other, that it does not seem reasonable to initiate the insertion of some relevant principles or rules into the PC. However, the view which were explicated within the AIPPI were not without use, since they provided a better understanding of the various concepts, an analysis of which has implications in principle and theory alike.

The determination of the *service character* was a debated question. The view can be considered homogeneous when the invention (or in the usage of the Hungarian rule: the elaboration of solutions belonging in the sphere of topic of the invention) is an obligation of the employee, following from his sphere of work.<sup>166</sup> (Surely, in connection with the determination of service obligations, it is not infrequent that disputes arise. The Hungarian practice, that the employer is liable to prove its position in case of a dispute, could be approved.) In general the systems can be considered homogeneous in that the employee qualification in itself does not suffice to establish the service character, if the invention is not even indirectly connected

<sup>162</sup> The 'niceties' of the inventor's principle is strongly questioned by e.g. the practice generally carried on, namely, that a worker transfers at the outset in the labour contract his rights relevant to his possible inventions to his company for, let us say, a consideration of \$ 1. — Cf. *Poggoda-Grabow*, op. cit.

<sup>163</sup> Already in 1957 the question of employee's inventions as regulated by a special law in the GFR. — Cf. *Reimer-Schade-Schippel*, op. cit.; *Röpke*, op. cit.; on the—unsuccessful—French suggestions preceding the 1978 codification, cf. *BAUMANN*, D.: Bestrebungen zur gesetzlichen Regelung der Arbeitnehmererfindungen in Frankreich, *GRUR Int.* 1977/12.

<sup>164</sup> Cf. *WEINMILLER*, J.: Bemerkungen zum Arbeitnehmererfinderrecht in der EWG, *GRUR Int.* 1975/11.

<sup>165</sup> Cf. AIPPI Annuaire 1964.

<sup>166</sup> § 22 of the Italian law; § 35 of the Japanese law; Para (1), Art. 1<sup>er</sup> of the French law; cf. also the AIPPI documents (Note 165).



with the service obligation.<sup>167</sup> (A different question is whether it is desirable for the enterprise to ensure accessibility to such 'free' inventions in case they can offer useful applications—even if they are not of service types—in the course of company activities.)<sup>168</sup> However, there are standpoints in a middle category, in respect to the inventions which, even though not closely related to the inventor's service obligations, still benefit from the company resources (instruments, laboratory, accumulated know-how, etc.). Several legal systems extend the service qualification to this category also, possibly by applying differentiation in the consequences.<sup>169</sup>

The Hungarian regulation in force raises a specific problem. In various legal systems it is typical that the obligation which is the basis of the service qualification is considered relevant only to the issue of an employment (labour law) relation. In Hungarian law, however, the invention is relevant to the issue of a service qualification also in cases of a connection with obligations 'originating from some other legal relationships'. From this provision there appear problems—among others—in that a lack of synchrony between the norms relating to research contracts and the patent law may occasionally allow grounds for contradictory decisions.<sup>170</sup>

The inventor's *personality type* and material, proprietary *interests* attach to employee's inventions as well. As regards the inventor's rights to be mentioned, the individual legal systems (either in their patent laws or other norms) specify them, in general, with regard to the PC provision referred to above.<sup>171</sup> The protection of integrity in the case of inventions is less significant. The company's right to carry out alterations in the employee's invention—on the basis of economic-technical considerations—can hardly be disputed. In principle, the inventor's personality rights can be injured if in the course of describing the employee's invention somebody distorts the essence of the invention; no legal debate arising from a legal injury of this type is known from the practice.<sup>172</sup> A more serious problem is raised

<sup>167</sup> Cf. Note 165.

<sup>168</sup> Cf. § 23 of the Italian law; Para (1) in § 35 of the Japanese law; Para (2) in Art. 1<sup>er</sup> of the French law.

<sup>169</sup> Cf. Para (1) of § 66 in Sri Lanka law; Para (2), Art. 1<sup>er</sup> of the French law. — Cf. Weinmiller, op. cit.; CHAVANNE, A.—BURST, J. J.: *Droit de la propriété industrielle*. Dalloz, Paris 1980, esp. pp. 85 et seq. —The invention judged in earlier French practice as a 'mixed' type has actually become in this way a so-called optional one.

<sup>170</sup> Cf. to this: FARKAS, J.: *A szolgálati találmányok néhány problémája* (Some of the problems of employees' inventions). An address to the Hungarian Lawyers' Association, in 1975.

<sup>171</sup> Cf. § 67 in the Sri Lanka law; Art. 4 in the French law; § 12 in the Mexican law.

<sup>172</sup> In the field of copyright, conflicts arise similar to those occurring in the cases of personality rights—although by no means without proprietary implications—with greater frequency. So, e.g., in the case when the user or owner of a building wants to carry out such alteration on it as would hurt the original designer's rights to integrity. See to this Lontai (7). From the viewpoint of the inventor, it can lead to injury to his interests if the employees' invention's holder carries out such alterations in the invention as lead to solutions different from the criteria claimed originally. This real conflict was relaxed by the 1983 modification of Hungarian patent law, according to which, "... it has no implication on the claim for remuneration based on the protection of the patent if one or two criterial specific features in the product or in the technology have been replaced by some specific feature of equal value, or by an improved one at the user's disposal on arrangement by the inventor" (Para (2), § 6/A in the Enforcement Decree of the Patent Act).



by the inventor's rights exercisable with respect to keeping the invention in secret or publishing it. In Hungarian law, the majority theoretical view is that the employer obtains the right of decision in this respect only after it has been transferred to him; until the time of transfer, the inventor can decide to maintain secrecy even in case of an employee's invention. In the latter case, the employer can apply labour law sanctions (in another type of legal relationship, the consequences built on breach of contract can be enforced), but the transfer of the invention cannot be demanded.<sup>173</sup>

In principle, the most pregnant solution reflecting the *inventor's material interests* is the one which, even in the case of employee's inventions, determines the claim for patent, in general *the right to dispose in favour of the inventor*. The latter, among the variants referred to above, is applied only exceptionally.<sup>174</sup> A typical solution is the transfer of the right of disposal to the employer, and for that matter either *ex lege*, let us say, as an independent acquisition, or by making it dependent upon the declaration of the employer, possibly as term-bound.<sup>175</sup> This is a defensible standpoint in the case of employee's inventions taken in a close sense of the term. The issue must, however, be raised here that securing the inventor's 'secondary' right of disposal is justifiable in the cases of employee's inventions. The previous Hungarian patent law position received rightful criticism. The claim for a patent, could be transferred onto the inventor only in the case of the company's expressed renouncement.<sup>176</sup> A well-founded view is that the inventor's interests deserve more powerful protection. Namely, the company's liability to declare should be introduced in relation to patenting and—in case of a granted patent—to utilization; if the company does not reply within an acceptable period of time—which may be fixed in a legal rule—it should entail the presumption of the company's renouncement. In the case of an unfavourable reply, insofar as it has a character of abuse, the transfer of the right of disposal to the inventor should be provided by law. The essence is that the patentee of the employee's invention who does not wish to properly utilize the invention, may not hinder the inventor in his attempt to exploit the material chances of his invention on his own—naturally assuming the risk as well. The propositions formulated above were partly honoured indeed by the 1983 modification of Hungarian Patent Act, when the latter on the one hand authorized the employee inventor to apply for a patent (on behalf of the employer in a way that does not affect the employee character of the invention) in case of delay in a reply by the employer (90 days following the information on the birth of inven-

<sup>173</sup> Cf. Világhy (1), p. 96; contrary to it, Törő (1), (2).

<sup>174</sup> Cf. the Japanese law's solution. Occasionally, as a variant of the solution, the statement of a joint patent between the company and the inventor has also turned about; however this is in general judged as a less successful construction. See the AIPPI documents referred to in Note 165.

<sup>175</sup> Austrian patent law is of a four-month term; the patent law of the GFR also stipulates a four-month term. According to Brazilian law, if the company does not put it into use within one year following the granting of the patent, the latter is transferred to the inventor.

<sup>176</sup> This provision was softened by the rule of Para (5) § 48 of the Hungarian Patent Act, according to which if the employer does not reply to repeated notification in the course of the patent proceedings or he does not supply missing documents, "... this will be considered as a consent to the transfer of the right of disposal on the inventor..."



tion). On the other hand, if the employer does not reply within 60 days following the information on the filing of the application on the part of the inventor, maintaining a claim for the invention, the law authorizes the inventor to continue the proceedings for a patent in his own name—now on the basis of his 'secondary' right of disposal.<sup>177</sup>

Practical problems, partly attaching to this issue, arise regarding the content and duration of labour law liabilities related to employee's inventions. It is not a rare occurrence among worker's liabilities laid down in labour contracts and occasionally in legal rules as well, that the secrecy related to the invention is obligatory for him even a certain time after the termination of the labour relation.<sup>178</sup> (This is important especially in the cases of inventions which are not patented, and are utilized as know-how.) Moreover, he is obliged to refrain from attacking the patent belonging to the employer.<sup>179</sup> It is also typical that an invention produced within a certain time following the termination of the labour relation is of an employee character, going to the credit of the previous employer.<sup>180</sup>

The inventor's material interests are essentially expressed by the recognition of the *claim for remuneration*, along with the exceptional or secondary nature of the right of disposal. As has been seen, the individual legal systems differ in this respect.<sup>181</sup> There are opinions in which the inventor's work of a creative type is held to have been paid in his wages, so he cannot claim fees surpassing that. Other legal systems hold the view that the issue should be assigned to the competency of labour law regulation, or (collective) labour contracts. Others set forth in principle the inventor's right to demand a remuneration beyond his wages, but bind this to certain criteria, e.g. the importance of the invention, useful economic results, the inventor's sphere of work, etc.<sup>182</sup> Concerning the claim for remuneration, several fora were used: conciliation committees, those of an arbitration-type administrative body or a judicial one.<sup>183</sup> The legal systems which recognize the claim for remuneration provide for the measure of the latter only rarely.<sup>184</sup> Mostly, they take

<sup>177</sup> Para (3), § 9 of Hungarian Patent Act as is modified by Law-Decree No. 5 of 1983.

<sup>178</sup> Cf. Para (3), Art. 1<sup>ter</sup> in the French law.

<sup>179</sup> Cf. *Dolder*, op. cit.

<sup>180</sup> E.g., § 26 of the French law judges the invention as of an employee type, if it is filed within one year after the termination of the employment relationship. Brazilian law also sets a one-year judgement time, while in Yugoslavian law it is six months.

<sup>181</sup> Cf. Bucharest Symposium (Note 154).

<sup>182</sup> The Italian law indicates as such a factor the 'importance of the invention', in the English law, it is the 'considerable profit' attributable to the invention which is indicated.

<sup>183</sup> French law indicates the arbitration committee as a primary forum organized beside the patent office, thereby leaving a possibility of judicial supervision of the arbitration committee's decision; English law authorizes the comptroller as a primary forum to make decisions, also providing the possibility for this forum to choose the judicial way; Italian law indicates a forum of selected committees—also in a way which can be supervised by court decision—(while in cases of state organs, the minister concerned decides with definitive effect); German law also assigns disputes to the competency of selected committee (*Schiedsstelle*) organized beside the patent office, and this proceeding in general—but not without exception—must precede possible court procedures. Cf. *Chavanne-Burst*, *Röpke*, op. cit., *Cornish* (1).

<sup>184</sup> For example, in Czechoslovakia, the Provision issued by the Office for Invention and Discovery Affairs in 1972 contains detailed tariffs on authors' remuneration for discoveries, inventions, suggestions of innovations and industrial designs; the order issued by the Soviet State Committee on Invention and Discovery Affairs in 1974 is similar in content and specification.



a position only in principle on the 'fairness' of remunerating, on the proper measure of the latter, etc.<sup>185</sup>

After 1969, for a few years, Hungarian law did not apply—unlike its earlier practice—tariffs and index-numbers prescribed by legal rules; however, in contractual and judicial practice certain principles and *typical ratios* did develop—even if, according to certain views, not always consistently.<sup>186</sup> The basis of the remuneration which was due to the inventor was the company's profitable result, while the tariff is basically adapted to the circumstance whether the company utilizes the invention in its internal activities, that is to say, whether it is put on the market in the form of material goods, or in that of the intellectual product itself (in the form of a transfer, or licence). In connection with this the question of principle arises regarding what kind of inventor's activity should be taken as the basis for calculating the remuneration; whether it is exclusively his actually creative activity, leading to the device, or (also) his active co-operation in the marketing (improvement, experimentation, organizing-marketing activity, training of the skill, etc.). These activities are closely connected to one another. In principle, the concept is justifiable which stimulates a continual co-operation between inventors and companies, building on their common interests, possibly even with the consequence that the rate of remuneration will differ in the given case from the ratios acknowledged in the phase of inventing taken in the strict sense of the word (in case of more than one inventor). The modification of the Hungarian Patent Act in 1983 reintroduced the concrete tariff system. The fees were however of a character oriented in principle, and stated as of a dispositive nature, not having a binding effect on the relevant company rules or those of the contracting parties. They provide, nonetheless, reliable guidelines for entering into a contract and judicial practice alike, in the rational application of the principles, starting values, and factors which normally increase or decrease the relevant tariffs, all of which were incidentally built upon the considerations referred to above that had developed in the earlier practice. It has also become clear that applying the inventor as in 'co-operation' is not excluded either, it is even desirable. The most recent regulation which entered into force on 1 January 1990, makes no mention of legal tariffs, leaving thereby the arrangements for contractual terms as tariffs to the employer and the inventor.<sup>187</sup>

54. The role of the solutions of a smaller significance, that of the *innovations*, is recognized in every modern production structure. Innovations result not in epoch-making, revolutionary changes, but, just because of their mass-utilization, lead to considerable economic profits, savings, and excite not only 'professional' promoters, possible inventors, but also a fairly large layer of physical workers, to more vigorous action in creative work and thinking. The economic importance of innovations is recognized also by western companies, and they often apply fruitful incentives as well.<sup>188</sup> It is, however, not often that the innovations are regulated institutionally and even if they are regulated, the given creative activity which exceeds the routine activities qualitatively is not honoured.<sup>189</sup> The legal systems of the ex-socialist countries consistently build into their institutional traditional

<sup>185</sup> The law-decrees referred to above expect the remunerations to be 'equitable', 'fair', 'reasonable', etc.

<sup>186</sup> Cf. Törő (3); Bacher (2).

<sup>187</sup> Decree No. 77/1989 (VII. 10) of the Council of Ministers.—Cf. Bobrovsky (7).

<sup>188</sup> A number of big companies—especially American and West-German ones—built effective systems to stimulate greater output by workers' suggestions for company management. Cf. Röpke-Szilvay, op. cit.

<sup>189</sup> An exception is the GFR law in which certain provisions of the 1957 Act (*Arbeitnehmererfindungsgesetz*) extend also to non-protectable (*schutzfähig*) intellectual products, that is to say, to innovations. Cf. Reimer-Schade-Schippel; Röpke, op. cit.



system of industrial property the terms relevant to innovations, thereby recognizing the innovators as creative men' personality rights (like the authorship rights, priority presumption, etc.), besides their subjective rights to a remuneration above their wages.<sup>190</sup> (Consideration of an employee's duties receives a greater role here than in the cases of an employee's invention; possibly, even the establishment of innovation is excluded.)<sup>191</sup>

55. As regards *industrial designs* produced in a service relationship, hardly any regulation can be met—in spite of the fact that it is typically within the employment relationship that the model designer's activity is brought into effective action.<sup>192</sup> Recognition of the creative nature of the model designer's activity is essentially correctly pronounced in the Hungarian legal rule in force on the protection of industrial designs.<sup>193</sup> (The exaggerated copyright-centered approach applied in the regulation on the remuneration of employee designers is highly debatable.)

56. Mention must be made of some of the *specific categories* of creative workers, like authors of know-how, software and plant-breeders.

The notion of *know-how* will be explained in our later discussion (Points 99–100). Suffice it to say here only that we meet with two typical variants of know-how. When it is actually a matter of accumulated experience, knowledge of the company the concrete origin of which cannot be established, the legal status of the "authors", first of all of their claim for remuneration does not even emerge as a problem for solution. However, in the case of know-how in which the author is known, the claim for remuneration may be well founded. In Hungarian law, the remuneration issue of the inventors of solutions which are otherwise patentable but are not patented due to business-political reasons, the law is more or less settled; it is because of problems of origin at most if the patent-law 'trick' has to be

<sup>190</sup> The legal systems in all the European ex-socialist countries contained special norms on the law of innovation, either in the form of an independent legal rule or—often—in legal rules of a complex nature, that is to say, together with the issues of discoveries and inventions (for example, in the Bulgarian, Soviet and Czechoslovakian laws). On the history of development, and problems of principle related to the Hungarian law of innovation, see: BÉRCZI, I.: *Az újítói jog elvi, joggyakorlati és kodifikációs kérdései újítómozgalmunk fejlődésének tükrében* (Questions of principle of legal practice and codification in the law of innovation as reflected by the development of the Hungarian innovation movement). Dissertation MS, Szeged (Hungary) 1975.

<sup>191</sup> Earlier, also Hungarian innovation law took a stand in a sense that non-existence of service liability belonged to the conceptual elements of innovation, that is to say, the employee's suggestion whose service liability implied the submitting of the proposition could qualify as an innovation only in exceptional cases—in the presence of some significant creative performance. Decree No. 10/1983 (V. 12) of the Hungarian Council of Ministers annulled the requirement of lack of service liability which had appeared among the criteria of innovation; the full resp. partial presence of lack of service liability can be taken into consideration in the course of setting the amount of remuneration. In this respect the legislative intention, legal-political endeavour, was to draw technical-intellectual workers (engineers, technicians) in a greater proportion to the field of innovative activity; namely, according to inferences drawn from the statistical data, the ratio of their participation was unjustifiably low (not fully 20%). The currently effective regulation, Decree No. 78/1989 (VII. 10) Hung. Council of Ministers, continues to maintain this principle. Cf. Bobrovsky (7).

<sup>192</sup> The questions of employees' designs are settled, for example, in the law of Sri Lanka in detail; in Mexican law, by reference to the rules on employees' inventions.

<sup>193</sup> According to Para (2), § 3 in Law-Decree No. 28 of 1978, if the employer does not reply to the designer's written notification within 60 days, the right of disposal on the service design will transfer to the author.



applied. In the cases of non-patentable—but valuable—know-how the issue of the author's remuneration is not solved, or, more exactly, the practice seems to be contradictory to the Civil Code concept referred to above.<sup>194</sup> In such cases, the author of the know-how can realize his claim for remuneration with success, if he files for his solution as 'innovation'.

The theoretical questions and solutions by legal rules related to the legal protection of *softwares* will be touched upon later in our analyses (see Point 85). Here it is merely necessary to mention that in certain cases it can be justifiable to qualify the software author as an innovator, or know-how designer, and to adjust his remuneration accordingly, including cases of 'routine' software. The Hungarian legislation and judicial practice of today unambiguously assigns the legal protection of individual-original softwares to the copyright sphere, consequently also in establishing the authors' remuneration the regulations relating to employee's works are applied.<sup>195</sup>

It is hardly disputable that the inventors producing in the field of biology, the *breeders* of new plant and animal varieties, are authors of no less valuable products than the inventors producing technical solutions. It is likewise not disputable that an overwhelming majority of such products come into existence within the framework of service relationships. Consequently, the legal protection, namely, the claim for remuneration of the breeders needs to be regulated. This problem arises especially sharply in the case of such legal systems (as will be touched upon later on in our discussion) in which the legal protection of new varieties is ensured outside the patent system, by special protection of the varieties.<sup>196</sup> In Hungarian law, the protection of new plant and animal varieties is ensured by the institution of patent; thus, to the issue of remuneration of the breeders the prescriptions relevant to the inventors of employee's inventions are applied. On the basis of the applicable Hungarian law, as a disturbing circumstance, the arrangement may emerge that the regulations of variety qualification—basically of an administrative character—also contain prescriptions on the payment of royalties to the breeders.<sup>197</sup>

*De lege ferenda*, the establishment of a harmony between the two systems of regulation, may bring a solution; *de lege lata* the practice may, however, be applied without any scrupulousness known by Hungarian effective law, namely, that no obstacle can arise in the way of paying remuneration based on a twofold entitlement, with the stipulation, however, that into the inventor's remuneration built on the patent, the breeder's royalty will have to be calculated (regarding it, as it were an advance payment).

**57. Joint inventions.** — In the foregoing, we have discussed questions of conflicts between creators' interests and others' interests (user, employer). Specific conflicts arise also from the creators' *internal conflicts of interests*.

Intellectual (technical) products originate not only from individual efforts; they are often the result of *creative co-operation among many producers*. In choosing copyright analogies, the view is well founded that in the cases of technical products, the co-author relationship is typical, that is, the creation cannot be divided into independent parts (even if a relationship comparable to that occurring in the case of joint-authorship—in connection, for example, with the concept of unity of invention—cannot be excluded completely). Accordingly, the creator partners

<sup>194</sup> Pf. IV. 20.306/1980 Supr. Court; (BH 1980/12.468).

<sup>195</sup> Para (1), § 1 of the Enacting Decree to the Hungarian Copyright Act supplemented by Decree No. 15/1983/VII.12/MM. In the case of software, the producer of the employees' work is entitled to 10–30% of the income (and not to the 60–80% due according to the general rules). Cf. § 12 in the Enacting Decree to the Hungarian Copyright Act.

<sup>196</sup> Cf. HESSE, H. G.: Züchtungen und Entdeckungen neuer Pflanzensorten durch Arbeitnehmer, *GRUR* 1980/5b.

<sup>197</sup> "In the case of such plant- or animal varieties as has received State qualification, the inventor can—depending on the patentee's choice in the course of concluding the given contract—realize his claim for remuneration on the basis of the legal rules relevant to the qualification of plant- or animal varieties." Cf. Para (3) in § 3 of Decree No. 77/1989 (VII. 10) Council of Ministers.



constitute a close unity among themselves, which does not exclude, it only makes it difficult for their internal conflicts to be solved.

In the individual legal systems we can find provisions governing *joint inventions*, joint patents (these—*mutatis mutandis*—can be directive as regards innovations, industrial designs as well). Certain legal systems are more laconic, indicating only how to apply the rules of joint ownership, while others fix more detailed terms. A typical rule is that any of the joint-patentees has the right to make use of the invention within his own sphere of activities, along with an appropriate sharing of the relevant incomes and costs, while the 'outward' legal acts, for example, the granting of licences, transfers, abandonments of protection, resp. revocations of filing, can take place only *jointly*, occasionally coloured with the partner-patentee's right to preemption (and even preemptive procurement of licences).<sup>198</sup>

A special problem is produced by the joint invention of inventors governed by the jurisdiction of *different countries*. Priority may be claimed here by various connecting principles of international private law (e.g. *lex personae*, *lex loci laboris*, *lex loci usus*, *lex loci protectionis*), such conflicts are not easy to decide.<sup>199</sup> The integrating endeavours of the COMECON in industrial property led to direct regulation in this field; the 1973 Moscow Agreement<sup>200</sup> attempted a unified regulation of the legal questions of joint inventions (and other categories of industrial property). The practice to date on the basis of the agreement provides a rather poor basis for proving the correctness of the solutions in the service of regulation.

Experience in practice reflects that joint ownership is one of the typical sources of legal debates, similar to joint inventions. The law-maker is hardly able to work out detailed rules for an equitable settlement of the possible conflicts of interest. It seems that the framework-type regulation is reasonable, which makes it possible for the forum to weigh the interests, on a wider scale, preventing an abuse of the right. It is easier, by all means, to solve the inventors' (patentees') conflicts of interest related to inventions that have already been protected (patented), than those that relate to the exercise of personality rights by the inventors. For example, one partner-inventor may vote in favour of secrecy, while the other urges publication. (This circumstance has not only personality rights implications, but it can reflect differences in judgements on the chances of economic marketability.) The appearance of the employee factor in the invention may bring a further complexity into the conflict. The ratio of remuneration among the employee-inventors of the companies which are in patent-partnership may be different from the ratios which had been established in the course of producing the invention, or employees and

<sup>198</sup> So, § 20 of Italian law refers merely to the rules on joint ownership; Para (2) in § 3 of Swiss law merely fixes that in cases of more than one inventor, they are entitled to the patent collectively. French law, for example, permits patentees in partnership to transfer their quotient, or grant a simple licence (exclusive licence can be given only jointly); however, the remaining partners have the right to preemption purchase or licence (§ 42).

<sup>199</sup> In given case, even problems of qualification or *renvoi* can emerge, for example, if the regulation of the given legal system is built on the theory of proprietorship.

<sup>200</sup> Promulgated in Hungary by Law-Decree No. 8 of 1975.



non-employees may appear in combination as factors in establishing the ratios.<sup>201</sup> (This situation can be further complicated by the aspects of private international law referred to above.)

Finally, attention must be called upon to another problem which is decidable more easily in the theory than in the practice. Obviously, only those partners can be qualified as co-inventors who have contributed in achieving the joint result by offering their really 'creative type' activities. (Another question is the establishment of the weight, quality, and thus the internal proportions of the individual co-inventors' co-operation which can be valued only with difficulty. Because of this, a majority of the legal systems—wisely—sets up the general presumption of the equality of proportions.) In practice, however, the activity of the co-operators in bringing about the results can be of strongly different characters and standards. Some partners offer their ideas, some are diligent experimenters; those in the third category fill the useful function of the 'advocatus diaboli', etc.

The question also arises whether the organizing activity or, simply, the protectable formulation of the patent idea (for example, the reasonable definition of the points of claims) can qualify as of a creative character.<sup>202</sup> The Hungarian practice testifies that it has happened more than once that such 'contributors' were qualified as co-inventors in connection with whose activities—however useful these were—the term creative type was at least disputable.

The recognition of a necessity to differentiate between genuine creators and non-creative-type contributors does not by any means call into doubt the usefulness of the latter category; the contributors are links in the innovation chain, and, accordingly, a far-reaching justification of their receipt of incentives is not doubted. Hungarian law—in relation to inventions and innovations alike—acknowledges these contributory activities separately, establishing the basis of principle on the contributors' entitlement to remuneration.<sup>203</sup>

58. *Principle of inventor vs. principle of applicant.* — The competition between inventor's principle and applicant's principle (first-to-invent—first-to-file) traditionally characterizes the solutions offered by the individual legal systems. The joint starting point of the two principles is the notion that an inventor can only be a physical person and, on the other hand, that the claim for a patent is in principle—as such an entitlement which is related to the patent and is proprietary in nature

<sup>201</sup> It can be observed in the practice of several companies that—as regards the intensity of co-operation—the differing ratios among inventors are fixed in the contract of remuneration; thus the solution is not that there are separately concluded contributory contracts for co-inventors. Cf. to this *MIE Közleményei* 21/2.

<sup>202</sup> According to the position of the Hungarian Patent Office published in 1978 (*SzK* 1978/6), the patent attorney cannot be considered as a co-inventor.

<sup>203</sup> § 13 in Decree No. 10/1983/V.12/ Council of Ministers; § 5 in Decree No. 11/1983/V.12/ Council of Ministers; Decree No. 17/1983/VII.6/ Finance Ministers. It is another question that a number of the negotiators do not consider as well-founded the 'narrowing' which is oriented to establish contributory remuneration on a basis proportional to the work put in. In given cases, it is more desirable to make a contributor interested in the result, too. In the course of the 1989 reregulation, these limitations were abolished.



—marketable. This difference between the two principles can be formulated in a statement that in the legal systems built on the inventor's principle it is the 'first and genuine' inventor who can enforce his claim for the patent based on the original right to it, while anybody else can do so only after he has satisfactorily certified his successorship. As against this, the legal systems advocating the applicant's principle do not examine the relationship between the applicant and the inventor; they presume the applicant's entitlement.<sup>204</sup>

It is hardly necessary to state that the *creator's interests* are expressed more pronouncedly by the *inventor's principle*. On the other hand, the view that a consistent enforcement of this principle would lead to serious difficulties of proof, and the views of legal security, tends to favour the applicant's principle.

The principles referred to above, prevails clearly in very few legal systems.<sup>205</sup> We see only to shift in accent, variants of *compromises*, tendencies. The patent law of the USA, and those influenced by it, essentially advocates the inventor's principle; however, its erosion can be observed in our days. The international tendency indicates a strengthening of *popularity of the applicant's (first-to-file) principle*.<sup>206</sup> It can be considered a typical solution that the relevant legal rule fixes in principle the inventor's original entitlement to the patent, but does not however require an examination of whether the applicant's claim for the patent can indeed be traced back to the inventor. The applicant's entitlement is established on the basis of a presumption, while guaranteeing however—normally by court procedure—the possibility of abrogating the presumption.<sup>207</sup>

To this sphere of questions belongs the problem of how the individual legal systems assess—from the viewpoint of destruction of novelty—the *inventor's publications* prior to the filing. Some of the legal systems take a rigorous stand (the Hungarian one included), in the sense that publication prior to the priority period is considered as destruction of novelty, even if it originates with the inventor himself. Other legal systems—by affording greater weight to the creator's interests—allow a certain period of grace (6 months, 1 year), within which—in the case of application—one's own publication is not considered as destructive of novelty (anteriority).<sup>208</sup> The opponents of the latter stand refer to the dangers of insecurity

<sup>204</sup> Cf. *Somorjai* (1).

<sup>205</sup> Reference can be made here on the one hand to the patent law of Iraq as one of the extreme examples, which exclusively permits for natural persons (inventors) to apply for a patent and makes the transfer of the patent possible only after it has been granted, and, on the other hand, to Greek law, which also permits for legal persons to file for a patent.

<sup>206</sup> So, most recently, also the British legal system, which traditionally advocates the inventor's principle, has shifted to the applicant's principle (§ 7 in the Patent Act of 1977), moreover, in connection with the patent law of the USA, similar reform conceptions have emerged. Cf. BANNER, D. M.: The recent proposal to change the United States patent system. *Patent Law Review*, 1970; BODEWIG, T.: Zur Reform des amerikanischen Patentrechts.—Die Novelle von 1980 und weitere Reformbestrebungen. *GRUR Int.* 1982/1.

<sup>207</sup> This solution is characteristic also of the European Patent System. Cf. *Mathély* (1); *Bentham* (1); *LIUZZO*, L.: Inhaberschaft und Übertragung des europäischen Patents. *GRUR Int.* 1983/1.

<sup>208</sup> So, e.g., by Italian law (§ 17); Japanese law (§ 30); moreover, Australian and German law.



in the law. As regards this question—especially in connection with the draft agreement on harmonization—experts' debates have been and are taking place in a number of fora (AIPPI, IFIA, etc.).<sup>209</sup>

### 3. Conflicts of competitors

59. An immanent element of commodity goods production is the market, i.e. competition. Companies, organizations carrying on economic activities of various character and rank, enter into partly horizontal partly vertical relationships with one another in the competition. Such a mechanism implies the economic organizations' dependency upon one another, so the necessity of their co-operation, on the one hand, while at the same time it sharpens their conflicts of interest, on the other.

The positions of competitors are determined first of all by the *strength of their economic conditions*, but suitable legal instruments, like the institutions of *industrial property*, afford good vehicles for the toughening of their position as well. Not only the rules of competition law in a wide sense of the term play a part here. The institutions serving the protection of technical products, and even more so the tools used for the protection of company and goods marks, actually work as *tools in the competition*. Naturally, the par excellence law of competition is of primary importance; its task is to prevent distortions of the economic structure from occurring and to make it sure that the conditions and rules of the game in the 'fair' competition will be observed (the content of this fairness is of course a 'historical category').<sup>210</sup>

Thus, competition goes together with the production of goods, and is a characteristic element of not only the capitalist economic systems but it was present in the former socialist economies, too.<sup>211</sup> The function of the institutions of industrial property as tools in the economic competition could not be neglected in the relationships of economic organizations in the former socialist countries, either.

The competitors' connections regarding conflicts of interest are multi-faceted. These conflicts will be examined from three particular aspects, namely, in relation to organizations of largely the same order (horizontal relations); to those representing different positions in economic activities or in the innovation chain (vertical relationship); and finally to those existing in monopolistic situations.

60. *Conflicts of interest among competitors in horizontal relationship.* — As regards the relationships among competitors of largely the same strength carrying on similar economic activities (manufacturer, seller), the situation expressed in the classical law of competition in liberal capitalism is characteristic of them. The

<sup>209</sup> As regards the stand taken in connection with Question No. 75, see: AIPPI Annuaire 1981. See also the material of WIPO-IFIA conference referred to above (our Note No. 152). Parragh (5); HÜNI, A.: Bemerkungen zur Einführung einer internationalen Schonfrist, *GRUR Int.* 1985/3.

<sup>210</sup> Cf. in detail Vörös (1); esp. pp. 155 et seq.

<sup>211</sup> For the characteristics of the former socialist commodity production, see, in the Hungarian literature on economics, the papers by Szabó, Sinkovics, Falus (Mrs) and others. On these, a valuable summary is offered by Vörös (1) pp. 35 et seq.



interests of the manufacturers require that such goods are produced as are marketable at prices as competitive as possible. A higher technical standard resulting in a higher use-value, can be assured also by technical solutions (inventions, innovations, know-how). It is therefore in the interests of the manufacturers to have the possibility of affording *effective legal protection* for their products, and to enjoy temporary exclusivity for the exploitation of new ideas. In principle, it is in their interest to have patents granted for really significant intellectual-technical products, then the circle of protectable products is possibly expanded, and the manufacturers' exclusive legal position is burdened with as few restrictions as possible. On the other hand, the interests of the competitors carrying on identical or similar activities are in favour of such possibilities as—by using a simplification—allow greater chances of getting around the solution protected for another competitor (possibly, the scope of patentable inventions should be restricted), at least insofar as it would make access to the other competitor's products possible, even against the will of that competitor (compulsory licence, voluntary endorsement of extending the patent, etc.). These interests of course prevail in the reverse sense as well; on a long-term basis, the 'equal treatment', the ensuring of identical conditions appears as of *common interests*, even if in one or another situation the interests are in conflict with one another. The same is valid (in relation to manufacturers, but even more strongly to sellers) for commodity marks. With marks, labels, similar to others' popular, time honoured trademarks, with the aid of a trade name which is easy to be confused with the other, the competitor's clientèle can be 'seduced', the goods can be sold more easily, on more favourable conditions by stealing the goodwill built by the competitor. In a newer situation the interests can however be reversed.

In the last analysis, it can be inferred that the interests of competitors in horizontal relationships with one another require that they can strive against each other on the basis of *identical, fair rules of the game, that the competition be honest* (of course, economic honesty is not always related by any means to the prescriptions of everyday morals).<sup>212</sup> The interests implicated here are those most appropriately reflected by traditional legal norms—prohibiting unfair competition—and not first of all by the various, characteristic presumptions of facts (termed as infringements, frauds, or impeachment of the competitor, etc.), but the flexible skeleton-type, '*general clauses*', which are easily applied by the law applier.<sup>213</sup>

One of the main goals of the Hungarian economy is to afford incentives to action for a sound competition and to establish the conditions for it; in this sense economic-financial regulation is used as an instrument of reaching the goals. In the course of this, two viewpoints conflict with each other. According to the prevailing concept, the so-called normative regulation exclusively ensures entirely identical conditions, grounds for the game for every economic organization, free from discrimination. This approach is in harmony with the interests of the horizontally-related competitors referred to above. However, another well-grounded argument has asserted itself. Its representatives point out that *nor-*

<sup>212</sup> Cf. Vörös (1); RAISER, L.: Marktbezogene Unlauterkeit, *GRUR Int.* 1973/6-7; SCHLUEP, W. R.: Vom lauterem zum freien Wettbewerb, *ibid.*

<sup>213</sup> Vörös (1).



mativity in principle and in general is an agreeable method of regulation, but there are areas in which automatism is not effective enough, e.g. technical development; innovation in a number of cases entails a higher degree of risk than is usual; the expectable result can be reckoned with only over the very long term; the companies undertaking this risk, which are of a modern attitude indeed, get into disadvantageous situations not in one case—on a short term, at least—as against their competitors who can build on comfortable, routine activities. It is therefore desirable to assist and motivate—by affording *preferences*—determined (innovation) activities as against doing that on the basis of company categories.<sup>214</sup> (To certain interconnections in this respect we shall come back in Points 138 and 187.)

61. *Interests of vertically-related competitors.* — Specific connections, resp. conflicts of interest emerge in relation to organizations which are active in various phases of the innovation process. It is especially characteristic of these relationships that their advantageous elements, attaching in general to co-operation, are mingled with greater or lesser conflicts resulting from opposing interests, and the interference of the positive elements with the negative ones makes a correct appraisal of the genuine or supposed interests extremely complicated.

One of the possibilities for such characteristic conflicts of interest emerges in the relationship between *researchers* and *producers*. The researcher's interests require that he carries on his activities as freely and as free from risk as possible, while as regards the research results his rights of disposal should be on the widest scale possible. The interests of the producer organization which utilizes the research results are also in favour of assuming the research risks in as small a proportion as possible, resp. utilizing the results that have been achieved possibly without any restrictions. These conflicts of interests appear typically in the area of *research contracts* first of all in connection with these stipulations of the contract that fix the decisions in favour of the mandate, resp. work contract variants, placing the research risk, and making arrangements in the area of rights of disposal (e.g. the claim for patent).<sup>215</sup>

As regards the relationship between researcher and user (manufacturer), conflicts of interest also emerge in the issue—touched upon already in relation to the creator's interests—that the researcher's interest often motivates publication, while the user's interest not rarely votes for secrecy.

As regards the *manufacturer's* and *seller's* relationship, the *identity of interests* is characteristic of them. Namely, both sides are interested in marketing the goods on as wide a scale and under as advantageous conditions as possible; it is at most (and this is not a negligible element) that their interests conflict in respect to setting the rate of profit. The latter can precipitate also in industrial property, first of all in the matter of marks. So, when establishing the rate of share of profit, reference can be made with success to the importance of weighing the indication of which one of the partners would exert a greater influence on marketing, so the conflict of the *trademarks* indicating the person of the manufacturer, resp. that of the commercial

<sup>214</sup> See on this the MIE material of the forum for debates held in October, 1981, Siófok, under the title: A műszaki és agrár szellemi termékek belföldi forgalmazása (The domestic marketing of technical and agricultural intellectual products).

<sup>215</sup> Cf. in detail, *Lontai* (4), (8).



partner can come to the fore. The manufacturer's share can reasonably be based upon the consumer's confidence in a stable and good-quality product. This can be grounded at the production phase by ensuring a proper technical standard, quality control, service shop, etc. (special parts are played in this respect by the so-called collective marks). The seller's role is also necessary since his widespread advertisements, and practice of marketing good-quality products attaches the consumer's confidence in him. Such conflicts of interests may emerge from the temptation of the seller to use the manufacturer's trademark (or an indication to it) even on goods which do not originate from the given manufacturer or—even if they do—are of poorer quality. Therefore he does not wish the given goods to be marked as registered.<sup>216</sup> Conflicts can be avoided by the joint use of trademarks, and co-operation in advertising and consumer service, etc.

First of all—but not exclusively—the former socialist countries may experience peculiar conflicts arising out of the former *foreign trading* monopoly. These problems arise not so much in the field of marketing such product as possess the advantages afforded by the institutions embodying intellectual products and protecting the industrial property, but rather in the course of the independent marketing (licence) of intellectual products. The claim by domestic partners was often heard that the system of interest in the foreign trade of Hungary was not properly differentiated, since it did not take into account the special difficulties and risks of marketing intellectual products.<sup>217</sup>

62. *Role of the monopolies.* — In the above variants we discussed competitors of typically similar strength in horizontal or vertical relationships. The situation is different if one of the partners possesses a significantly greater *economic potential*, that is to say, he is in a monopolic (or oligopolic) situation. The significance of the institution of industrial property is twofold here. It can bring about and to strengthen monopolic situations, on the one hand, but it can offer instruments to break up harmful monopolistic situations, against the abuses of market superiority.

Compared to classical free market competition, the establishment of monopolies distorts the economic market structure. The norms of the industrial property reflected relatively early on the struggle against monopolies, and the attempts to preserve the freedom of competition. In spite of *anti-trust* legislation and norms for restricting and regulating the *cartels*,<sup>218</sup> it seems that the tendency toward economic concentration is irreversible. (An economic evaluation analyzing the above situation is not a task of the present volume. It must however be pointed out that

<sup>216</sup> A peculiar precipitation of such conflicts is the practice of passing off. Cf. WESTERHOLT, H. G.: *Die Passing off Klage im englischen Recht*, Köln 1976; *Cornish* (2).

<sup>217</sup> Cf. the material of the forum of debate referred to in Note No. 214.

<sup>218</sup> For the presentation, historical analysis and evaluation of the anti-trust law in the USA, cf. THOMPSON, G. C.—BRADY, G. P.: *Text, Cases and Materials on Antitrust Fundamentals*, West Publishing Co., St. Paul, Minn. 1979; cf. HANÁK, A.: *A gazdasági verseny és jogi szabályozása a fejlett tőkés országokban* (Economic competition and its legal regulation in developed capitalist countries), *GJ* 1978/1–2. A detailed analysis of this complex of questions is given in Hungarian specialized literature by Vörös (1).



economic concentration goes together with indisputable economic, national-economic advantages as well; it is of necessity an inseparable element of the division of labour; it increases the strength necessary to assuming the risk, a guarantee of setting out mature company strategy for the long term, which is especially necessary from the viewpoint of technical development. These advantages cannot be disputed, even if they lead to distortions, asymmetries, and occasionally to an 'euphoria of fusion'.<sup>219</sup> Incidentally, such euphoria can also be nourished from above, as was clearly illustrated by 'unsound' development of companies' structure in Hungary—justifiably criticized by many—which is attempting transformation in our days, with the result more than once, that the dangers of 'swinging to the other extreme' are also evoked.) The weight and the role of mammoth companies, especially multinational and transnational companies, is characteristic of the economics of our age; the international and even supernational character of the monopolies, stepping over boundaries, creates further specific problems and conflicts of interest.<sup>220</sup> The dominant role of the multinational companies in the marketing of technologies, or—let us say—in the practice of applying trademarks causes injuries—in most of the cases real ones—from the viewpoints of the developing countries' interests (see more about this below).

The *interests of monopolistic companies* in dominant market positions, dictate the maintenance and even widening of the advantageous possibilities offered by their rank. Their size and economic strength provide the possibility of developing a comprehensive and long-term company strategy; of assuming risks and costs related to technical development and marketing activities; of rationally organizing production capacity; of the insider development of the necessary vertical co-operation. They can strengthen this economic-technical potential also by a suitably applied policy of industrial property. They apply for patents of a substantial part of their significant technologies, while another part of these technologies is amalgamated into complex know-how; the solutions considered to be less significant are disclosed by so-called defensive publications,<sup>221</sup> thereby narrowing their competitors' chances of applying for patents. They monopolize the market by applying conscious trademark policies; by establishing families of trademarks; and by a widespread advertising campaign. Let us add to this the specialized legal apparatus against these—considering the cost and time demands of law suits—the weak competitor can fight with only little chance of success. In a word, monopolies—by consciously using the vehicle of industrial property, allow only a very modest chance for competitors operating on a small or medium scale.

An essential interest of *weaker competitors* facing the monopolies is the issue of 'survival'. Practically two solutions present themselves. Either they attempt as co-operating partners—acknowledging their inferior position and the dictated

<sup>219</sup> Cf. *Mádl* (1), esp. pp. 50 et seq. For the latest American tendencies see, 'Guidelines for Vertical Restraints', published by the Anti-trust Division of the U.S. Justice Department (Trade Regulation Reports, No. 687, Part II, 30. I. 85).

<sup>220</sup> *Szentes*, op. cit.

<sup>221</sup> See *Bobrovsky* (1), pp. 55 et seq.



conditions—to join the ‘circle round the moon’ of a monopoly (even with the relatively full-circled inner verticality—with due regard to the reasonable boundaries of specialization—these mammoth companies draw to themselves numerous small ‘home-working’ companies); or they follow the ‘strategy of gaps’ and concentrate their energy to such fields as—on various reasons—are outside of the monopolies’ circle of interest (e.g. products of small series, unique products, exclusive fashion-articles, etc.).

*Anti-monopoly legislation* in any case endeavours to prevent the over-expanding distortion of a situation judged as sound competition. This endeavour occasionally transfers one or the other institutions of industrial property into a battle ground. In the development of monopolistic situations, parts may be played by various patent-pools, exclusive licences, and in general the utilization of institutions of exclusive structure in the field of industrial property. It is especially interesting to scrutinize the EC development, from this viewpoint.<sup>222</sup> The Rome Treaty (Arts 85 and 86) in principle prohibits the establishment of monopolistic situations which can obstruct competition. The integrated community deems that the system of industrial property as well as law integration and co-operation should be developed. It will suffice to refer in this field to the European patent system (and within it, to the special patent system of the Community) which have been established by the Munich and Luxembourg Agreements,<sup>223</sup> namely, that the Luxembourg Agreement specifically fixes the possibility of affording the sort of exclusive licence.<sup>224</sup> The conflicts frequently occurring between the principles laid down in the Rome Treaty on the one hand and those immanent in the industrial property on the other, and also the leading cases<sup>225</sup> of the decisions of the Community fora in connection with these conflicts, testify to the fact that monopolies need not fear an essential restriction of their existential conditions, on the one hand, and that no mention can be made of some unambiguously crystallized principles working in practice of the Community.<sup>226</sup>

The conflicts indicated above can be observed in the field of protection of technical products (patents, contracts on licences, etc.) but, e.g. the problem of ‘exhausting’ the rights sharply emerged in relation to the law of trademarks<sup>227</sup> even if not without any transmission of the problem to the field of patents.

<sup>222</sup> In detail, see, Mádl (1); CAWTHRA, B. I.: *Industrial Property Rights in the EEC*. London 1973.

<sup>223</sup> Cf. *Die Praxis des EPÜ*, München, 1979 (reviewed by G. FALUDY, JK 1981/12).

<sup>224</sup> Art. 43 in LPÜ.

<sup>225</sup> For example, the cases of Grundig-Consten; Continental Can; Parke-Davis, etc. Cf. Cawthra, op. cit.; Mádl (1); Beurteilung von Vertriebssystemen, Wettbewerbsverboten und Vereinbarungen über gewerbliche Schutzrechte nach europäischem Kartellrecht, *GRUR Int.* 1977/7. Recently, cf. Report of the EEC Committee in 1982, on the competition policy of the EEC, *GRUR Int.* 1983/10.

<sup>226</sup> Mádl (1); MEIER, G.: Die Lauterkeit des Handelsverkehrs: Zur Einwirkung des Art. 30 EWG auf Auslegung und Anwendung der Generalklauseln des deutschen Wettbewerbsrecht, *GRUR Int.* 1993/3

<sup>227</sup> Cf. ULLRICH, H.: Staatsgrenzen und Warenzeichen, *GRUR Int.* 1975/8–9; STERN, R. H.: Restrictions verticales imposées en matière de brevets aux États Unies d’Amérique; Épuisement des droits par suite d’une vente autorisée—la situation après l’affaire GTE Sylvania, *Prop. ind.* 1985/9.



#### 4. 'Owners' and consumers

63. *On the consumers' interest in general.* — The 'natural end aim' of economic activity is the consumption or utilization of goods which are produced. 'Everything' which is done is done for the consumer. This, however, does not by any means imply that everything is adjusted to the actions in this process, the weight, role and honouring of the consumer's interest. We could say that competitors form as it were a common front—in spite of their inner conflicts of interests—against the consumers, resp. their clash in the collision of their interests also often injures them.

In agreement with the concepts which form the basis of international endeavours, we consider the consumer in a narrower sense, namely, as a natural person, the really final consumer.<sup>228</sup> The situation of the so-called producer-consumer is radically different, and deserves attention in the competitors' relationships as an aspect only. Another specific problem is raised by the 'State as a consumer'. Let us indicate here the areas of public transactions or those of research-management where the State emerges as a contracting partner (commissioner, party giving the order), that is to say, as a consumer; however, in the typical case, by no means in an unprotected situation, rather as the stronger, dominant contracting partner. The so-called government contracts are in general characterized—even if not always in an openly formulated way—by the weight of 'clauses exorbitantes'.<sup>229</sup>

The typical *individual consumer* occupies such a position in economic life, in the market, as to illuminate some features relevant to all kinds of economic systems. The essence of these features—with a slight simplification—can be formulated as stating that the consumer's situation—in comparison with that of the producer, and of the seller standing (directly or indirectly) opposite to him—is weaker, *more unprotected*. This phenomenon can be traced back to various factors (e.g. smaller-sealed economic basis, isolation, lack of organization, lower level of technical-economic-legal information, etc.), and it obviously emerges on different territories and with unequal intensity in different social systems. (It can even occur that in a given case the consumer is the 'master' of the market; this, however, is not the typical case.) We see considerably different variants of the consumer's 'defencelessness', as well. The problems of consumer protection obviously are different in economies without even the security of a minimum living standard, that of the basic consumer's goods is distinct from economies where the consumer has to overcome the 'confusion of a plethora'. Here mention must be made of the fact that the category of the consumers is not homogeneous, either. There are some layers which are more 'defenceless' than the norm; for example, minors, addicts; those who are more easily abused, due to language difficulties or cultural causes; who are seducible (e.g. guest-workers, refugees, minorities),<sup>230</sup> etc. All these, however, do not exclude the possibility of sketching the requirements; on the contrary, they

<sup>228</sup> For similar inferences see, PIZZIO, M.: L'introduction de la notion de consommateur en droit français, *Recueil Dalloz*, 1982/13. He contrasts the consumer with 'professionals'.

<sup>229</sup> To the subject, comprehensively, cf. HARMATHY, A.: *Szerződés, közigazgatás, gazdaságirányítás* (Contract, public administration, economic management). Akadémiai Kiadó, Budapest 1983.

<sup>230</sup> Cf. HIPPel (1).



underline the importance of a differentiated approach, and, especially, the part played by choosing the store of legal instruments in well-proportioned arrangements.

If we wish, by building on the above—to a certain extent abstracted—typical model of the consumer, to formulate the essential *consumer's interests* deserving protection, those enumerated below will serve our purpose:

It is an essential interest of the consumer that *goods be available on the market*, and first of all the essential goods should be at the consumer's disposal;

— these goods should be offered in a right, expanding *variety*;

— the goods shall be of *good quality*, reliable, safe, possibly in a fancy display (fashionable);

— in the course of his purchases (using the services), the consumer should receive *full and correct information* on:

— the objective characteristics of the commodity goods purchased (composition, performance, use, possible sources of danger, etc.);

— source of origin (producer, seller, region, country, etc.);

— certain accompanying services (service-shops, guarantees, shopping service);

— in case of defects in the commodity goods (or services), the entitlements and the methods of enforcing the consumer's rights;

— it is the consumer's right to have access to goods free of discrimination, under *reasonable conditions* and, especially, at agreeable prices;

— finally, the consumer should be enabled *to enforce his rights* easily (by way of quick, cheap and simple procedures).

The consumer's interests (we could even use the term consumer's rights) listed above (without an aim at completeness) actually reflect and express the principle of *satisfying the needs* on as high a level as possible, which—in principle—is one of the essential (declared or real) endeavours of every social system, every country.

64. The development of the viewpoint of consumer protection, the emphasis on consumers' interests can in our day be noticed in the concepts of *individual and in the goals at an international level, as well*.<sup>231</sup>

'Consumerism' has become especially 'popular' in the practice of *capitalist countries*. The establishment of organizational conditions and formulation of long-term aims can be found just as well as the development of the legal means, either in the form of comprehensive legal norms for the protection of the consumer or in partial regulations related to individual legal areas. Reference can be made here to the example of the USA, UK, Germany and Japan and especially to the endeavours for the protection of consumers in the Scandinavian countries (outstandingly, in Sweden).<sup>232</sup> Let us see now only a few as examples.

In the UK, an independent ministry was built in 1972 for the administration of consumers' affairs; in 1973, the special office of the Director General of Fair Trading was set up in connection with the Fair Trading Act; even a network of decentralized consumer advisory organs has developed. Of the more significant partial regulations, let us mention the Trade Descriptions Act; the Unsolicited Goods and Services Act; the Supply of Goods (Implied Terms) Act, and the elaboration of the so-called Manchester

<sup>231</sup> On a comprehensive basis, cf. esp. Hippel (2); Lontai (9); SCHRICKER, G.: Verbraucherschutzrecht — ein neues Rechtsgebiet? *GRUR Int.* 1976/7; Vékás (1).

<sup>232</sup> In detail, cf. Vékás (1).



Arbitration Scheme assigned to make the enforcement of claims less burdensome.—In the USA, the President's Committee on Consumer Interests and the National Institute for Consumer Justice were established; moreover, several significant part areas were regulated by e.g. the Fair Packaging and Labelling Act; the Consumer Credit Protection Act, etc.—In Japan, the basis of comprehensive consumer protection is the 1968 Act.—A successful invention of the Swedish legislation was the establishment of the institution called 'ombudsman'. In these countries, the organizations for consumers' interests protection also play a significant part, especially in the USA, Canada and Sweden.

In the *former socialist countries*, it is first of all quality protection that is emphasized, but in our day the direct consumer protection approach is not rare either, in the literature and in legislation alike.<sup>233</sup> Hungarian law also contains several such regulations and institutions; the importance of consumer protection is indisputable.<sup>234</sup> In addition to the relatively comprehensive (obligatory marks, information of the consumer, advertising practice and sales promotion practice, etc.) Act on Home Trade, the provision of the following Acts should be mentioned: Health Matters Act (No. II of 1972) on food and pharmaceutical products; the regulations of the Civil Code, mainly the provisions related to nullity (e.g. the consequences of abusing the dominant economic position; the possibility of quasi-popular action as an attack upon unilateral business terms); the norms of warranty; the procedural rules for alleviating the enforcement of claims (e.g. the attorney's advocacy possibility; the trade unions' judicial service); recently, the establishment of the National Council of Consumers can be acknowledged as an enrichment of the judicial-organizational store of instruments.

In the *developing countries*, the approach of consumer protection is novel as yet (and it appears to be mingled with other interests, not always without contradictions). Nevertheless, modern and comprehensive legislation can be found (especially in Mexico and Venezuela). The Mexican Law of 1975 provides a detailed and comprehensive regulation regarding the characteristic territory of consumer protection. Its provisions cover the questions of *del credere* liability, rules of advertising, and some special kinds of contract and business methods. A fairly significant provision of the Mexican Law is the setting up of *procuraduria federal del consumidor* and the organization of the *Instituto Nacional del Consumidor*.

The protection of consumer interests plays an increasing role in the activities of *international organizations*, on universal and regional levels alike. Let us mention only as examples, the functioning in this field of ILO, ECOSOC, WHO, FAO, UNCTAD, ISO, as well as the EEC and the Council of Europe.<sup>235</sup>

In what follows, a few of the actions of the relevant organizations will be reviewed by means of data. The ILO publication in 1973 furnishes a detailed analysis of the whole sphere of problems by surveying the history of the consumer movement, its difficulties, actual tasks, and the methods that can be best used for the purpose. On request by the ECOSOC a report was prepared by the Secretary-General in 1973 (Consumer protection: a survey of institutional arrangements and legal measures), which analyzes the main areas and institutional framework of the subject, the efforts of governmental and non-governmental (social) organizations, the international endeavours and results.—UNCTAD examines the issues especially from the viewpoints of consumers in developing countries, mainly analyzing materials

<sup>233</sup> Cf. among others LETOWSKA, E.—SOLTYSINSKI, ST.—TROJANEK, J.—ZULAWSKA, CZ.: Die Problematik des Verbraucherschutzes in der Volksrepublik Polen. *Zeitschrift für Verbraucherpolitik* 1978/1; LABADY, T.: On the civil law safeguards of consumers' interests, and on the consumer protection system. *AJ* 1978/3-4; KEMENES, B.: Legal and administrative means of the consumer protection system, *Acta Szeged*, 1980; VILUS, J.: Réglementation légale et autogestionnaire de la condition des consommateurs en Yougoslavie, *Yugoslav Law*, 1977/2.

<sup>234</sup> So, esp., Act No. I of 1978 on home trade.

<sup>235</sup> The 'Charta of Consumer Protection' of the Council of Europe, ratified at its XXIVth Meeting in 1973 (Res. 543/1973), is principled and comprehensive; similarly Res. No. 39/248, 1985, of the UN, on consumer interests.



related to technology transfers and trademarks.—The OECD repeatedly dealt with the issue; its report of 1972 is of outstanding importance.—Mention should also be made here of the activities of WHO (designations of pharmaceutical products); FAO (foodstuff patents, jointly with WHO); ISO (established a separate committee for the examination of the role of standards from the viewpoint of consumer interests); the International Chamber of Commerce (e.g. the issuing of the Code of Sales Promotion Practice). Beside the Charta of the Council of Europe referred to above, mention must be made of the Council for the Protection of Environment and of Consumers established in 1973, within the frames of the EEC, and also of the 'preliminary program' of the latter accepted in 1975, on the policy of consumer protection and information.

65. The consumer protection approach covers the *whole economic process*; nevertheless, with a slight simplification, three focal points (more significant phases), can be detected in which consumer interests show certain characteristics.

In the phase of *production* or manufacturing, it is the technical development (innovative activity), quality control, requirements of safety, etc., the significance of which is examined from the viewpoints of the consumer. In the area of *selling* goods (here include storing, stocking and trading in the narrower sense) the consumer's interests deserve attention mainly in connection with concluding and performing contracts. In the area of *marketing*, the consumer's interests lie in receiving proper information and protection against misleading information; moreover, against aggressive, manipulative methods of trade-business-advertisement.

The consumer interests defined above generally, may appear with different emphasis in relation to a State or another, depending on the level of development of the given economy on the rate of national income and the proportions of its distribution; on geographical factors, national tradition, etc. Similarly, the weight, the role, and the proportion of factors, of means in the service of protection for consumers' interests appear in a number of variants, depending not to a small extent on the given country's economic-social structure, on the system of economic management, etc. Generally, the following *more important factors* are worthy of emphasis in this respect: the given country's economic, technical development, the structure and standard of production; the given country's economic policy (within this, especially, the standard of living; price- and foreign-trade policy); the standard of general culture, education; within this the means of the consumer's general information education service; the character, the standard of the consumers' organizations, protection of interests.

As important as the above factors are the *legal means* serving the consumers' protection. There are several branches of law where institutions and rules suitable for consumer protection can be found.<sup>236</sup> In the *law of public administration*, the protection of consumer interests emerges in the norms on public health affairs, on market policing, in the technical regulations, in standards, in the organization of quality control, in the system of compulsory marks—indirectly—in the activities related to price regulation and the control of foreign trade. In the most flagrant, rudest cases of damage to consumers' interests, the sanctions of the *criminal law* are also applied traditionally. The norms of the *civil law* serve the purpose in a

<sup>236</sup> Cf. in more detail, Lontai (5).



many-sided way; first of all the rules of contract law and of liability. Such is the task, occasionally, also of the prescription of compulsory contract-making, of the cogent determination of certain content-elements of the contract, of the proper setting of the circle of invalidity cases, of the control of adhesion—blanket—contracts, of general business conditions.<sup>237</sup> An outstanding role is played by the modern regulation of the consequences of faulty performance, against the interests of the consumer (here belong the questions of warranty and of liability); by the 'objectivization' of liability; by the increasing rate of the enforcement of producer's liability; by the prescription of the compulsory guaranty. The partial regulations prevailing with regard to individual contracts, e.g. restrictions of interest rates, of cancellation, the rules of sales on installments, etc., are also important from the viewpoint of the individual contracts.

66. *Consumer interests and industrial property.* — As has already been referred to, the institutional system of industrial property is basically built on the model of the relationship among competitors. The consumer interests, in general, appear indirectly, partly in the 'envelope' of the public interests, partly by attaching to the competitors' interests. In a word, in the regulatory system of industrial property, the consumer interests are not factors '*creating models*'.

The tendency of reflecting the consumer protection approach in industrial property will be dealt with in Chapter IV of the present book. Here only a few examples will be provided to show the kinds of consumer interests which must be honoured in certain areas of industrial property, and the chances offered by effective regulation (or by those to be modified in the desired direction).<sup>238</sup>

From the viewpoint of consumer interests attaching to the expansion of product varieties and to increased quality and safety, as well as to the establishment of favourable prices for products, technical development is of basic importance. It can be stated that all legal means which promote technical development, the production of new *technical products* in as great a number as possible, and the quick and unobstructed flow of new technical results, together with the spreading of the latter in practice, also serve—possibly indirectly—the consumers' interests. As regards the new intellectual products, industrial property offers an exclusive-type protection and this—in principle—may hinder the unobstructed spread of the new solutions. Thus it can be said that consumers' interests work in the direction of unobstructed utilization of the intellectual products, and in this way toward *limitation of protections* having absolute structures, along with *narrowing the sphere of protection* (e.g. exclusion from patentability some articles of vital importance, foodstuffs, pharmaceutical products, etc.). It is a question however whether such a tendency really serves the issue of technical development (to this, see Chapter IV), whether 'free use' will not have a harmful effect on the technical standard of the products, on their reliability and safety. Similar considerations emerge regarding the duration of the *time of protection*. In principle, large-scale utilization—and so

<sup>237</sup> Cf. MALINVAUD, PH.: La protection des consommateurs, *Recueil Dalloz*, 1981/7; recently, in detail, TAKÁTS, P.: *A szabványszerződések* (Standard contracts). Budapest 1987.

<sup>238</sup> Cf. Lontai (5); Aracama Zorraquín (1).



the interests of the consumers—would be served by a protection period of a relatively shorter duration, which can promote the intellectual product becoming a public property earlier than otherwise. It seems however that this concept has not been borne out in practice. Even with an acceleration of technical development, only a few of the patents live through the period of secured protection—legally. It is rather the prescription of compulsory utilization and its effective legal guarantees that encourage proper results.

As has been seen above, proper information on the essential elements of goods (or services) belongs to the consumers' basic interests. The latter can be injured first of all in the field of commerce, and marketing. Industrial property reflects this area first of all by regulation of *company and commodity markings*. In regulating the protection of *trade names* (company names), the consumer's interests require that he should be protected against misleading and confusing names (e.g. trade names which are foreign sounding may indicate a foreign company), and this can be served by e.g. a compulsory registration of trade names, and, in the course of this, the supervision of whether the designation furnishes proper information to the consumer on the scope of the company's activity, whether there is danger of fraud or confusion. Similar consumer's interests deserve to be honoured also in the field of *trademark law*.<sup>239</sup> An essential function of trademark is to furnish information, to fix the individual relationship between the commodity and its producer (trader) while—indirectly—it also implies a kind of guaranty related to the quality of the marked article. The consumer's interests dictate that the norms of trademark law exclude the dangers of *false representation, misleading*, and confusion, whether the latter relates to the origin, type, or quality of the goods. Here again, the question can be raised whether the expansion of supply will not be obstructed by an exclusive entitlement which is granted in relation to commodity markings. However, it seems that consumer interests vote rather more for the correctness of the marking—that it is bound to the company—than for the possible 'advantages' deriving from the marking if it can be used by anybody. Consumer interests require that the *function of a quality guaranty* is emphasized, namely, by the institution of collective or certification marks. Similarly, consumers' interests are served by the prescription of specific protection in the cases of well-known trademarks, by the effective compulsion of *use of the trademark*, by such regulation of the transfer of trademarks and of licences of trademarks as will exclude the dangers of misrepresentation. A specific problem in the territory of trademark law is the regulation of the possibility of parallel marketing—serving, in principle, the consumer's interests—e.g. the proper regulation of the question of the exhaustion of rights. Finally, a consumer's interest which is emphasized is the modern regulation of *marking the source and origin*, partly directly, partly by including it in the trademark law, in order to provide correct information to the consumer on the original source of the article.

As has been indicated, the rules of *competition law* also provide certain possibilities to reflect the consumer's interests. The so-called *general clauses* of the tradition-

<sup>239</sup> GABAY, M.: Le rôle de la marque dans la protection du consommateur et le développement des pays en développement. *Prop. ind.* 1981/3.



al norms prohibiting unfair competition provide the means—by their framework character—that the rightly (e.g. by legal-political guiding principles) directed law-applying practice, in the course of filling in these frames, can with greater emphasis express the protection of consumers' interests. In connection with some marketing conduct, consumers' interests require specific protection, too.<sup>240</sup> Especially, modern sales practice applies devices which manipulate the consumers' demands, stimulate unnecessary purchases, often build upon the consumer's lack of information, and possibly, upon his inferior instincts. *False, misleading sales practices*, advertisements which misguide—directly or indirectly—the consumer with respect to the quality, origin, etc. are regarded as outstanding dangers. The consumers' basic interest is that they receive—in the course of sales practices, too—objective information on certain essential issues, namely, regarding the goods' quality, purpose, method and time of utilization, composition, possible dangers of harmful side-effects, etc. The protection of consumers' interests requires the prescription of the minimum requisites of sales practices, their efficient supervision and sanctioning.<sup>241</sup> Consumers' interests appear characteristically in cases of the so-called *comparative advertisement*. These make objective comparisons, and such information that can provide a sound basis for buying decisions, desirable. The consumer needs efficient protection against the *aggressive business tricks* which are applied, abusing his lack of information. The dangers of these—although they can have advantages for the customers as well—are great, for example, in the sphere of huckstery; hire-purchases; sales; linked buying; rewards, gifts given or promised by the seller. Against such business tricks that disguise the dangers of abuse, the consumer justifiably requires the prescription of proper conditions and their effective supervision.

Finally, it is important for the consumer not only that substantive legal rules should reflect his justifiable interests but also that the conditions for the enforcement of his rights ensured by *procedural law* should be specified. This can be served partly by creating reasonable (simple, quick, inexpensive) procedural vehicles, partly by widening the scale of consumers' or their organizations' *actoratus* in comparison with current solutions.<sup>242</sup>

<sup>240</sup> Cf. Vörös (1), esp. pp. 174 et seq., 186. Vörös points out that it is first of all the quasi-general clause applied in the French solution which is suitable for this, since in the German model the existence of the 'competitive relationship' is the criterion.

<sup>241</sup> For example, the International Code of Advertising Practice and the Code of Sales Promotion Practice; BRANDMAIR, T.: Neufassung der Internationalen Verhaltensregeln für die Werbepraxis, *GRUR Int.* 1974/6; TILMANN, W.: Grenzüberschreitende vergleichende Werbung, *GRUR Int.* 1993/2.

<sup>242</sup> The rules of the PC (Para (2) in Art. 10; Art. 10<sup>ter</sup>) ensure actoratus for the competitors (producers, traders), resp. for their representative organs. Of course, certain legal systems can recognize (and they indeed do so) the actoratus of the consumers' representative organs. The new Hungarian Act on competition affords such entitlement to the National Council of Consumers established by Decree No. 1006/1982 of the Council of Ministers.



## 5. Private interests—public interests

67. As has been seen, the institutions of industrial property surround the interests attaching to technical products and trademarks, with entitlements of *exclusive* character. However, these entitlements—although they are exclusive in nature—are *not without limitations*. On the basis of the Hungarian theory of law, it was obvious that—like all the substantive rights—the right of an absolute structure does not enjoy an exemption from the general principle of the rights' adjustment to their *social purpose*. Moreover, modern theory generally holds that through the temporary monopolistic situation afforded by the institutions of industrial property, the interested receive such benefits from society, from the State, which have counterparts as well.<sup>243</sup> Namely, it is not only the individual's 'genius' that has a part to play in the creation of new valuable products but also the positive interplay of the social environment has significance. Consequently, as against the interests of the position secured by the institutions of industrial property, public interests wish to prevail, too.

As has been referred to above, the beneficiaries of the institutions of industrial property in practice are the economic organizations, the *companies*. The public interests must also be represented and enforced by someone. This someone is traditionally the *State*, especially the modern State, which—also in general—interferes in the direction and supervision of economic life with a growing intensity.

*Public interest*—also in this context—is of course an *abstract* category. Actually, it also contains such other partial interests which are deemed preferential by the State. In comparison with these interests, and on the basis of public interests, certain limitations and restrictions prevail. In the field of industrial property, e.g. partial interests which must be honoured are evidently the creator's, weaker competitor's and especially the consumer's interests. These are significant components of the interest which is classified as general social, national economic, etc., in one word, as public interest.

It can be considered a general phenomenon that, in the course of creating the terms of industrial property, the individual legal systems—built partly upon some of the principles fixed in the PC provisions—determine the *boundaries of public interest* which indicate the socially desirable framework for exercising the rights related to intellectual products. The determination of the boundaries of public interest evidently occurs to varying degrees, depending on the given country's economic-social structure; the standard of development; the legal concepts related to State interference; and tradition of industrial property.

In what follows a few of the usual, typical rules will be indicated which—in principle—aim at the realization of public interest.

<sup>243</sup> Világhy (2); Boytha (2); Bobrovsky (1), pp. 45 et seq.; Parragh (1), esp. pp. 18 et seq.; similarly Ulmer (1), p. 6; Knap, K.: Schranken des Verfügungsrecht auf dem Gebiet der Immaterialgüterrechte, *GRUR Int.* 1983/6–7; in the course of the Hungarian recodification of the legal area of intellectual property, one of the characteristic features is the consistent and detailed regulation of restrictions of public interest. Cf. Lontai (3); (16).



From the field of technical creative products (*inventions*) we can list here the rules that determine the conditions of patentability, and, especially, fix those inventions which are excluded from protection. As regards the latter, reference is usually made to the public interest when certain goods (foodstuffs, medicaments) of really vital importance are considered in relation to exclusion from product protection.<sup>244</sup> As for the norms reflecting the creator's certain specific interest, let it suffice to refer here to the rules on e.g. the establishment of the *right to prior use*, or to the rules on preferential judgement of the novelty-destroying consequences of the inventor's publication prior to filing.

It is a basic public interest that the protected solution really become part of the economic activity, that the inventions be applied in practice—in a way and to an extent that suit the national economy's needs. The *sanctions of non-utilization* (typically the compulsory licence, more rarely the revocation of protection) are regulated in most legal systems, even if their enforcement in practice—as has been seen previously—is not a frequent occurrence. The emphasized public interest is expressed in the prescriptions which fix the possibility of requisition, *expropriation* of patents and inventions in the interests of the public. In this respect, the rules of individual countries secure the methods of interference with varying intensity. First, military interests provide a ground for requisition for the public interest. The possibilities for this are seen in cases related to public health matters, public supply of food, or is of a national economy level.<sup>245</sup> (The questions related to this field are analyzed in detail above, in connection with the timely revision of the PC.)

As regards *commodity marks*, public interest does not emerge with as much force as it does in relation to technical products,<sup>246</sup> but characteristic prescriptions inspired by public interest can be found also in this area. With preference to public interest, trademark law prohibits the use of marks “which are liable to create confusion of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of the Convention”. The prohibition is valid even if the *well-known trademark* has not been registered in the country at issue.<sup>247</sup> Similar considerations serve as the basis for several countries' concept of trademark law according to which the entitlement to trademark is not linked to—or not exclusively to—registration, but to *actual use*.<sup>248</sup>

<sup>244</sup> For the assessment and criticism of the theoretical standpoint, attaching first of all to the name of Kohler, cf. Bobrovsky (1), pp. 219 et seq.

<sup>245</sup> The patent laws of several countries (e.g. Austria, Portugal, Spain) pronouncedly fix the possibility of expropriation of patents on the basis of public interests. The Polish patent law makes it possible also on the basis of national economy interests, besides military interests.

<sup>246</sup> The direct relationship between technical products and commodity marks can be noticed most plastically in the case of licence contracts.

<sup>247</sup> Article 6<sup>bis</sup> of the PC obliges Union members to refuse the registration of marks which are liable to create confusion of a mark well known in that country, but only with respect to identical or similar goods. Hungarian law is ‘freer in giving’ than the general, by qualifying the possibility of confusion of a mark with the well-known other mark as an absolute cause for prohibition. (Point (d), Para (1), § 3 in Hungarian Trademark Act.)

<sup>248</sup> It is characteristic first of all of the common law legal systems that they accept a trademark right in favour of the first user; so: UK, USA, Canada, India, Israel, etc.



In several countries, it is considered in the public interest that the registered marks should be put to actual use. An increasing number of countries prescribe the *compulsory use* of trademarks. The sanctions for failure to use the marks are of a large scale. A typical solution is that in a case of compulsory use, failing to do so leads to cancellation. In some countries, this is also examined officially, usually in an indirect way, i.e. in the course of renewing the registration, the holder must properly prove how the mark is actually used.<sup>249</sup> Although there are the exceptions, some legal systems utilize the possibility of compulsory licence in the case of trademarks (and even industrial designs)—as is used in patent law.<sup>250</sup> (As regards the justifiability of the latter, there considerable problems emerge.)

The norms of *competition law* reflect in numerous cases the protection of public interest, especially in such antimonopolistic legislation as are directed against conduct resulting in distortion of the economic structure.

68. The conflicts between the public interest and private interests, resp. corporate (company) *interests* and *social interests* emerge in some respects specifically in the practice of the former socialist countries. Such aspects can also be seen in the authorship certificate vs. patent debate (see Chapter IV). On the basis of *Hungarian domestic practice*, some such conflicts of interests will be examined below.

Although the strengthening of Hungarian domestic competition is indeed in agreement with the concepts of Hungarian economic policy, still, it cannot be considered as a lucky arrangement if our home companies *collide on foreign markets*, thereby destroying—in certain cases—each other's chances in the competition. Recent examples of this can be found in the field of toy-export from Hungary.

Public interest virtually originates from preferences afforded to individual or group interests based on assessments of various corporate interests. It is fairly popular to give the title '*national economy*' *interest* to the corporate or *sectoral interests*. An example of conflicts of this type is the recent debate in connection with the patenting of plant-protective agents (possibilities of product patents).<sup>251</sup>

## 6. Specific interests of countries, or groups of countries

69. In the foregoing, issues of characteristic interests and conflicts of interests which are in generally able to influence the domestic system of the given country's industrial property, have been presented. In what follows, a few specific interests relevant to international co-operation in the field of industrial property will be pointed out, as reflected in individual countries or groups of countries. These specific interests appear on a wide scale with blurred, overlapping dividing lines; in effect, the individual features indicate only the general, typical phenomena, keeping in mind the distortion of generalization.

It will best suit our purpose if the three characteristic groups of countries (capitalist, socialist and developing) are taken as our basis for defining the various interests.

<sup>249</sup> A typical solution is the cancellation on the request of a third person. A few of the countries (e.g. Argentina, Japan) request certification of the use at the renewal of the trademark; in Mexico, the certification must take place within three years after registration.

<sup>250</sup> As regards the possibility of compulsory licence, the provisions of Mexican law are exceptional. Cf. *Fernández-Nóvoa* (2).

<sup>251</sup> Cf. *SOMFAI, É.: Növényvédőszer szabadalmaztatásának problémái* (Problems of patenting the plant-protective agents). *UL*, 1978/24; studies of debates, by *Kende, Palágyi, UL* 1979/3,4.



70. The *capitalist countries* (their companies) possess a considerable part of creative products and developed technology; their firms carry on marketing activities on a large scale, building on a highly developed structure. These countries' tradition in the field of industrial property can look back on a long period of accumulated experience, and continuous usage. Consequently, it can be pointed out as a general feature that the capitalist countries' interests dictate the maintenance of the traditional system of industrial property, the *strengthening of patents*.

This is reflected in the attempts of those countries to maintain the international system of industrial property, at least as regards its essential principles, in a relatively untouched, unchanged form. This endeavour naturally follows from the circumstance that the institutions, norms of international industrial property are built basically (as has been pointed out in Chapter II) on the interests of large capitalist companies, and on the specific features of their linkages. The skirmishing for revision of the *PC* unambiguously testifies to the fact that the capitalist countries have made determined efforts to *preserve* the present system; they are inclined to accept certain modifications rather reluctantly, and only after sharp debate.

The group of capitalist countries represents a common platform in the field of world economy international co-operation. Within the unity, however, opposing principles strain the situation, which becomes evident especially in conflict situations. More than once, national interests have come to the fore forcibly, emphasized in political (occasionally nationalist) arguments, and that protectionism is growing. Sharp conflicts emerge even within the closely integrated communities, e.g. the Common Market; or the USA–Japan–Western Europe economic conflicts, of the partners' frequent search for excuses by using the terms of GATT.<sup>252</sup> The economic conflicts occurring among the capitalist countries also precipitate conflicts in the field of industrial property. The capitalist concept, which can generally be considered homogeneous concerning basic questions, does not exclude that the interests—building upon specific potentials—of one or the other country, could lead to conflicts. Such conflicts could emerge in regulating conditions of patentability; in assessing the level of invention differently; in regulating cases of exclusion from protection. It is well known, e.g. that the Italian legislation, which radically excluded the patentability of pharmaceutical products, established a preferential position for the Italian exporters of medicaments, causing no little friction.<sup>253</sup> Or, another example, the French patent law of 1968 excluded software from the scope of patentability—according to semi-official information—consciously and pronouncedly, also because the country, justifiably, was afraid of a specific '*défi américain*'. The area of indication of sources and origin is often a scene of sharp conflicts of interests. Here, it is especially the countries engaged in agricultural and food-industrial activities whose interests can be in conflict, partly with those of one another, partly with those of countries with an industrial profile.

71. The *former socialist countries'* position on the evaluation of the present system of industrial protection was basically also positive, even if not without criticism. The part played by the technical progress in the economic growth of the former socialist countries, as well as the conscious advocacy of international co-operation—all these provide the foundation of the view professed and re-

<sup>252</sup> Cf. Gyenge, op. cit.

<sup>253</sup> Cf. Sgarbi's lecture at the Budapest Symposium on Patent Protection in a Market Economy (18–20 November 1991), *WIPO Doc.* 709(E).



presented by the former socialist countries, according to which the present *international system of industrial property rights protection* essentially offers a *useful* framework for the purpose of increasing co-operation.<sup>254</sup> This positive evaluation is testified by the active part played by them in the PC and in numerous subsidiary agreements, too.

As regards the *technology transfer*, the former socialist countries' interests also justify—even if they do not share in all concepts formulated by the developing countries—a certain modification of the current practices and removal of the rigidity caused by the one-sidedness of some typical contract conditions. This is obvious from the fact that a majority of the former socialist countries—as regards technical intellectual products—may be classified as more of an importer than an exporter.<sup>255</sup>

The legal system of numerous former socialist countries acknowledged the institution of an *author's certificate* as a preferred protective form of inventions. (On the advantages and disadvantages of this form of protection, and on its connection to the given system of economic management, cf. Chapter IV.) So, their interests implied that the certificate form should receive its proper place in the international system of industrial property.

The former socialist countries' interests also imply that they should have a voice—in accordance with their weight—in forming the international system of industrial property, reflecting their specific interests and features in the course of possible revisions of the system. All these conditions would imply the reform of the international organization's mechanism for making of decisions and the rational enforcement of the *majority principle* (cf. Chapter II).

The former socialist countries' interests also manifest some divergence. Namely, their evaluations of the form of author's certificate were not identical with respect to certain differences in the individual countries' concepts of economic management, as well. Conflicts of interests have also arisen in the field of indication of the source of origin (e.g. the dispute around the wine made near Tokaj in Hungary).

72. The most conspicuous specific interests, which have mostly been given voice, can be observed in relation to the *developing countries*.

Although numerous differences, specific interests, and internal contradictions can be uncovered within the groups of capitalist or ex-socialist countries, nevertheless, in comparison with the group of developing countries, they can qualify as the prototype of homogeneity. Considering the rank, level of development, economic structure, natural resources, and orientation of the individual countries, this group is comprised of extremely *heterogeneous* members.<sup>256</sup> As regards the technical development, and, in connection with this, the industrial property, fairly substantial differences exist among the various developing countries with respect to the personal and organizational conditions of bringing about independent intellectual products, the domestic chances of utilization in the field of technologies, and the possibilities of adaptation, and absorption of foreign technologies.<sup>257</sup> The third world is thus by no

<sup>254</sup> Cf. comprehensively, PRETNAR, ST.: La protection de la propriété industrielle et l'ordre social, *Prop. ind.* 1981/4.

<sup>255</sup> To this, in more detail, cf. Mádl (1); Lontai (4), esp. pp. 19 et seq.

<sup>256</sup> Cf. to this, Note No. 3 (Studies on the new world economic order).

<sup>257</sup> To this, see in detail, Parragh (1), pp. 6 et seq.



means homogeneous; it is justifiable that sometimes even a 'fourth' world is differentiated, their internal conflicts have effect occasionally even on their otherwise characteristically homogeneous presence, too.<sup>258</sup>

The necessity of the establishment of a *new world economic order* surfaces first in the developing countries' interests. There is no doubt that these interests are justifiable. A sound moral sense can hardly bear the level of poverty that can be experienced in certain developing countries, the expansion of the gap between the levels of development, and occasionally the hopelessness of the given country's development. It is not only the planetary solidarity built on moral considerations that dictates the efforts to help those countries, but also the developed countries' well-conceived interests; the present divergence—in the age of worldwide co-operation—may be an obstruction to the developed countries' further progress. These principles formulated internationally are widely approved and supported by the former socialist countries, and the capitalist countries cannot exclude themselves either—even if sometimes reluctantly, under the moral pressure of international public opinion—from accepting these principles and setting goals.<sup>259</sup> It is however a different question to arrive at a homogeneous position relevant to the *principles* and *aims* to be achieved, from the question of reaching an agreement on the *methods* serving the achievement, and the realization of the aims.

Similarly, it is one thing to declare that the results of technological development constitute part of the public wealth of the whole of mankind, and another thing to find the economic-legal methods which—by securing a possible integration of the interests—can purposefully promote and organize the *spread* and *transfer of technology*. Access to technical products is one of the essential interests of the developing countries, and this interest demands to be honoured in the field of industrial property also.<sup>260</sup>

In the struggle for a preferential attainment of technology, one of the essential efforts made by the developing countries is directed toward establishing internationally standardized conditions which are advantageous for them in relation to contracts—licences taken in a wider sense—serving the organization of technologies' transfer. The acceptance of the relevant *Code of Conduct* has been included in the agenda for a long time.<sup>261</sup> The more important phases of this

<sup>258</sup> The first session of the Revision Conference of the PC, held in Geneva, has not performed substantial work, partly because it was only with difficulty that the group of developing countries could agree on the question of their representation. Cf. *Kunz-Hallstein* (5).

<sup>259</sup> On the new world economic order, cf. in detail our Note No. 3; *Erasmus*, op. cit.

<sup>260</sup> To the industrial property relevance of the developing countries' efforts, see, generally, *Parragh* (1); *Sunshine-Buxbaum*, op. cit., Vol. II, pp. 37 et seq.; HORVÁTH, GY.: A fejlődő országok iparjogvédelmi gondjai (The developing countries' concerns in relation to industrial property), *UL* 1971/8; *Kunz-Hallstein* (7); MANGALO, N.: Patentschutz und Technologietransfer im Nord-Süd-Konflikt, *GRUR Int.* 1977/10; STUMPF, H.: Interessenlage und Interessenkollision beim Technologietransfer: die Rolle des Patentwesens, *GRUR Int.* 1977/12.

<sup>261</sup> On 'the evolutionary history' of the Code of Conduct, and its timely issues see in detail *Parragh* (1), pp. 43 et seq.; *Erasmus*, op. cit.; FINNEGAN'S M. B.: address at the 1976 MIE-AIPPI International Congress, *UL* 1976/19; Az 'új világgazdasági rend' és a 'harmadik világ' ('New world economic order')



process are marked by the so-called Havana Charta; the various ECOSOC proposals; the conferences organized on the subject between 1958 and 1973; then, the phase which has unfolded on the basis of the 1974 UN Resolutions, and lasting even until the present; an aim to establish a universal Technology-transfer Code of Conduct has been put as a task to be accomplished in this phase. As regards the different drafts, there are a number of open questions. So the completion within the foreseeable future of a unanimously acceptable formula, is fairly doubtful. Especially debated is the character of the Code, its incidental cogency, the list of prohibitions in the restrictive clauses (although here undoubtedly, the positions are nearer to one another), and the methods of making decisions in the debates.

As regards the justification of the monopoly situations secured by industrial property, considerable doubts have arisen in a large number of the developing countries. The positive effect of the *patent system* on the technical development is questioned in general, and from the viewpoint of the developing countries' interests specifically.<sup>262</sup> This concept is evident in the national legislation of several developing countries,<sup>263</sup> and is prevalent in their regional groups as well (see more on this, also later).

The developing countries mainly claim that their markets are monopolized by the importers—often by means of the institutions of industrial property—and that they inhibit the internal development.<sup>264</sup> The attempt to achieve the goal that registered inventions are put to effective utilization in the home-country, supported by domestic enterprises, seems to be built on rightful interests,<sup>265</sup> while many others hold the view—not without foundations—that in a considerable proportion of the developing countries, the infrastructure necessary for domestic utilization (personal and other conditions of adapting and acquiring technology) are hardly available.<sup>266</sup>

Regulation of the legal protection of *geographical indications* also implies specific interests in relation to the developing countries. Since their industry is at present

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and the 'third world'), *UL* 1977/5; FIKENTSCHER, W.—KUNZ-HALLSTEIN, P.: Technologietransfer an Entwicklungsländer und Kartellrecht, *GRUR Int.* 1979/10; FIKENTSCHER, W.: The Draft International Code of Conduct on the Transfer of Technology, *IIC-Studies*, Vol. 4, 1980; see also FIKENTSCHER, W.—LAMB, I.: Zur Anerkennung von Grundsätzen des gewerblichen Rechtsschutzes, Urheberrechts und Wettbewerbsrechts im Rahmen einer neuen Weltwirtschaftsordnung, *GRUR Int.* 1987/11; SCHMIDT-DIEMITZ, R.: Geistiges Eigentum und entwicklungspolitischer Wissenstransfer, *GRUR Int.* 1988/4.

<sup>262</sup> Cf. Parragh (1); *Sunshine-Buxbaum*, op. cit.; Bobrowszky (2), (3); further HIANCE, M.—PLASERAUD, Y.: *Brevet et sous-développement*. Paris 1973; See also T. PALÁGYI's report on the Conference held in Morocco, entitled 'International Patent Strategy', *UL* 1979/14, 15.

<sup>263</sup> *Aracama Zorraquin* (3); SIEMSEN, P. D.: Die Entwicklung des gewerblichen Rechtsschutzes in Brasilien—Erosion oder Anpassung? *GRUR Int.* 1976/2.

<sup>264</sup> Cf. UNCTAD "The International Patent System as an Instrument of Policy for National Development", TD/B/C.6/AC.2/3 (1975), Note No. 47.

<sup>265</sup> Cf. AGUILAR, E.: Innováció és iparjogvédelem a fejlődő országok gazdasági kapcsolataiban (Innovation and industrial property in the economic relations of developing countries), *UL* 1980/4.

<sup>266</sup> Cf. Stumpf, op. cit.; further, GREIF, S.: Die Rolle patentschützter Importe für den Technologietransfer in Entwicklungsländer, *GRUR Int.* 1976/9; idem: Ausübungszwang für Patente—Ökonomische Möglichkeiten und Grenzen unter besonderer Berücksichtigung der Entwicklungsländer, *GRUR Int.* 1981/12.



only rarely competitive, they can emerge on the international market first of all with raw materials, with agricultural or food industrial products, possibly with folk-art products. The competitiveness of these articles can be increased by the indication of source and origin; however, a number of the 'exotic' geographical signs have already been registered, as e.g. a trademark, by the companies of developed countries. Basically correct—although sometimes exaggeratingly radical—conception propositions bring to expression here the specific interests of the developing countries.<sup>267</sup>

The developing countries' desire to receive specific *preferences* is expressed in the areas mentioned above (and in several other territories as well). This desire became formulated in a comprehensive character in the course of the timely revision of the PC.

## 7. Universal interests—regional interests

73. In Chapter II, we analyzed the nature and importance of international co-operation in the field of industrial property, included in the framework of the PC and its subsidiary agreements. Considering the great degree of heterogeneity of interests, such universal co-operation (in its efforts and actual results alike) can of course only to a lesser extent endeavour to work out a detailed regulation. Essentially, it restricts itself to the unification of the most important principles, certain minimum standards.

The interests of various countries or groups of countries, dictate a *closer co-operation in the field of industrial property* than the one existing today. Various forms of regional connections in the field of industrial property have also originated from the claim of closer co-operation. The agreements in this field are of course not destined to serve their own ends, but in general serve to reflect and promote endeavours for closer *economic* co-operation, for *integration*, possibly—not rarely—as part of the wider purposes of *unification*—harmonization of laws.

Several varieties of regional agreements can be seen. Among the general *factors promoting a closer integration* of industrial property, the following ones play a part: identical (nearly identical, or with chances of possible harmonization) economic-technical standards of development; identical economic-social structure; identical or approaching economic structure and concepts of economic management; geographical proximity, neighbourliness;<sup>268</sup> the concepts and tradition of industrial property are commonly followed, are akin to one another (at the time of establishing the European patent system, the member countries occasionally had to make no small 'sacrifice' for integration in this respect).<sup>269</sup>

<sup>267</sup> Cf. *Aracama Zorraquin* (1).

<sup>268</sup> Here again, it should be indicated that the international terminology acknowledges regional connection(s) in the case of geographical proximity only (cf. BUZA, L.-HAJDU, GY.: *Nemzetközi jog* (International law). Tankönyvkiadó, Budapest 1961, p. 8); in the absence of it, the terms particular agreements, connections, are used.

<sup>269</sup> So, e.g., as regards the material conditions of patentability, the adaptation of the German, French and common-law tradition, differing especially in relation to the 'inventional level'—was not a process without conflicts. Cf. *Bobrowsky* (1); *Cornish* (1).



The regional connections of industrial property *can be classified* on the basis of various aspects.<sup>270</sup> There are communities aiming at unification, or harmonization, of the norms of substantive law,<sup>271</sup> while there are others who attempt to co-operate in the field of procedural examination, that is to say, to achieve first of all a technical-type co-operation.<sup>272</sup> Yet other regional communities achieve the supra-nationality of the patent or at least its naturalization.<sup>273</sup> Finally, some integrating communities also accomplish organizational unification.<sup>274</sup> (In a certain sense, the subsidiary agreements of the PC also imply regionality; they formulate more detailed prescriptions and liabilities, with respect to individual areas of industrial property.)

74. A more detailed presentation of the regional agreements will have its turn in Chapter IV. Here only one link will be examined—essential from the viewpoints of the connections between interests—namely, the links between the PC system and the *regional* communities of industrial property.

The regional co-operation tightly attaches to the *specific economic interests* of the given community. In a typical case it is a reflection of an effort toward economic integration. This economic integration often shows *protectionistic* features which causes (may cause) conflict with the universal interests. It is in this respect that the connection between regional co-operation and universal principles, and rules of the PC is worthy of attention.

Article 19 of the PC fixes the member countries' rights to conclude industrial property agreements of a narrower scale, so long as they are not in opposition to the PC provisions.

As has been seen in Chapter II, in spite of the universal character of the PC, and of the continual increase in the actual number of the member countries, a number of the developing countries are not members of the PC yet. Undoubtedly, part of this reluctance is the fact that these countries do not consider the PC model, and certain PC principles and rules, to conform to their own interests. The co-operation among such—mainly Latin-American—countries unfolds virtually *outside the PC frame*, thereby partly substituting for the PC's unifying function, and partly expressing the specific concepts different from the PC, and to which they object. Some of these regional agreements definitely inhibit the member countries from becoming PC members.<sup>275</sup>

The members of other regional communities are simultaneously PC members as well. Thus, the PC provision referred to above, in principle relates to them and

<sup>270</sup> So, *Bogsch* (1), resp. *Bobrovsky* (2), (3) classify them on the basis of different viewpoints.

<sup>271</sup> Such is, e.g., the 'Nordpatent' of the Scandinavian countries, or the joint trademark law norms of the Benelux States.

<sup>272</sup> Such is, e.g., the 1975 Convention of Leipzig relating to the unification of the formalities required for patent applications.

<sup>273</sup> An example of the preceding case is the system established by the Munich Agreement, but even better is the Luxembourg Agreement; for the second case our example can be the Havana Agreement concluded by the former COMECON countries.

<sup>274</sup> Such is on the one part the European Patent System, on the other part the OAPI.

<sup>275</sup> The Cartagena Agreement can be qualified as an 'anti'-PC regional one.



accordingly, their agreements must not oppose the PC prescriptions. These agreements also formally fix the above stipulation and even emphasize pronouncedly their *conformity to the PC*.<sup>276</sup> Nevertheless, certain general concerns arise in connection with these types of regional agreements, too.

The latter, namely, occasionally afford such preferences or allowances, to nationals and organizations of the member countries as cannot be enjoyed by the interested non-member countries. The question arises not without foundation whether providing such *special preferences* is not in opposition to the basic PC principle which fixes the requirement of *equal treatment*. To raise this problem is especially timely now, in the course of the actual PC revision, so that the demand for the replacement of the very principle of national treatment with the principle of preferential treatment may receive an emphatic formulation. The regional agreements virtually fix a certain kind of positive discrimination.

The contradiction in principle is undoubted, even if in practice the prevention of possible conflicts is in general successful. Legal literature attempts to settle the contradiction by arguing (and emphasizing at the same time, the justification of an unambiguous settlement of the issue) that in the case of the regional agreements, we are virtually faced with the 'regional national' regulation and specific regulation ensured in the PC for national laws cannot mean a kind of discrimination.<sup>277</sup>

## 8. Interest-overlapping; the ambivalence of the evaluation

75. In the preceding parts, a survey of the specific interests of persons, organizations and countries in various positions of the chain which is unfolding in the area of industrial property was presented, by contrasting the usual pairs of interests, or competing interests, with one another. An attempt was made to throw light upon the solutions which are considered suitable (or better suited) to be used in the course of regulating the given institution of industrial property, namely, to realize the interests at issue. In practice, these interests do not emerge in a clear, pointed form, as if it were merely a question of deciding the priority of one of two interests facing each other. The networks of connections which serve as a basis for the individual institutions, are *complex* in nature, and the various regulations are coloured with *overlapping areas* and combinations of interests.

Although such interconnections have already been indicated occasionally in our preceding sections, let us now survey for the sake of illustration a few *typical situations*.

Such conflicts of interest emerge especially in relation to the analysis of the consumer's interests which makes the determination of a right interest hierarchy difficult. So, e.g. the protectionistic solutions, often applied in developing countries, namely, restrictions on importation—also by means of industrial property—offer, in principle, favourable situations for national competitors (companies), but, in given cases, the consumers' interests require the expansion of variety, i.e. parallel importation.

<sup>276</sup> Regional agreements—like the so-called subsidiary agreements — often pronouncedly fix their PC-conformity.

<sup>277</sup> Cf. Mathély (2); Pálos (1).



It harms the competitors' interests if competition indirectly 'dequalifies' the other's products, by comparing his own to the other's goods. It would therefore be desirable to prohibit comparative advertising, on the basis of the competitors' interests. However from the viewpoint of the consumers' interests, this may be considered useful information in certain cases of making a purchasing decision. The value of trademark protection may justify its transferability, either by licencing the trademark on the one hand, or transferring it independently of the firm, or part of the firm, on the other. Permission of such transactions, nevertheless, implies the danger that the consumer will be confused regarding the article's origin.

Certain interests of the creators, namely, the fullest possible right of disposal, or the exclusion of one's own earlier publications from the scope of novelty-destroying publications, may clash with the interests of legal security, that is, public interests attaching to the time of filing.

The specific interests of individual groups of countries do not always appear unambiguously. So, e.g. the interests of the ex-socialist countries, resp. of the developing countries, coincide in a number of cases, while in other cases the former approximates those of the capitalist countries. The interests of the latter are occasionally similar to those of developing countries. To all these, a number of examples could be taken from the history of the timely PC revision.

In theory, a *hierarchy of interests* can be constructed. So, e.g. it may be sympathetic to fix—by building on the priority of universality—that universal-type interests have prior claim over regional interests, with regional interests having priority over the specific interests of individual countries. In relation to a given country, it can similarly be inferred that the public interest has priority over the group interest, and the latter over individual interest. Accordingly, the public interest, representing the consumer interest has priority over the company interest (over that of the entitled), and in the case of an employee's invention, the employer's interest is stronger than that of the creator. Such a scheme can hardly be applied in practice. There can be such significant (almost vital) national interests, which can hardly be pushed into the background when contrasted with regional interests. In given cases, an incentive to sound competition which serves the technical developments can be qualified as a public interest which is more important than certain consumer interests. The significance of human personality, the interests attaching to the unfolding of creativity, deserve—in given cases—priority over company interests.

In a word, it is hardly possible to establish such a hierarchy of interests which would be unambiguous in all cases and which would be of everlasting validity. The regulation of a given institution, the selection among the possible regulatory variants needs conscious weighing, in the course of which the accountable specific interests must be compared, and in the case of a clash between them, the most honourable must be found. Possibly, the law-maker or law-applier finds a kind of *modus vivendi* or succeeds in formulating a compromise more or less suitable for clashing interests (or harming them less); lacking the chance for such a compromise, the law-applier must prefer the interests of some of position. Such a decision can be built only on thoughtful, conscious economic-political considerations; modifications of the situation, and of the interest relations may make revision of the decision desirable, even non-negligible. The optimum establishment of a *dynamic harmony* between interests, and its continual service, is a delicate task, the more or less successful fulfilment of which requires a thoroughgoing exploration and analysis of the competing interests.



## Modern Tendencies in the Field of International Industrial Property

### 1. The basis and general features of the tendencies

76. *Facts as points of departure.* — As it was touched upon in Chapter I, one of the characteristics of our time is the *acceleration of the pace of techno-scientific progress*, and in this context the relatively rapid aging or erosion of new results. A similar characteristic is the slackening of the boundaries between the domains of science and technology; the progress of the interdisciplinary activities in research and development; the correlative prevalence of specialization and integration. The costliness of research and development, the ascent of the practical orientation of R&D, and, consequently, its function as a means of competition, require the creation of appropriate organizational forms, the conscious direction and planning of R&D activities, and this leads—in a way and with an intensity depending also on the given State's economic-social structure—to the State's increasingly more energetic 'intervention'.<sup>278</sup>

The economic and scientific-technical activities alike have overgrown the national boundaries. *International co-operation* has stepped into a qualitatively higher phase, and extends to ever wider areas, thereby overgrowing the traditional model. The framework and forms of co-operation offer a varied, rich palette.

The increasing and intensifying relationships sharpen old controversies and become the source of new oppositions. *Conflicts of interests*—analyzed in Chapter III from particular aspects of industrial property—can be observed partly among countries or groups of countries with different economic-social structures (conflicts of East and West and of North and South), as well as in the individual country's relationship and those within it.

The above features, characteristics of economic and scientific-technical development, occur also in the field of industrial property. They appear partly directly; however, in numerous cases, they appear rather indirectly, coloured by the mechanism of the institutions of industrial property, occasionally in the garment of certain inherited traditions. The tendencies noticeable in industrial property indicate certain general necessities.

77. *General characterization of the tendencies.* — The latter, which of course characterize not exclusively and not even primarily industrial property, are built on

<sup>278</sup> Cf. Gyenge, op. cit.



strained areas of oppositions. Undoubtedly, a process of unification and *convergence* of the legal areas at issue may be experienced simultaneously with them; the phenomena of differentiation and *divergence* cannot be excluded either.

The institutional systems of industrial property and their operative mechanisms are increasingly characterized by a tendency to *complexity*, although the tendency to *specialization* also manifests itself.

*Prima facie* it seems that the area of industrial property is not an exception to the general developmental necessity—prevailing in numerous areas of law—that *centrifugal* and *centripetal efforts*, and tendencies alike arise, unavoidably. The classical boundaries of a given branch of law may be extended, and certain new phenomena may stretch the traditional framework, straining to get out, either by becoming independent or moving into another branch.<sup>279</sup> The strengthening of these opposing tendencies cannot always and is not easily be synthesized; this characterizes the system of industrial property of our age (and even the legal area of intellectual property in general). In the analyses that follow, an attempt will be made to confirm the realization of these tendencies, or more exactly, to point out that the *centripetal tendencies are in general the stronger*.

Without a claim to completeness, a few such important areas of industrial property will be chosen as bases for giving examples in which the tendencies can be detected relatively well. These are: the scope of protectable products; changes in the varieties of protected products; the forms of protection; the areas of dynamism in industrial property connections, and of the application of contractual methods; the 'competition' between universality and regionality; the erosion of certain characteristic principles; the enrichment of traditional approaches with new, unusual aspects.

While presenting the individual areas, and the effect upon them, we obviously have to overstep the framework of international institutions taken in the strict sense of the word (cf. Chapter II); the national systems of industrial property of individual countries must be broadly included in the scope of analysis.

## 2. Changes in the sphere of protectable property

### (a) General remarks

78. The centripetal and centrifugal tendencies referred to above are noticeable also in the legal importance afforded to the varieties of products or interests which are deemed worthy of protection. The *widening* of the *scale of creation varieties* worthy of protection—is an undeniable tendency. This direction of development—in our judgement—correctly reflects the effort to achieve that every intellectual product which deserves it, should receive adequate and efficient protection (requirement of "gapless" protection). In another trend borderland problems intensify, which occasionally strengthen the efforts to get away from a given legal area,

<sup>279</sup> Cf. Eörsi (3); Sárközy (2).



or from the traditional forms of protection. Thus, the trends of widening and narrowing alike can be detected, the former being undoubtedly dominant. The two tendencies can of course lead not only to mutually exclusive consequences but also fertile synthesis, which—with a slight simplification—means that not necessarily all the product varieties which are worthy of efficient protection should obtain it by means of conventional institutions, or by all means within the institutional system of industrial property. Illustrative material can be drawn from the area of technical products, although trademarks also offer some characteristic examples.

In the field of industrial design, the above tendencies prevail characteristically. It is not so much that the enrichment of variety in the category of protectable product varieties can be experienced, it is rather that the varieties of product scale—which were not excluded either earlier, but were less usual—are becoming more fashion-oriented, and that the designers' activity becomes an increasingly more organic part of the innovation process. A particular legal problem is the not-rarely-occurring instability in drawing the dividing line between industrial designs and industrial arts products,<sup>280</sup> and, in this context also the differences between the concepts and legislations, allowing or not the possibility of parallel protections.

### **(b) Problems of the technical products**

79. According to the lessons of history, the recognition and protection by industrial property of technical products—occupying a fairly large scale—have been constructed with differing intensity and in various ways.

The regulation of the specific legal protection of scientific *discoveries* (in the natural sciences) has taken place in only a few of the legal systems (in the former socialist systems).<sup>281</sup> In the latter, the form of institutional protection is akin to that provided for inventions by the inventor's certificate (see, in detail, Point 96). By building on the principle of gapless protection, we can say that the discoverers' interests are—in the last analysis—protected by other legal systems as well, but in the judgement of the latter, the suitable institution for this function is generally the one which is the broadest area of protection for intellectual products, namely, that of the copyright.<sup>282</sup>

More examples can be found in respect of the legal protection for *innovations*, which are specifically of a lower value and standard. Their problems—considering other relevant connections—will be surveyed first of all (in Point 101) when the forms of protection are discussed. Here it is sufficient only to indicate that the 'fight' between the tendencies referred to above is reflected mainly in the extent to which a given legal system restricts the conceptual sphere of innovations to technical-type proposals, or extends it to that of organizational, possibly administrative 'innovations', as well.

The traditional regulation of industrial property constructed the protection of inventions from among different standards, values, and levels of creativity, as well

<sup>280</sup> Especially, *Boyth* (4).

<sup>281</sup> Discoveries enjoy special institutional protection in Soviet, Bulgarian, and Czechoslovakian law. Cf. *Bobrowsky* (4).

<sup>282</sup> Cf. *Vékás* (2).



as the social utility of the technical products. Indeed the *inventions* also represent today, a *category of central importance* within the technical products. Because of this, our detailed analyses will be centred on the problems of inventions, namely, on two areas: questions of the general criteria of protectability, the so-called material criteria, resp. questions related to invention varieties, which are governed by special criteria, or are excluded from protection.

80. *The criteria of protectability.* — Invention is—commonly known as—a meta-juristic, *a priori* category,<sup>283</sup> it is therefore not this which our attention must be centered upon when analyzing the scope of relevant issues, but to the concept of *protectable* (patentable) *inventions*, to its concept ‘reduced to legal purposes’.<sup>284</sup> The definitions of the individual legal systems, and the theoretical concepts underlying or reflecting them—coloured by tradition and by interconnections in a given legal system—show different approaches. There are more abstract and more concrete, formal and contentual, etc. formulations. Even if an analysis of the material conditions of protectability allows us to conclude that the criterial systems of the individual legal systems stand, in practice, nearer to one another than is reflected in legal formulations, the different approaches in the course of unification and harmonization of laws implies no small difficulty, and creates compromises which are not always of indisputable value.

As an example of the above statement, we may refer to the dispute which arose in connection with the European Patent Convention. The draft-directive relating to the concept of patentability fixes, namely, that ‘something which is abstract is never patentable’. It is justifiable that the literature raises this question as a disputable approach, which contradicts the ‘immaterial’ character of the invention.<sup>285</sup> As, in the Hungarian literature, Bobrovsky<sup>286</sup> explicates, “... the invention... is such an interconnection between purpose and means as comes about by intellectual work and can be acquired intellectually and materially...”, thus it is a ‘thought’, and training. Obviously, in this case it was intended to mingle the abstract (German) and the concrete (common law) approaches that has led to a consequence not exactly successful.

In analyzing the criteria of protectability, let us take as a point of departure—even if some other convincing approaches also offer themselves<sup>287</sup>—the system of criteria applied in Hungarian patent law. In accordance with that, the legislation requires that the patentable invention should be of a technical character, of a practical applicability, of absolute novelty, and of a progressive character.<sup>288</sup>

<sup>283</sup> Cf. Somorjay (1).

<sup>284</sup> In detail Bobrovsky (1), pp. 167 et seq.

<sup>285</sup> Cf. Blum (1).

<sup>286</sup> Bobrovsky (1), p. 171.

<sup>287</sup> So, e.g. Somorjay (2) explicates his views in his comparative analysis, in relation to the general criteria of patentability, by starting from the terms of the 1963 Strasbourg Convention.

<sup>288</sup> In referring to solutions as materials for illustration we relied to a great extent on the following publications: Bobrovsky (1); Somorjay (2); Eminescu (1); TRAHTEGERC, L. A.: *Prava promyshlennoi sobstvennosti v stranakh-chlenakh SEV*, Moscow 1974; BAXTER, J. W.: *World patent law and practice*, Sweet and Maxwell, London 1968; *Külföldi szabadalmi és védjegyjog* (Foreign patent and trademark law), ed. Vida, S., BMETI, Budapest 1978.



As regards *practical* (industrial) *applicability* and *technical character*, the solutions offered by individual legal systems are very near each other. Incidentally, the two criteria strongly overlap, the boundaries of the technical character expand (the so-called exclusions by definition, which draw the boundary lines will be discussed in the next point); similarly, the term 'industrial' character, which is used synonymously with the term 'technical' character, broadly defines the sphere of industry. Bobrovsky points out with convincing argument that in the Hungarian patent law the criterion of technical nature does not indicate anything more than practical applicability, so it should be eliminated *de lege ferenda* from among the terms.<sup>289</sup> The fact that as regards practical applicability, the legal systems referred to above are close to each other, does not imply that no differences can be found, so, e.g. whether a given legal system places the emphasis on the task or on the solution or whether it disjunctively or conjunctively requires the 'industrial' character in relation to the object, the application, or the result.<sup>290</sup> In the last analysis, practical applicability is a criterion suitable for drawing a dividing line between inventions and discoveries, and it is a more flexible approach than utility is; it does not attach evaluating elements—which, in the course of technical-economic development may become instable—to this criterion; it simply wishes to express that here we deal with a method, a solution which in practice can be used routinely, repeatedly, with the same result.

The increasing number of legal systems—which are already in the overwhelming majority today—requires the so-called *absolute novelty* as a criterion, that is to say, every publication, or public utilization that takes place prior to the filing (priority date) and reveals the essence of the invention, is held to destroy novelty. The sphere of countries which restrict in space or time the criterion of novelty is ever more narrow. This means that publication prior to 50–100 years before the application for patent is not considered as destructive of novelty or the consequences thereof with local effect (related to the territory of the country).<sup>291</sup> It is especially as a result of the harmonization of laws necessitated by the European patent integration that spectacular abandonments of earlier concepts have taken place, e.g. in the British and in German patent laws.<sup>292</sup> The consistent enforcement of the criterion of absolute novelty unambiguously serves the approximation of the patent criteria, the strengthening of patents, and a greater degree of legal security; let us say, it reflects a centripetal trend.

<sup>289</sup> Cf. Bobrovsky (1), pp. 186 et seq.

<sup>290</sup> Cf. Chavanne-Burst, op. cit., pp. 22 et seq.

<sup>291</sup> So, e.g., by the patent laws in Australia, South-Africa, Egypt, Libya, Spain, publications older than 50 years of age do not rank as destructive novelty. Up to the time that Act 284/1983 entered into force (January 1, 1984), ex-GDR law had considered as irrelevant—by co-German tradition—publications older than 100 years of age. Novelty is destroyed by local prior public use in, e.g. Japan, Greece and Austria.

<sup>292</sup> Until the reform in 1977, the law in the UK—similar to that of numerous other countries recipient of the English system of law—had not considered publications older than 50 years of age destructive of novelty, while the GFR law—until the modification in 1976—traditionally qualified publications which were older than 100 years of age as irrelevant.



The situation is specific in those countries which recognize the institution of special varieties of patents, firstly that of the *importation patents*.<sup>293</sup> In respect of such patents, the criterion of novelty is conceptually more restricted; it requires only local novelty.

The exemptions from the criterion of absolute novelty, regulated in the various legal systems, seem to have an effect toward the opposite, centrifugal direction and reflect a narrowing of the sphere of protectable products. Two kinds of such *exemptions* may be encountered. One is the allowance provided for the original entitled, as a result of which, *illegal publication* is not considered as disruptive to novelty if the original entitled applies for a patent within the *grace period* following publication (six months, in general). This exemption is recognized by several legal systems; some have introduced it only recently—under the effect of the European patent-integration.<sup>294</sup> The other exemption also provides an allowance for the *inventor*, and, for that matter, in the case of his own *earlier publication*. The variant of this allowance, rooted in the PC, the so-called exhibition allowance (priority) is recognized practically by all legal systems of the union countries. The judgement of such an allowance, to be provided in cases of publications independent of exhibition, is by no means unambiguous. The number of countries inclined to disregard the novelty-destroying consequences of the own publications in the cases of application for patents, and also within, in general, six months following publication,<sup>295</sup> is relatively not too great.

A function akin to the above is performed by the institution of 'caveat', known in some Latin-American patent laws, which means that the applicant in general enjoys a one-year relative security, in case of competitive filings (it is actually a kind of protection; a patent variant; see Point 99 below).<sup>296</sup>

Protection by patent is due only for *significant, valuable inventions* which essentially enrich the store of instruments of previous technical solutions. The individual legal systems (groups of laws) bring to prevalence the *assessing* and *qualifying*, from the viewpoint of protectability important criteria, the requirements, by the application of varying approaches. This assessment influences to a certain extent also that of the judgement of novelty, although, undoubtedly, the criterion of novelty logically means a kind of formal-quantitative evaluation. It is a more difficult task to draw a dividing line between the requirements of progress, utility, and the actual assessment criteria.<sup>297</sup> Concerning the latter, a particular traditional approach can be found in the statutory rules and theories of the individual legal systems: they stipulate partly, a considerable enrichment of the scientific-technical standards (state of the art, the techniques) in comparison with the preceding levels; partly, the

<sup>293</sup> The institution of the patent of importation is known by the patent law of e.g. Iraq, Iran, Cuba, Spain. As regards its content, the confirmation patent of Algeria is similar.

<sup>294</sup> This exemption has been traditionally fixed by the laws of e.g. Denmark, Finland, India, Japan, the ex-GDR, Norway and Sweden. Recently, the UK, Holland, Italy and Switzerland have adjusted their local laws to the prescriptions of Article 55 of the Munich Agreement.

<sup>295</sup> Such solution is known e.g. in the patent laws of e.g. Australia and Japan.

<sup>296</sup> The institution is regulated in, e.g., Brazil and Honduras.

<sup>297</sup> It is analyzed in detail in *Bobrowsky* (1), pp. 198 et seq.; *Somorjay* (2), pp. 53 et seq.



inventor's creative activity. The German approach places the emphasis on the result, requires the invention level (*Erfindungshöhe*) from the protectable invention.<sup>298</sup> In the French concept the processes leading to the results, the inventive activities (*activité inventive*) are examined. In other legal systems, like e.g. in the former Soviet patent law, the essential novelty, or the essential difference was considered as the decisive criterion. The typical (and pragmatic) approach in the common law systems places non-obviousness as the criterion of protectability. In practice, different criteria and various approaches, often produce identical value judgements; nevertheless, the unification and harmonization of the different concepts causes difficulty from the viewpoints of principle and practice alike. This was especially obvious in the course of the preparatory work for the European Patent Convention. In the end, the criterion of *non-obviousness* proved to be the most acceptable compromise in the course of integration (although those advocating other concepts evaluated the solution more than once as their own victory), moreover, with a universal character. Noticeably, also in connection with the PCT, this criterion was accepted.<sup>299</sup> The popularity of the criterion of non-obviousness is seemingly increasing; several views voted in favour of its introduction in the course of the unfolding integration for the protection of industrial property within the ex-COMECON countries;<sup>300</sup> the assessment criterion is becoming homogenized within the protection criteria.

It is hardly disputable that the assessment element of qualifying an invention implies the most of the *uncertainties*, the dangers of subjectivism, and even the possible unification of the assessment criterion does not exclude the many-coloured and for this reason uncertain changes in the assessment in the practice. Whatever traditional approach is applied, the decisive element of uncertainty is the classification of 'the professional', 'the specialist', that is to say, the decision of what kind of a *model of the professional*, the specialist should be used, on which basis the standard, the possible expectation can be defined, and beyond which level can we speak of an inventor's activity, of a performance not expected from the professional, because it is non-obvious for him.<sup>301</sup> Using a negative approach, the 'invention' is not an invention if it can be proved that "... it *obviously* and *reasonably* (logically) follows from the state of the art, the technics. This is valid for the case when the professional, the specialist can find not only the constituent elements of the invention, or the equivalents of these in the state of the art at the time of priority, but also the guiding lines for the adjustment (combination) of these elements, and in this way, he can arrive at the invention without an inventor's activity, relying exclusively on the state of the art".<sup>302</sup> Thus, here we deal with the

<sup>298</sup> Cf. Troller (1), Vol. I, pp. 180 et seq.; REIMER, E.: *Patentgesetz und Gebrauchsmustergesetz*, 3rd ed., Carl Heymanns Verlag, Köln-Berlin-Bonn-München 1968, pp. 31 et seq.

<sup>299</sup> For its recent analysis and assessment, see Cornish (3).

<sup>300</sup> As is pointed out by Bobrovsky (1), pp. 211 et seq.; the advantage of the non-obviousness criterion is that it also has an appropriate theoretical basis and fits into the trend of law unification.

<sup>301</sup> Cf. Bobrovsky (1), pp. 200 et seq.; Somorjay (2), pp. 55 et seq.; in detail and with a comprehensive comparison: Palágyi (3).

<sup>302</sup> Somorjay (2), p. 60.



general, metajuristic criterion—rarely fixed explicitly by legal norms on patent—which considers the invention as a kind of *creation*, as the result of genuine creative activity.<sup>303</sup>

The legal literature and court practice reveal elements which underscore this creative activity.<sup>304</sup> So, e.g. they point out that the 'subsequent' obviousness of the solution, its clearness does not defy—it even strengthens—the supposition of the creative activity, especially if there have been—unsuccessful—attempts made at the solution of the problem for a long time. "... If it has been stated that... the problem has been waiting for solution through years; that the given solution is really new and of a higher degree than that applied earlier; that it has now been applied in a broad sphere and preferred to other, alternative solutions; then I think it is practically impossible to assert that such a spark of the invention is not present as would necessitate the support by the patent..." This is what has been pointed out *Tomlin's* often quoted *obiter dictum*.<sup>305</sup> Evidently, several other factors may also be weighed, e.g. overcoming technical prejudice, the spark from Heaven, intuition just as well as long, zealous work (*Mehrschritt-Theorie*). Special problems arise—and in practice they may even lead to different qualifications, often in the practice of the same court of justice—like the transmission, combination, the application of equivalents, or analogous procedures, etc.

Let us see a few illustrative examples from the Hungarian practice.<sup>306</sup> "Invention is a kind of an intellectual work. It should be also examined that on the basis of the earlier data on the destruction of novelty, what kind of inventive-type activity was needed in bringing about the solution, and to what extent did the activity exceed the kind which is expectable from the professional man." (Judgement No. Pkf.IV.20.842/1974 of the Hungarian Supreme Court.) "The elaboration of the optimal value obtained on the basis of proper experiments, calculations, does not exceed the professional man's obligatory knowledge, consequently it is not patentable." (Judgement No. Pkf.IV.21.087/1977 of the Hungarian Supreme Court.) "From the circumstances... that the legal rule provides for patentable inventions it undoubtedly follows that the basis, the indispensable condition of granting a patent is the inventive character. Because of this, the fact in itself that similar or identical solution had not earlier been applied does not suffice, since here a qualitatively new, invention-type solution is needed." (Judgement No. IV.20.004/1976 of the Hungarian Supreme Court.) "Patentable invention may come about also by the application of part-elements known by themselves, if the way of application or a new area of it, the order of the operations, resp. the particular joint application of the known elements—their combination—means the novelty and the progress." (Judgement No. Pkf.IV.20.21.7/1978 of the Hungarian Supreme Court.) "The extension of a technical solution over a new area, or the joint application of elements known by themselves are not inventions which are patentable by themselves." (Judgement No. Pkf.IV.21.173/1979 of the Hungarian Supreme Court.) "New invention-type solution may come about also by the application of some material for a purpose not known in the sphere of technics." (Judgement No. Pkf.IV.20.052/1978.)

<sup>303</sup> Cf. *Világhy* (1): "... the patentable invention is first of all an intellectual product..." (p. 77); *Troller* (1), Vol. I, pp. 174–175, builds his witty differentiation between the static character-type (recognition, description) discovery and the dynamic invention. The inventor applies the laws of nature in a way never used before him, creates something 'new'. To this consequence drawn from the concept of invention points *Chavanne-Burst* (op. cit., pp. 43 et seq.) when they analyze the enrichment of the criteria of patentability with the requirement related to patent.

<sup>304</sup> Especially, *Somorjay* (2), pp. 65 et seq.; *Chavanne-Burst*, op. cit., pp. 49 et seq.; *Reimer*, op. cit., pp. 35 et seq.; *Cornish* (1), pp. 153 et seq.

<sup>305</sup> *Parkes v. Crocker* (1929). 46. R. P. C. 241. (C. A.), cit. *Cornish* (1), p. 164. Similar arguments can be found in Decision No. Pkf.IV.20.553/1976 of the Hungarian Supreme Court (cit. *Törő* (3)): "... the circumstance in itself that the inventive thought seems natural, simple, afterwards, does not exclude the creative character..."

<sup>306</sup> Cit.: *Törő* (3).



81. *Excluded varieties of inventions; special inventions.* — The invention varieties referred to above are reflected in certain particular evaluations produced by the law-makers and in the theory, namely, in the exclusion from protection, and, in this context, in the interpretation of the boundaries of the 'technical' character. In connection with this, four particular areas will be put under scrutiny, viz. the questions of chemical and microbiological inventions; the protectability of animal and plant varieties as well as that of software.

82. *The protection of chemical products.* — Regarding the intellectual products which come into existence in the field of chemistry, two conceptions are noticeable. Some legal systems grant protections by patents also for the products brought about by means of chemical processes, while others do so only for the process applied for the production.

The law-maker's position which is *against the protection of the product* refers to certain theoretical viewpoints on the one hand, and to practical ones on the other. The theoretical counter-arguments (referring especially to Kohler's name) point to the circumstance that chemistry virtually reproduces the materials which are available in nature at any rate, by means of artificial processes. Moreover, chemical processes which lead to the formation of materials cannot be observed satisfactorily. The practical viewpoint argues that an essential part of the chemical products is such (and this is valid especially for medicines and foodstuffs) as regards of which the public interest (consumer's and certain producer's interests alike) require the inhibition of the monopolistic situations' development, or at least the restriction of them.<sup>307</sup> It is also customary that reference is made to the complex nature of description and examination, and to the technical difficulties originating from that.

The *theoretical objections* can hardly be maintained today. On the basis of experience gained in the course of the rapid development of the chemical industry (synthetic materials industry, pharmaceutical industry, etc.) it can be stated that undoubtedly the sphere of chemical products has significantly overextended the simple reproduction of materials occurring anyway in nature. (Besides, it can be raised justifiably—what virtually it is we are to qualify as natural product.<sup>308</sup> With no less justification we can ask—with regard to the modern concepts of the natural sciences—whether the boundaries can unambiguously be drawn between the areas of chemistry and physics. Legal categories do not necessarily coincide with notions of the natural sciences.) Concerning the observational difficulties, these emerge in other areas of technical products as well—even if with different characters—so,

<sup>307</sup> According to the motivation of the Hungarian Patent Act, too, it is "obvious... that it would hurt considerable social, national economy interests if the circulation of medicines, or products serving human or animal food supply—as that of the consumer's utility goods, which ensure the sustenance of the people and animals—were restricted by the patent law. It would be also detrimental from the viewpoint of development of the Hungarian chemical industry, which is of increasing significance if the patent protection of any chemical product excluded the possibility of production of the patented chemical product by means of a new more developed technology."

<sup>308</sup> Cf. Schmied-Kowarzik (1). According to him, something qualifies as natural what is available freely for anybody, not a 'natural' material which is a product of a lengthy process of isolation.



Palágyi remarks with justification that this argument would just serve to exclude the process patent.<sup>309</sup> The argument based on complexity and particularities of the examination does not justify the discrimination by substantive law either. In the last analysis, this is a question of patent-techniques, which may also require overcoming particular difficulties in other technical areas.<sup>310</sup>

Concerning the *practical counter-arguments*, their well-foundedness is also fairly doubtful. Either the better (cheaper, greater-variety centered) meeting of the consumers' needs, or the development of industrial branches are considered, the international experience, the history of the technical development do not underline the problems related to the 'inhibitory' effect of product protection. On the contrary, it seems that countries whose legal systems recognize product protection, based on a longer or shorter tradition, it is the development of the very industrial branches concerned, as well as the broadening of the research and development areas and, consequently, an increase in the varieties and qualities of the products—not unimportant by any means from the viewpoint of the consumers—can be noticed.<sup>311</sup> All these experiences justify the conclusion that making product protection possible is in itself not more 'against the public' than any other 'monopolistic situation' ensured in general in respect of some other technical solutions.<sup>312</sup> So far as concerns some particular, increased public interest, which justifies a more intensive intervention, this can be solved partly by administrative methods, partly by the aid of known patent law institutions (compulsory licence, or expropriation) as well, and it does not necessarily require narrowing the sphere of protection.

The *international tendency* of patent codification also supports the above inference. There are legal systems which belong to the traditionally product-protecting party—although, in certain cases, not without 'hesitation'<sup>313</sup>—while in the anti-product-protecting legal systems, strong erosion can be observed in the past decades. Virtually, the patentability of the analogous processes (the so-called Kongorot case), the indirect product protection (product-by-process claim), and the setting up of certain presumptions—all these already belong to this trend.<sup>314</sup> A definite tendency in recent years is the *introduction of product protection*, partly the so-called 'targeted', partly and increasingly the absolute product protection. The introduction of product protection is encouraged more increasingly by theory

<sup>309</sup> Cf. Palágyi (4), pp. 45 et seq.

<sup>310</sup> This is pointed out emphatically by SZABÓ, N. (Mrs.) in her article: A kémiai találmányok helye a szabadalmazható találmányok sorában (The place of chemical inventions in the ranks of patentable inventions), *MIE Közleményei* 7; similarly, Palágyi (4).

<sup>311</sup> Cf. SAMPERI, S.: La brevetabilité des produits pharmaceutiques en Italie, *Prop. ind.* 1979/5.

<sup>312</sup> Bobrowszky (1), p. 221, qualifies the solution of the patent law as a paradox, in this case of the so-called security exclusions, "... it excludes not the useless patents from the protection... but those which are especially useful for society...".

<sup>313</sup> So, in the UK, in 1919—breaking away from the traditional principle—chemical products were excluded from patentability; then, in 1949, the traditional acceptance of product-protection was re-established.

<sup>314</sup> Cf. Bobrowszky (1); Palágyi (4).



too,<sup>315</sup> and such a proposal was formulated in the AIPPI fora, as well.<sup>316</sup> The conception of product protection was also adopted by the European Patent Convention,<sup>317</sup> and it has received unequivocal recognition—not irrespective of the former—in recent legislation.<sup>318</sup> Today, the majority of legal systems provide the possibility of patenting for chemical products, resp. the outlines of alterations in this direction are noticeable in them,<sup>319</sup> and this is the position on which the draft of the harmonization treaty referred to above is based. (The solution applied and known as author's certificate in some former socialist legal systems is particular in this respect; as a consequence of this solution, product protection was available just in the form of a certificate, while the patent is granted for the process.)<sup>320</sup>

In the Hungarian theory, and in practice as well, there arose repeated disputes concerned with the justifiability of introducing the patent of products, especially in connection with—the preparations for—modifications of the legislation. A number of views criticized the 'conservative' position of the Hungarian law, while paying attention at the same time to the modern international tendencies, and to the underlying theoretical and practical arguments (referred to above), on the one hand, and to the economic and economic-political viewpoints on the other. In the assessment represented by these views, the situation of Hungarian industry, and within it that of the chemical industry (and outstandingly, of the pharmaceutical industry), and in the long run the interests of development of the industrial sector, is served by the introduction of the product patent system, undoubtedly resulting in stricter conditions of competition, at the same time, however, ensuring a safer situation for competition.<sup>321</sup> Evidently, in considering such a trend, a determining role is played by the economic-political evaluation, particularly, by the opinion of the interested company or sector.<sup>322</sup> Essentially, it was the sector's position that led to the decision on the basis of which Hungary's patent law remained even in the course of reform, with its traditional stand, while not excluding the possibility of a long-term revision and reassessment of the concept.<sup>323</sup> It should be mentioned finally that a legislative decision in favour of product patent does not mean that no practical problems can arise in respect to certain part-issues. Reference can be made

<sup>315</sup> Cf., e.g., BLUM, R. E.—PEDRAZZINI, M.: *Das schweizerische Patentrecht*. Bern, 1957, Vol. I, pp. 233 et seq.; MEDIGER, P.: *Das Problem des Stoff- und Verfahrensschutzes im Patentrecht unter besonderer Berücksichtigung der wirtschaftlichen Gesichtspunkte*. Stuttgart 1953; ZIMMERMANN, P.: Aktuelle Fragen auf dem Gebiet des chemischen Patentwesens im Licht einer historischen Betrachtung, *GRUR* 1966/6-7; Reimer, op. cit., pp. 121 et seq. (*ibid.* rich literature); PEDRAZZINI, M.: Zum Umfang des Stoffschutzes für chemische Erfindungen, *GRUR Int.* 1973/9.

<sup>316</sup> Cf. especially, the materials of the AIPPI Vienna and Brussels Congresses.

<sup>317</sup> It was already the 1963 Strasbourg Treaty on the basis of which the introduction of product protection became necessary. The Treaty provided a period of grace (10 years) only with respect to medicines and foodstuffs, for the reformation of domestic laws (Art. 12).

<sup>318</sup> Austria, Greece and the Scandinavian States put forward reservations. In their cases further legislative steps are needed in order that product protection may be recognized.

<sup>319</sup> Cf. ASSARSON, L. O.: Zehn Jahre zweckgebundener Stoffschutz für chemische Zwischenprodukte, *GRUR Int.* 1978/1.

<sup>320</sup> Cf. Bobrovsky (1); Trahtengerc, op. cit.

<sup>321</sup> Cf. Palágyi (4); Bobrovsky (1); Sárándi (2); Kende (1).

<sup>322</sup> So, the prohibitive provision in relation to the product protection got into the 1877 German Patent Law on the request of the 'Deutsche Chemische Gesellschaft' (cit. Reimer, op. cit., p. 126); on the other hand, the proposal developed in the AIPPI framework (referred to in Footnote No. 316) was encouraged first of all by the representatives of the industry. (Cf. Troller (1), p. 249.)

<sup>323</sup> See, ADLER, GY. (Mts.)—POSTEINER-TOLDI, M.: A termékoltalom bevezetésével kapcsolatos egyes kérdések (Certain questions related to the introduction of product protection), *SZK* 1989/3.



here to particular questions of equivalents and of the analogous solutions, as well as to issues of patentability of intermediate materials, etc.<sup>324</sup>

83. In the course of the production of *medicines* (and, partly, of foodstuffs), partly chemical, partly physical, and partly biological (microbiological) processes can be taken to application. Thus to this area, partly the explications relating to the problems of patentability of microbiological inventions (to be touched upon later), partly the inferences related to the patentability of chemical products mentioned above, are also relevant.

By medicine we mean such mixtures as consist of "effecting materials and others which are neutral from the viewpoint of effect, but are necessary for achieving the effect".<sup>325</sup> The importance and public 'interestedness' of medicines cannot be doubted.

In surveying the *regulatory variants* related to the patentability of medicines, we can see that various legal systems show a fairly variegated picture. There exist legal systems (in general those seeking product protection but by no means all of them) which qualify the medicines as patentable without any restriction. In other legal systems, their protection is served by special kinds of patents (so-called medicinal patents). Further, other legal systems deny any kind of patent protection (product and process protection alike) for medicine.<sup>326</sup>

The possibility of the process patent seems to be secured typically, with further variants within the system. Some legal systems exclude, from the beginning, the protection of the agents produced by mixing, while in others patentability depends upon whether the mixture produces some new, unexpected medicinal effect.<sup>327</sup> It is a frequent solution that with respect to patents for medicines, the possibility of a compulsory licence or expropriation with regard to the public interest is of a wider scale.<sup>328</sup>

Hungarian patent law—irrespective of the type of process serving the production—excluded (for the recent amendment see Point 190) product protection for medicines and foodstuffs. The process used for manufacturing is patentable, although practice narrowly defines this, too.<sup>329</sup> In accordance with the position taken in relation to chemical products, there are a number of views in favour of a revision of the regulation in force. The arguments of principle and theory are similar to those usually referred to in the case of chemical products. Naturally, it is also desirable here that a given sector's standards and possibilities of development be scrutinized and depth-analyzed, not dissimilar to the concept of the

<sup>324</sup> Cf. Assarson, op. cit.; CASALONGA, A.: Der Schutz allgemeiner Formeln in Chemie, *GRUR Int.* 1973/10; Schmied-Kowarzik (2).

<sup>325</sup> Cf. PARRAGH, G. (Mts.)—ZOLTÁN, B.: Újabb tendenciák a gyógyszer-tárgyú találmányok szabadalmazása területén (Newer tendencies in the field of patentability of medicine-related inventions), *SZK* 1975/1.

<sup>326</sup> Cf. BENUSSI, F.: Der Patentschutz von Arzneimitteln in Italien—Entwicklung und gegenwärtiger Stand, *GRUR Int.* 1981/16.

<sup>327</sup> Cf. Palágyi (4); Parragh—Zoltán, op. cit.

<sup>328</sup> Cf. MANDI, A.: Gyógyszerekre és élelmiszerekre vonatkozó szabadalmakkal kapcsolatos különleges kényszerengedélyek a nemzetközi joggyakorlatban (Special compulsory licences, related to patents for medicines and foodstuffs, in international practice), *SZK* 1976/12.

<sup>329</sup> Cf. Parragh—Zoltán, op. cit.



country's legal system where the characteristic partners are based. It seems that the Hungarian pharmaceutical industry is competitive enough even in an international environment to undertake the possible risk following from the product protection.<sup>330</sup> In order that the public interest—basically reflected in the consumer interests—can be ensured it seems to be sufficient if the known instruments of patent law (compulsory licence, expropriation) are applied, possibly the likelihood of their realization are extended.

It can undoubtedly be stated that the recent patent codifications indicate an *increasing tendency* also in respect to the *patentability of medicines*, but it is proceeding at a *more limited pace* than in the case of product protection. For example, the Munich Convention accepted the concept of the so-called targeted product protection for medicines.<sup>331</sup> Advocates of the patentability of medicines emphasize the high degree of risk in medicine production and the considerable increase in costs accompanying the experiments.<sup>332</sup> The recognition in principle of the patentability of medicines obviously does not imply neglecting certain specific problems. Reference can be made here to the importance of the examination of questions related to new medical effects, the secondary or further 'indications' of known compounds.<sup>333</sup>

In the Hungarian patent literature (and partly in the practice), the qualification according to patent law of *plant-protective agents* has become disputed. According to one view, the Hungarian Invention Office carried on a mistaken practice when providing product protection for plant-protectives, since this practice is contrary to the right interpretation of the patent law in force. The advocates of this stand support their position by referring to the circumstance that: (1) the plant-protective is a kind of medicine (it exerts its effect on living organisms); (2) the plant-protective agent is a chemical product (the effecting material comes about in a chemical way); (3) the recognition of the specific, biological effect of the plant-protective is not an invention, it is a discovery. The representatives of this view refer to concrete court decisions.<sup>334</sup> Those who advocate opposing views argue that: (1) the plant-protective is not a medicine; (2) neither it is a chemical product, since the essential phase of its being brought into existence

<sup>330</sup> For the assessment of similar problems in the Italian pharmaceutical industry cf. *Samperi*, op. cit.

<sup>331</sup> Cf. *Schmied-Kowarzik* (1); NAHME, H. D.: Besonderheiten für Pharmazie-Patente nach den europäischen Übereinkommen, *GRUR Int.* 1978/5; STIEGER, W.: Artikel 54 Abs. 5. des Münchener Patentübereinkommens: eine pharmazeutische Sondernorm. *GRUR Int.* 1980/4.

<sup>332</sup> Cf. DEUTSCH, E.: Arzneimittel im gewerblichen Rechtsschutz. *GRUR Int.* 1983/6-7; WEHLAN, H.-HEINZE, D.: Patentschutz für pharmazeutische und medizinische Erfindungen, *N* 1988/2, 3, 4.

<sup>333</sup> See JALSOVSZKY, GY. (Mrs.): Ismert vegyületek gyógyászati hatásának felismerésén alapuló találmányok szabadalmazhatóságának kérdései (Questions of patentability for inventions based on the recognition of medical effects of known compounds), *MIE Közleményei*, 18; FARKAS, E.: Az első és második indikáció szabadalmazhatósága az Európai Szabadalmi Egyezmény alapján és a magyar szabadalmi törvény adta lehetőségek (Patentability of the first and second indications, on the basis of the European Patent Convention and the possibilities provided by the Hungarian Patent Act), *SZK* 1988/6, 1989/9, 1989/12; PALÁGYI (6); BRUCHHAUSEN, K.: Die zweite medizinische Indikation von Arzneimitteln im europäischen Patentrecht, *GRUR Int.* 1985/4; HÜNI, A.: La Convention sur le Brevet européen et la brevetabilité des applications thérapeutiques des substances connues, *Prop. ind.* 1986/7-8. Naturally, particularities may emerge with respect to description, examination etc., too. See for this, *Parragh* (6).

<sup>334</sup> Cf. *Somfai*, op. cit. The decisions referred to here are: No. 3.Pk.24.808/1973 of the Municipal Court of Budapest, resp. No. Pkf.IV.21.018/1974 of the Supreme Court.



requires a physical process (stirring and mixing); (3) it is not a discovery, since on the basis of the recognized biological effect a product applicable in practice comes about.<sup>335</sup>

In all probability, the most well-founded position is that which argues in favour of the continuity of the present-day practice and its legality. Namely, the opinion can be agreed upon according to which it is the unexpected new effect of the known material, or the new possibility of its utilization which is protectable. As regards the issue whether the plant-protective is a chemical product, the negative position seems to be grounded, too. This is supported by a newer decision by the Hungarian Supreme Court, according to which: "... In determining the essential role of the chemical reaction, the order of the operational steps is not decisive... our point of consideration should be the origins of the products' characteristics which provide the basis of the products' patentability...".<sup>336</sup> Thus, if from the viewpoint of novel effect of a progressive character, it is the mode of mixing, of outfitting that is important, the agent cannot be considered a chemical product. Finally, grouping of plant-protectives and medicines in the same category in patent law does not seem well founded. It is a basic legal principle that an exemption cannot be interpreted on an extended scale, and medicine is regulated as an exempted category, as one which is excluded from the circle of inventions meeting the criteria of solutions otherwise patentable. Here reference also can be made to the circumstance that the law-maker operates not with scientific notions but with those understandable by the layman, and according to lay public-opinion medicines—with fairly great probability—do not mean the agents exerting a positive effect on the plant, however attractive such an argument would appear.

It can thus be fixed that from the recent regulations related to the protection for chemical products and to the patentability of medicines the conclusion can unambiguously be drawn that the circle of protectable product varieties is widening.

84. *Microbiological inventions.* — It can hardly be disputed that in our day one of the spectacular territories of scientific-technical development is biology. The 'drawing' of biological laws under our domination, the conscious control of biological processes, the exertion of our influence upon the latter, and their utilization, become increasingly more possible. The conventional concepts—theoretical and codified alike—consider it problematic if the scope of patentable solutions also extends to the 'living' organism. Tendencies in recent developments, even the results, it seems have dissolved the essential anxieties, and the sphere of patentable inventions has been increasingly expanded to include varieties also falling into the field of biology.

The classification of *microorganisms* is disputed occasionally (whether they are primitive plant varieties, possibly an independent category); it is however undoubted that they (bacteria, fungi, algae and viruses, etc.) can be fruitfully utilized in numerous fields, including in the pharmaceutical industry and food processing, conquering increasingly newer fields, in such a way that they offer technically and economically advantageous, practical use.

From the viewpoint of *patent law*, the *assessment* of microorganisms shows a number of varieties. Some legal systems in principle take a negative stand, other

<sup>335</sup> Cf. esp. the contributions by Kende (2); resp., Palágyi, *UL* 1979/3.

<sup>336</sup> Decision No. Pkf.IV.20277/1980 of the Supreme Court. (Cit. by Törő (3).) By recognizing the product-patentability of plant-protectives decision No. 20.110/1982 (BH 1982/5) Pres. Council, Civil Chamber, of the Supreme Court, has made the situation unambiguously clear recently. Cf. KERÉNYI, J.: Recent Decision of the Hungarian Supreme Court on the Patentability of Plant Protecting Compositions, *Proceedings* 11–12.



legal systems regard the inclusion of microorganisms in the sphere of patentable inventions as a possible arrangement, again with several variants. It can be considered a fairly typical solution that the patenting of such processes, resp. their results, are permitted in the course of which microorganisms are utilized.<sup>337</sup> It occurs more rarely that examples can be found of cases in which a given legal system qualifies the *microorganism stock* itself as patentable.<sup>338</sup> Of the newer international developments, two momenta are worth mentioning in this respect.

One is recognized by the European Patent Convention (this can be regarded as unambiguous especially on the basis of the so-called interpretation protocol) the patentability of microorganism stocks. As has been pointed out in the relevant comments, the basic problem will arise in practice first of all in respect of the permissibility of reproduction.<sup>339</sup> (Evidently, in the course of regulation, the prescription of the special conditions going together with the particularities of microorganisms must be given consideration.)<sup>340</sup> In this respect, especially in the course of the international co-operation the Budapest Treaty referred to above is a significant result.

The second noteworthy event is related to the decisions of the US Board of Patent Appeals and Interferences in the cases of Bergy and Chakrabarty. In the decisions, the position is expressed that the solution to be patented either as a product or as a compound may—if all the other statutory conditions are met—obtain protection, irrespective of the circumstance that a microorganism, that is to say, 'living matter' is involved.<sup>341</sup>

<sup>337</sup> A useful survey of this is provided in the material of the 1973 AIPPI-MIE Conference. Cf. SOMFAI, É.: Összefoglaló a mikrobiológiai szekció munkájáról (Summary of the work of the microbiological section), *MIE Közleményei* 8–9; further TAKÁTS, E.: A mikrobiológiai találmányok szabadalmi oltalma a nemzetközi gyakorlatban (Patent protection of micro-biological inventions in international practice), *MIE Közleményei* 19; see also Bobrovsky (1); Parragh (10).

<sup>338</sup> Reference is to be made here to the circumstance that—similar to the protection of chemical products—the ex-socialist legal systems, which also recognize the institution of the author's certificate, provide protection for stocks of micro-organisms, in the form of a certificate. Cf. Takáts, op. cit., resp.: *Mikroorganizmus-törzsek oltalmazhatóságának néhány kérdése a szovjet szabadalmi irodalomban* (Some of the questions of the patentability of micro-organism stocks in the Soviet patent literature). On the basis of an article in the 'Voprosu izobretatelstva', compiled by PARRAGH, G. (Mrs.), 1977/5.—In the course of the Conference mentioned in our Note 337, opinions differed widely; there were those, namely, who could conceive of the patentability only of mutants.

<sup>339</sup> Cf. Schmied-Kowarzik (1); TESCHEMACHER, R.: Ein Sonderrecht für mikrobiologische Erfindungen? *GRUR Int.* 1979/10. *idem*: Die Patentfähigkeit von Mikroorganismen nach deutschem und europäischem Recht, *GRUR Int.* 1981/6.

<sup>340</sup> For a few such problems, see Parragh (7).

<sup>341</sup> Cf. in detail VOSSIUS, V.: Ein wichtiger Schritt zur Anerkennung der Patentfähigkeit von Mikroorganismen in der USA, *GRUR Int.* 1980/1.—We are hardly mistaken if we qualify these as are worthy of being cited as often as are the cases in the German literature of *Bäckerhefe* or of the *Rote Taube*. Thus, living organism can also be the subject of patent protection; insofar as concerns—at least on the basis of the earlier law—his profession, the British decision-maker (cf. Cornish (1), pp. 177–178) and the French patent law alike, threw the doors open wide in this respect (cf. Chavanne-Burst, op. cit. p. 78).



A great number of advocates from the theoretical field also argue in favour of the patentability of microorganisms or more exactly, in the interest of resolving the restrictions existing today in legislation and decisions alike.<sup>342</sup>

It can thus be fixed that as regards the patentability of microorganisms (in a generalized term: certain living organisms), the tendencies towards a further widening of the sphere of protection are positive and worth noting.

There is no doubt that certain concerns become evidenced along with the above tendencies, namely, the dangers inherent in intervening into the living organism, and which arouse fear in the average man—not irrespective of the effect of science-fictions and films—concerning such unusual methods as cloning and gene-therapy (gene-technology plays a part in plant-breeding, this will be touched upon briefly). Microorganisms can undoubtedly be dangerous—to the environment or the human personality;—this can be more advantageously controlled by means of proper administrative regulation than by excluding them from the sphere of protectability altogether.

85. *Protection of animal and plant varieties.* — The burning issues of world food supply can hardly be solved without intensive agricultural development, especially, without developing and breeding such animal and plant varieties as are of a high productivity, resistency, etc. If we wish to indicate only the Hungarian conditions, we can state—by neglecting a historical analysis, namely, an explication on the disadvantageous consequences directly experienced by consumers, of neglecting the development of agriculture because of the overexaggerated and often not appropriately founded industrialization—that in the national economy, the agricultural sector is of outstanding importance, from the viewpoint of either the domestic consumer, the living standards and politics, or the ‘foreign currency production’. The impressive results of Hungarian agriculture are closely connected to internationally acknowledged standards of *breeding activities* leading to the establishment of new plant (and animal) varieties, having more favourable properties. The establishment of a legal protection appropriate to the particular creative activity mentioned above, resp. to its results, is indispensable task.

Plant-breeding is only one of the—outstandingly important—territories of biotechnology, which is a multi-disciplinary sector looking forward to huge development. Its importance touches, beside agriculture, the food, pharmaceutical and chemical industries, as well as metallurgy, energy production, and several other—for the time being hardly foreseeable—areas, too.<sup>343</sup> Beside the technical-scientific and economic problems emerging here, it is not an underestimable task to provide an adequate legal regulation of this activity, and in this respect an outstanding part is shared by the institutions of industrial property. The legal protection of gene therapy—showing numerous achievements—resp. of

<sup>342</sup> Cf. to this several of the referenda submitted to the Conference referred to in Note 337, and also: *Schmied-Kowarzik* (1); *Teschemacher, Vossius*, op. cit.; *Beier* (2); *EPSTEIN, F.*: Der Schutz der Erfindungen auf dem Gebiet der Mikrobiologie, *GRUR Int.* 1974/7; *Blum* (2).

<sup>343</sup> See to this *BULL-HOLT-LILLY: Biotechnology—International Trends and Perspectives*, OECD, Paris 1982; *COSSA-MANIE, C.*: L'essor des biotechnologies en France, *Marché de l'innovation*, 53; *HAÜSSER, E.*: La protection des procédés et produits biotechnologiques modernes au titre de la propriété industrielle, *Prop. ind.* 1989/4. A comprehensive analysis of the sphere of questions is given in the rich material of the conference organized by the Max-Planck-Institute, between January 15 and 17, in 1987, under the title “Biotechnologie und gewerblicher Rechtsschutz”. (See *GRUR Int.* 1987/5.)



its results are (or may be) related to several fields of patent law,<sup>344</sup> here only those concepts are to be drawn into our survey which are in connection with the protection of varieties.

The survey of the solutions applied in the various legal systems shows a varied picture in this respect.<sup>345</sup> In certain legal systems, the proper protection is ensured by means of traditional *patent law* rules. In others, also in framework of the patent system, particular rules and forms (e.g. plant patents) provide the protection.<sup>346</sup> A number of legal systems consider the establishment of a particular *variety-protection system*—separate from the patent system—as sensible.<sup>347</sup> (Some part can be played here by certain other legal institutions, the instruments of contract law, the legal norms of competition, even in given cases, those of customary law.)<sup>348</sup> Hungarian law protects the new plant and (in an uniquely consistent and comprehensive way) the animal varieties within the framework of patent law, by means of the institution of patent, but by particular prescriptions.

It is obvious that in this territory it is primarily product protection and, to a less extent, process protection that has a part to play (the processes applied in animal and plant breeding are not excluded from the field of technics by the traditional concepts either), on the one hand, and the particularities of the breeding activities and results justify the prescriptions of certain differing criteria, on the other. If we survey the solutions of various legal systems, it is the particular realization of the criterion of novelty, the experimental breeding necessary in the course of examination—assessment; the speciality of the criteria of stability; the different effect of protection (linked to the breeding purpose); the defining, on a wider scale of the restrictions for public interests (expropriation, compulsory licence), that are to be noted.<sup>349</sup>

The Paris Convention of 1961 on the protection of new plant varieties (*UPOV*) took a significant step towards international unification and encouragement of the protection. The Union has ensured—especially since the time following the 1978 modifications—appropriately flexible possibilities of joining it.<sup>350</sup>

The union members are in principle free to choose the *form of the protection*. This can be any of the variants described above, either a patent or a special plant-protec-

<sup>344</sup> Cf., especially, WILLIAMS, S. B. (Jr.): Schutzrechtliche Aspekte der Gentechnologie bei Pflanzensorten, *GRUR Int.* 1983/9; Straus (1).

<sup>345</sup> See, in detail, Bobrovsky (1), (8); Pálos (3); JAENICHEN, H. R.: Die Patentierung von Biotechnologie—Erfindungen beim europäischen Patentamt, *GRUR Int.* 1992/5.

<sup>346</sup> Cf. BYRNE, N.: Fifty years of Botanical Plant Patents in the US, *EIPR*, 1981, pp. 116 et seq.; Williams (op. cit.) points out that the law of the US offers—in principle—even four chances of protection, namely, besides the Plant Patent Act of 1930, and the special norms of the Plant Variety Protection Act of 1970, consideration can also be given to general patent possibilities (cf. Chakrabarty v. Diamond case referred to in Note 341), resp. to the protection provided as know-how.

<sup>347</sup> Special variety protection is known e.g. by the legal systems of the GFR, France, Belgium, Austria, Italy and Switzerland.

<sup>348</sup> Cf. e.g. LODI, L.: Les usages, les coutumes et les contrats dans le domaine de la diffusion des nouvelles variétés végétales, *Prop. ind.* 1976/6.

<sup>349</sup> Cf. Pálos (3); further, WUESTHOFF, P.: Schutzzumfang inländischer und ausländischer Sortenschutzrechts, *GRUR Int.* 1977/12.

<sup>350</sup> Cf. Pálos (2).



tive certificate. On the basis of the Convention provisions, and of solutions applied in various legal systems, in essence, we can say that in the case of any of the protection variants, the material criteria and legal structures of protection are identical, or *variants* which are very close to one another, are convertible and essentially of *equal values*. The limitation of the convertibility is meant however by the circumstance that there is a prescription in the UPOV provisions according to which the Union-members can grant only one of the possible variants (patent or special variety protection) as regards identical varieties. The groundedness and sensibility of this limitation have also been called to doubt in the literature.<sup>351</sup> It may indeed be questionable if the prevalence of the principle of parallelity—acknowledged otherwise on a wide scale—is excluded or limited in this special area.

Hungary's entry into the UPOV in 1983 required certain modifications and refinements of Hungarian patent law—in principle, conforming to UPOV anyway.<sup>352</sup> In the last analysis, the Hungarian legislature decided that—instead of introducing special provisions for the protection of varieties into the system—patent protection would be applied. However, in connection with this additional legislative tasks and those of the application of the law will also emerge. In Hungary there is a well-established system for qualifying the varieties. It was updated by Decree No. 19/1980/VI.6/MT—Council of Ministers, enforcing Decree No. 15/1980/VI.20/MÉM—Ministry of Agriculture and Food. The parallel prevalence of the qualifying and of the patent system occasionally lead to disturbances and misunderstandings. It must be clearly seen that the functions of the two institutions are different. The qualifying system secures administrative supervision so that only such varieties can be utilized on a large scale, namely, for common production, resp. breeding that are up to the conditions set by the law. However, the patent system for varieties construes an exclusive legal position with definite persons (breeder, employed inventor). The differing functions of the two legal institutions do not mean that no close co-operation would be needed between them (e.g. in the course of the experimental production, required also for the patenting, it is desirable to rely primarily on well-testing methods) on the one hand, and that such 'function-alien' provisions of the legal rule as e.g. the breeder's royalties, or the conditions of the compulsory utilization are, should not come to either expulsion, or—in the interests of conformity with patent law—to being properly modified, on the other.

The experiences of the past years shows that—attributable to several factors—practice testifies to the *increased popularity of the particular variety protection*; newer codifications less frequently choose the patent form.<sup>353</sup> Here, it seems, the centrifugal tendency prevails, although this is rather apparently so, and it is perhaps more correct to see in them a kind of reflection of the protection forms being enriched.

86. *The legal protection of software.* — Computer technique invades ever more increasingly the areas of technical-economic activities (and even wider spheres). One of the increasingly noticeable phenomena of this tendency, which has been accelerating in the past decades, is that the rate of importance between hardware and software is inclined to shift in favour of the latter. The creation of a kind of appropriate *legal protection for software has not kept pace with the increase in value*

<sup>351</sup> Cf. *Straus* (1).

<sup>352</sup> Cf. *Pálos* (2).

<sup>353</sup> Cf. *Bobrovsky* (1); *Pálos* (2); further, BECHER, K.: A nemesített növényfajták oltalma a Német Demokratikus Köztársaságban (Protection of plant-breeding varieties in the GDR), *UL* 1972/21.



of its proprietary, economic role, although the debates that had taken place in the frame of the literature and in the organizations which are active in this field (AIPPI, WIPO, ALAI) were not in need of formulating some concepts and proposals. By neglecting the presentation of even a sketchy picture of the extremely rich material of the specialized literature, we shall now indicate the characteristics of the main varieties of solution.<sup>354</sup>

According to the representatives of one of the proposals, software belongs to the area of technics, so its protection should be delegated to the institutional framework of the patent.<sup>355</sup> The possible difficulties related to patent (examination of novelty, supervision of the exploitation, etc.) do arise—emphasize the advocates of this trend—in other areas of patent varieties as well (e.g. microbiology). The trends seen in the techniques of legal application of some (first of all common law) countries argue also in favour of the patentability of softwares.<sup>356</sup>

According to the other view, the essence of software is a mathematical-type product. Thus, it is a concept which falls outside the area of technics; consequently, it cannot belong to the category of patentable inventions. Its creative character cannot however be doubted and this invites the inference that it can and should be placed under the protection of the legal institution of *copyright law* which ensures the protection of intellectual products on the largest scale.<sup>357</sup>

In other views software is really 'out' of the conceptual circle of typical inventions, while the protection to be offered by copyright law is only slightly suitable for grasping the economic essence of software, that is to say, it is not able to protect those elements of software which should share the protection most. This is the reason why a *specific new institutional form of protection* should be established, separate from patent and copyright law protection alike and which is, possibly, unified on a global level.<sup>358</sup>

<sup>354</sup> For a detailed survey, cf. Bobrovsky (1), (8); the MIE-AIPPI conference material; furthermore NAGY, T. (Mrs.): Problémák és vélemények a számítógép programok jogvédelmével kapcsolatban (Problems and opinions in connection with the legal protection of computer programs), SZK 1974/8; recently and comprehensively: Boytha (5); Pálos (4); and GYERTYÁNFY, P.: *A szoftver és az elektronikus adattárak jogi védelme* (Legal protection of software and of electronic data banks), Budapest 1989 (MS).

<sup>355</sup> So, in the Soviet literature, Mamiofa; Bobrovsky ((1) p. 248) also considers his arguments as convincing; similarly, Eminescu (2).

<sup>356</sup> So the cases of Lee vs. Harris, resp. Prater, etc. A useful survey—pro and contra—on the US practice and on the *de lege lata* and *de lege ferenda* arguments are provided by BENDER, D.: Computer programs: should they be patentable? in: *Patent Law Review*, New York, 1969.—The US legislation eventually decided to take the copyright law approach. See in detail: Boytha (5); Bobrovsky (1). Prior to the re-codification in 1977 the British patent practice had also been to a certain extent an open system regarding the patentability of software. The expressed provision of exclusion in the 1977 Patent Act seems to make the situation unambiguous. However, Cornish ((1) pp. 172–194) does not consider it in such an optimistic way.

<sup>357</sup> In the course of the Conference referred to in our Note No. 337, especially Plotnikov argued in this sense. Similarly, Ulmer (2); Gyertyánfy: op. cit.; *idem*: The software as a new subject matter of copyright law? RIDA, 1982/113; similarly, GAVRILOV, E. P.: Pravovaya okhrana algoritmov i program dlya EVM v SSSR: sovremennoe sostoyanie i perspektivy, VI 1990/1.

<sup>358</sup> Cf. KINDERMANN, M.: Special Protection Systems for Computer Programs, IIC 1976/3; BATURIN, Ju. M.: Problemy okhranosposobnosti izobretenii kompiuternoi tekhniki, VI 1988/1; LINDEN, W. H.:



Recent developments testify to the *strengthening position of the copyright law approach*. A number of newer patent laws definitely exclude computer software from the sphere of protection. Other recent legislation, resp. law-applier's and juridical stands recognize the protectability by copyright law.<sup>359</sup> On a global level, in the course of works carried on within the framework of WIPO, the copyright law qualification has also become prevalent.<sup>360</sup>

It was *Boytha* who expounded the most comprehensive and consistent viewpoints of the copyright law approach.<sup>361</sup> In his study, he examines the possible legal instruments and proposals formulated in relation to the protection of software. *Boytha* judges the chances offered by the contractual methods and the norms prohibiting unfair competition as unsatisfactory, and points out with emphasis that "... the exclusion of software has been the result of the immune reaction of the institution of patent to protect the effectiveness of law...". In connection with the presentation and assessment of the copyright approach, the key category is the author's work, which is defined by *Boytha* as "an original texture of thoughts expounded in an identifiable way...". He proves convincingly that software meets in every respect the above criteria of authors' work, the intellectual product. He presents the solutions offered by individual national laws, the international endeavours, the theoretical positions. Among the latter, he analyzes and evaluates the concepts directed towards the *sui generis* kind of protection and fixes that the Model Law elaborated within the framework of WIPO is nothing other than "... the copyright law... tailor-made for software...". *Boytha* lays emphasis on the idea that there is no need for constructing *sui generis* protection, on the one hand, and that a software-specific regulation is needed in the system of copyright law, on the other. He examines in detail whether the effective Hungarian copyright norms are appropriate for the protection of software as copyrights work, and he gives a positive answer in this respect. Nevertheless, he emphasizes that in connection with the utilization of software, or more exactly, with the contracts concluded for the utilization, certain conditions are indispensable.

In Hungarian law (positions taken in the literature codification proposals, and court practice), the copyright law approach is gaining strength. There is little doubt that software can be qualified as an intellectual product that is protectable under the copyright law. The Copyright Law Experts' Body has repeatedly stated that certain software varieties meet the requirements—elaborated by legal regulation and the theory, and—accepted in relation to copyright works, that is to say, they fall into the area of science and possess individual-original features. (It is usual that—as an analogy—the qualification of technical designs under copyright law is referred to.) The qualification by copyright law is—in principle—grounded, but not all the questions arising in the area at issue are answered reassuringly.

While there are undoubtedly such variations within the software category (although it is by far not possible to speak about opinions which have crystallized in respect to a determination and delimitation

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Entwicklungsprobleme im Rechtsschutz immaterieller Wirtschaftsgüter in der DDR, *GRUR Int.* 1989/2. In Hungarian literature, especially, Jacsó, P.: *A szoftver jogi oltalma* (The legal protection of software), KSH, Budapest 1981; and Szendy (1).

<sup>359</sup> So, French and Polish patent law, as well as the PCT and the Munich Agreement, definitely exclude software from patentability. As regards the qualification by copyright law, the new US copyright law has taken an affirmative position (cited by Pálos (4)). Similarly, some newer foreign decisions: Decision of 2 Nov. 1982 of the Cour d'Appel de Paris (*GRUR Int.* 1983/1); Decision of 13 Sept. 1983, of the Bundesarbeitsgericht (*GRUR Int.* 1983/10); Resolution of 18 June, 1981 of the South-African Supreme Court in the case, Northern Office Micro Computers Ltd. v. Rosenstein (*GRUR Int.* 1983/8); the Dutch Court Decisions on such subjects dated 30 January, 1981 and 14 May, 1982 (*GRUR Int.* 1983/8); Decision of the Canadian Federation Court of 29 April 1986, in the case Apple Computer, Inc. v. Macintosh Computers Ltd. (*GRUR Int.* 1986/7).

<sup>360</sup> Of this, comprehensively, *Boytha* (5); Pálos (4); *Eminescu* (2); *Plasseraud-Savignon*, op. cit., pp. 117 et seq.

<sup>361</sup> *Boytha* (5).



of individual varieties) that may qualify as individual-original products protected under copyright law, it is also undoubted that certain software varieties are of a *routine character*, and are lacking in individual-original features. They do not enjoy protection as scholarly work; on the other hand, they can be considered as the product of technical expertise which has proprietary value. For the protection of the latter—according to Hungarian law—various legal institutions can be reckoned with. So, the non-intellectual-type—or less so—softwares can be qualified as innovations, or more closely as organizational innovations (in the contractual practice and in that of the various companies, strong endeavours directed toward this kind of solution can be met with). They can enjoy protection—considering the solution by the reform of the Civil Code—also in the form of that offered for technical knowledge having proprietary value (know-how).

Finally, the position that lower-level software is judged to be protectable in the sphere of the so-called allied (related) rights—while remaining in the circle of copyright law is supportable.

Even if the copyright law approach is accepted, it can hardly be doubted that software does not belong to the category of 'typical' author's work. Although according to certain views the rules in force of copyright law protection of software is, in principle, assured, it seems the views of those who favour *sui generis* protection are also worthy of being honoured. It is thus sensible if such a specific protection is established not as an independent category but by setting out *software-specific rules* within the copyright law (e.g. as regards the questions of the employee's works, or in connection with utilization). This solution was eventually chosen by the Hungarian legislature, when in the course of modifying, resp. supplementing the enacting clause of the Copyright Act, completed the listing of scholarly works—exemplificative anyway—with the category of software, that is to say, it set the fee-index lower than the typical (60–80%) for software (10–30%) among the fees established for employees' author's works.<sup>362</sup>

It must also be pointed out with emphasis that in principle the Hungarian Civil Code acknowledges the possibility of *parallel protection*. The position which accepts the protection of certain software varieties as scholarly works does not mean by itself the exclusion, on the basis of principles and theories, of other protection patterns. Consequently, the acceptance of the possibility of even the patentability of softwares, as regards certain varieties of the latter—e.g. those with a closer connection to hardware—cannot in principle be excluded from the outset.<sup>363</sup> Here, the concrete legislative-judicial decision can be strongly influenced—along with the theoretical considerations—by the practical approaches, which also take international tendencies into consideration. Namely, it is not desirable to secure stronger protection than that applied in other legal systems in relation to products concerning which the weight of those originating from foreign sources is overwhelming.

87. The scientific-technical developments promise even some more such 'border-line' problems as are difficult to tackle by means of the conventional approaches and delimitations. Today this includes the question of legal protection for integrated circuits, the *chips*.

Integrated circuits essentially blend hardware and software inseparably. As concerns their legal protection, the theoretical debates which had taken place in connection with software were actually repeated in part, that is to say, the struggle continued between parties emphasizing the patentability concept and those supporting the copyright aspects. The solutions applied by legislations testify to the fact that in this field the *sui generis* kind of legal protection has become typical,<sup>364</sup>

<sup>362</sup> Decree No. 18/1988/VIII.24/MM of the Minister for Culture introduced a few further software-specific provisions (e.g. in relation to transcriptions into another program language, or to electronic data banks); Gyertyánfy, op. cit., formulated a few further proposals.

<sup>363</sup> Bobrovsky (8), esp. pp. 248 et seq.

<sup>364</sup> See Pálos (5); cf. HEIN, W.: Der US. Semiconductorship Protection Act von 1984, *GRUR Int.* 1985/2; LAURIE, R. S.: La Loi de 1984 sur la protection des microplaquettes semiconductrices: cadre



this pattern has also come to the forefront in the course of regional and universal co-operation. The latter has led to concrete results very quickly, namely, to the conclusion of the 1969 Washington Treaty, to which—according to the previews of information—a number of countries will join.<sup>365</sup>

The Treaty defines the subject of protection, namely, it contains a detailed description of the original, resp. the combination of the original integrated circuit (the topography), which is the result of the designer's mental efforts, and which is not qualified as the product of some technical common sense. The topography is a concrete arrangement intended for production, among the elements of which at least one is 'active'; the interconnections among the elements show a three-dimensional arrangement and their aim is to realize some electronical function. The content of the legal protection is laid down in the Treaty; the reproduction of the latter in products (chips) and the trade of such products are prohibited. Exclusive entitlement is not harmed by utilization of the product in research, education, or reverse engineering. The Treaty allows the member countries a free hand in respect of transmitting the protection into their own legal system, that is to say, whether they ensure the protection by a *sui generis* regulation or within the framework of some other institution to effect protection. Neither does the Treaty bind the members in respect of setting the time for the grace period (e.g. for the actual creative work, listing, utilization), the minimum prescribed is eight years. The Treaty—as a separate agreement attaching to the PC—lays down the principle of national treatment. It ensures the possibility that in an exceptional case, a compulsory licence can be applied; fixes the prevalence of the principle of the exhaustion of rights, and introduces a separate mechanism for the settling of debated issues. It is worthy of mention that, in the areas of international protection of industrial property, the Treaty is the first such convention which allows membership status not only for states but also for inter-governmental organizations.

88. In the foregoing we could see that the boundaries of 'technics', and the scopes of patentable intellectual products are expanding, although, in certain borderline areas (e.g. software), opposing trends also show up. It can also be stated that in certain legal systems the group of cases called *exclusions for security's sake*, also increases, e.g. especially in respect of inventions relying on atomic energy.<sup>366</sup> On balance the statement on opposing tendencies seems to be grounded which qualifies the *enlargement of the circle of protection*, the product varieties' scale, as a characteristic, *prevailing trend*.

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législatif, *Prop. ind.* 1986/3; KITAGAWA, Z.: La protection des configurations de circuits intégrés semi-conducteurs au Japon, *Prop. ind.* 1986/9; DREIER, T.: Die Entwicklung des Schutzes integrierter Halbleiterschaltkreise, *GRUR Int.* 1987/10; COMBALDIEU, J. C.: La protection des circuits intégrés en France, *Prop. ind.* 1986/6. The Common Market Guiding Principle dated 16 December, 1986, is also significant (87/54/EWG).

<sup>365</sup> KRIEGER, A.-DREIER, TH.: Die Washingtoner Diplomatische Konferenz zum Abschluss eines Vertrages über den Schutz des geistigen Eigentums im Hinblick auf integrierte Schaltkreise, *GRUR Int.* 1989/10.

<sup>366</sup> Cf. Bobrowszky (1).



### (c) Commodity marks

89. The tendency towards increasing the range of protection has relevance mainly in the field of technical products; significant illustrations can also be taken from this field. However, analogous tendencies can be observed in other partial areas of industrial property, namely in the laws related to commodity marks. In what follows below a few examples will be presented for this—as indications only.

90. *Trademark legislation.* — The endeavours here to widen the circle of protection are mainly remarkable in two respects: devices which are applicable as trademarks, resp. the commodities which can be marked by these devices.

The distinguishing *marks* applicable as trademarks have conventionally become restricted to the two-dimensional ones (word and/or figure). In the newer legislation there is a distinct tendency to expand the circle of protectable markings including three-dimensional markings (those reflecting in the particular external outfitting of the product, or even more in that of the packing or bottle, etc.) moreover, the combinations of colours, sound and light effects, etc.<sup>367</sup> Naturally, all these markings are protectable as trademarks only if they are suitable for distinguishing the commodity goods. There are legal systems which do not even specify the applicable marking varieties, but in principle and without restriction judge as suitable every kind of marking so far as its distinguishing character can be established.<sup>368</sup>

The conventional approach toward trademark legislation placed in the fore the distinguishing of physical objects, commodity goods and products. Accordingly, manufacturers' mark and trademarks were accepted and regulated as two basic varieties, and such that are suitable for indicating the individual relationships between goods and producers, resp. traders. In modern economic activity, growing importance attaches to activities which are not—or not necessarily—linked to concrete products, namely which belong to the category of services (insurance, tourism, banking, management, etc.). The growing role of this sector is reflected in trademark legislation by the regulating of *service marks*. By paying attention also to the encouragement set forth in the PC, the individual countries' trademark norms fix in growing number the protectability by trademark of services.<sup>369</sup> (Occasionally, different regulations can also be found as regards services, e.g. in respect to the constitutive character of the registration.)<sup>370</sup>

<sup>367</sup> As to the protection of sound effects as trademarks there is a pronounced indication in the trademark legislation of Bulgaria and Romania—similar to Hungarian law. Cf. *Major provisions of trademark legislation in selected countries*, Genf 1977.

<sup>368</sup> There is an indication in the trademark legislations of Iraq, Canada, Kuwait, Norway, and Switzerland to the protectability as a trademark of any kind of marking which is suitable for distinguishing trade articles.

<sup>369</sup> A growing number of countries pronouncedly indicate the protectability of services by trademark; others apply this principle in practice—even in the lack of definite regulations.

<sup>370</sup> So, e.g., Soviet trademark legislation does not make the registration of service marks compulsory.



Partly the tendency to increase the scope and quality of the protection varieties is reflected along with the strengthening of the trademarks' quality guaranteeing function—mainly from a consumer protection approach—by the introduction and application of the system of *collective trademarks*, resp. the so-called *certification marks*, in certain legal systems.<sup>371</sup>

91. *Geographical indications*. — The growing role of the indications of source and the appellations of origin (summarily discussed as geographical indications) is reflected partly in particular rules of *trademark legislations*, in the formulation of special inhibiting clauses, but is also shown by the endeavours to establish *independent*, institutionalized legal protection of the markings.

The legal protection of the indication of source and origin has acquired importance mainly in the connections with international economic activity. Consequently, the codification results also appear mainly at the level of *international co-operation* in industrial property, in the framework of partly universal, multilateral treaties (cf. Chapter II), partly bilateral agreements.<sup>372</sup> However, the recent codifications of a few countries testify to the fact that the enrichment of the stock of their *internal legal instruments* by creating such specific institutional protection forms is not a worthless endeavour either.<sup>373</sup>

### 3. The enrichment of the forms of protection

#### (a) General remarks

92. From the viewpoint of social-economic development, the technical-scientific creative products constitute a particular, fairly significant area of intellectual products. This category unites *varieties of intellectual creations* on a considerably *large scale*. Its lower limits are formed by non-routine activities (innovation, rationalization) which add value to regular professional knowledge; the upper limits of the category are constituted of scientific discoveries, the recognition and revelation of natural necessities not known previously. The scale between the two extremes is extremely wide; certain types of creative work falling within them may be considered separate, but the dividing lines among them are by no means always unambiguously defined. Even the lower limit, the determination of activity which is considered to exceed that based on routine knowledge, is not set on uniform grounds. In principle, the standards are different for routine work according to whether it is done by a design engineer or an unskilled worker.

The requirement of legal regulation should be set so that it should appropriately stimulate every kind of creative activity and technical creative work—independent

<sup>371</sup> Cf. SCHRÖDER, S.: Kollektiv védjegyek a Német Demokratikus Köztársaságban (Collective trademarks in the GDR), *UL* 1972/2; *Bacher* (3); *Vida* (1).

<sup>372</sup> Cf. *Bognár, M.* (3); *BENSON, R. W.*: Vers un nouveau traité sur la protection des indications géographiques, *Prop. ind.* 1978/4.

<sup>373</sup> Such a special norm is e.g. the Bulgarian legislation of 1967, resp. the Czechoslovakian legislation of 1973.



of its level—and should ensure that the legal guarantees necessary for this, along with adequate legal protection for the various kinds of creative activity, are available. This is requested for the respect of the creative man as well as for the establishment of the proper harmony between individual and social interests in the course of the creative activity.

Hungarian law provides '*gapless*' protection for intellectual products. The apparent gaps originate rather from the fact that the possible forms of protection are not *differentiated* to the desired extent. As a result of the reform of the Hungarian Civil Code, the former statement of the author is now based on substantive law. There is no legal 'no-man's land' any more in the area of intellectual products, and no '*numerus clausus*' for the creative product varieties, worthy of protection, can be established. (Whether the monetary regulators reflect in given cases a similar approach is a separate question.)

This requirement of gapless protection for technical creative products thus means that every creative product must receive legal protection, on the one hand, and that the protection must be constructed on the basis of appropriate differentiation, on the other. Law must thus set divisions on this wide and rather heterogeneous scale of technical creative products, thereby enabling the differentiation of various types of creative products, and the adjustment of the desired *forms of protection*, to their characteristics.

The various legal systems accomplish this classification by considering various aspects. The most frequent criteria of separation are the standard of the creation, resp. its novelty. These two criteria sometimes coincide with each other.

It is desirable not only that—as has been pointed out in the previous section—the circle of varieties of technical-intellectual products should be enlarged, but also that *varieties of the forms of protection* should be available in greater number. Opposing tendencies can also be noticed here. Strong—and often justifiable—efforts are made to ensure the protection of novelty-like solutions, which come about in the course of technical-scientific development, by using the traditional protection categories. Occasionally, these efforts lead to solutions qualifying as a Procrustean bed. The conventional framework become stretched out. It is however an unfortunate tendency if we create—sometimes forcibly—new, 'original' forms of protection in the case of every product variety, by unjustifiably disconnecting—possibly emptying—the framework of well-proven institutions. Nevertheless, *prima facie*, it seems that the desirable tendency is the 'sensible' enrichment of the forms of protection, and this tendency is also reflected in practice.

Namely, 'the sensibility' of making the spheres form of protection expanded also requires the consideration that the form of protection chosen should appropriately be adjusted to internationally accepted institutional systems. A certain degree of caution is also justified because the forms of protection are usually of an exclusive type. While this monopolistic situation has a stimulating effect on one hand, it is restrictive-prohibitive, that is to say, it can unjustifiably narrow the 'free' areas of development on the other hand. (This has also been indicated in connection with the conflicts of interests.)



Although the enrichment of the scale of forms of protection can be experienced in other areas of industrial property (e.g. service marks, etc.), the phenomenon deserves our analysis *mainly* in connection with the legal protection of *technical products*. The investigation below will thus be restricted to this sphere, namely, to the issues of discoveries, innovations, know-how and—in most detail—to those of the protection forms of the inventions.

### (b) The legal protection of discoveries

93. As has been indicated, the scientific discovery is at the top of the hierarchy of scientific-technical products; it is the highest-order achievement of creative activity. If we wish to give its positive definition, we consider it as a discovery if an existing, objectively effective, natural necessity not known previously is revealed and determined. If we also wish to distinguish it from some other types of creative products, then it should first of all be distinguished from the invention, which comes next after the discovery in the hierarchy. The discovery—considering its scientific value—is of a *higher order* than the invention; however, it is perhaps more correct to say that it is of another character. The delimiting criterion is whether direct, *practical applicability exists or not*.<sup>374</sup> The discovery reveals such natural necessity by building on which, utilizing of which concrete technical solutions, inventions, can come about and—according to the evidence of the history of technics—they do come about, but directly in practice, discoveries cannot be applied, that is to say, “... the discovery is a kind of extension of knowledge, and it is not a technical prescription for execution...” (In the US legal system, the dividing line between discoveries and inventions is drawn by practice; formally, the discovery is also patentable, but in that system, discovery is not conceived of in the above sense.) As regards the criterion of novelty—at least by considering the viewpoints that can be grasped in the legislation—*absolute novelty* is a common requirement in the case of both types of creation.

What kind of protection is provided by the individual legal systems to discoverers? In general, the protection is rather lean. The norms of *copyright law*, as the broadest background protection line of every intellectual product, evidently, provide protection. Although in the case of a typical scholarly work, the role of the form, the individual-genuine character are of basic importance, and the creator's essential interests are ensured by the protection attaching to those, in the case of the creators of scientific works in general, and that of discoverers', too, the formal elements are considerably more pushed into the background, or just lose their significance. With a certain degree of simplification we can thus state that if the discoverer formulates, describes, records and publicizes the result of his discovery,

<sup>374</sup> This is laid down by a negative approach in those patent laws which definitely exclude discoveries from the sphere of protection by patent for invention. So, e.g., in the Polish, furthermore—by building on Art. 52 of the Munich Treaty—in the British, French, GFR, Danish and Swedish patent laws. In other legal systems, the law-applier comes to an analogous conclusion by interpretation of the law; Bobrowszky ((1), p. 215).



the copyright law is suitable to protect this particular formulation, but not the actual content of the discovery.<sup>375</sup>

The importance of discoveries, the desirability of social prestige and of the stimulation of discoverers have led a number of the former socialist countries to bring about a *special legal institution* serving the protection of discoveries. The Soviet, Bulgarian, Czechoslovakian and Mongolian legal systems ensured such special protection for discoveries, and the discoverers. The essence of these regulations is that by them subjective rights are guaranteed for the discoverers as regards moral-personality and material recognition alike, although no rights of disposition concerning the subject of the discovery are afforded to them. (Thus, the protection accepts the so-called certificate model.) The establishment of the discovery character takes place in the course of a specified process in which—normally—important functions are assigned to the scientific institutions (universities, academies).

The special protection, referred to above, undoubtedly implies *advantages* as against the mere copyright approach. Thus, it primarily widens the discoverers' sphere of rights, decides the priority issue, makes the protection of personality rights more grounded and also guarantees subjective rights regarding material allotments. The institutional regulation establishes a closer connection between discoveries and the other categories of technical creative products, mainly with inventions (we must not forget that the boundaries between the phases of research become less and less distinct, basic and applied research become intermingled, resp. mean only steps of a unified research process),<sup>376</sup> and makes certain controlling-projecting methods possible. The favourable experiences relating to the institutional regulation have had a part to play in the fact that the issue of a more effective protection of discoveries has received a place in the agenda at *international levels*, too. This is shown by the Treaty of Geneva referred to above.

### (c) The protection of inventions

94. In this sub-section, the traditional form of protection for inventions, the patent, will be touched upon, furthermore, the form of protection by means of an author's certificate and a few issues in connection with the variants of patents and utility models will be examined.

95. *The patent.* — The patent is a form of protection of inventions based on the oldest traditions, which ensures for the inventor (resp. his successor, or employer) a temporary and *exclusive* legal possibility, legal 'monopoly' concerning the right of disposal over the invention. A number of *theories* has been created concerning the justification of the institution of the patent, most notably the proprietary theory based on natural law, moreover, the so-called award theory, the theory of incentives, as well as one advocating the concept of contract on publication. All of them have protectable and disputable, justified and less justified elements. It seems that the most grounded theory, justified also in practice, is the theory of incentives

<sup>375</sup> Cf. Bobrowszky (1), p. 257; Vékás (2).

<sup>376</sup> Cf. Beier-Straus (2).



which builds upon the positive correlation between patent protection and scientific-technical development.<sup>377</sup>

In the course of its historical development, the institution of patent has, evidently, gone through a process of refinement. Depending on the changes of the economic-social environment, its effectiveness and applicability have changed also. Undoubtedly, its role has become altered, too, among conditions of monopolistic capitalism, among of State intervention becoming more intensive,<sup>378</sup> or just among the conditions of the former socialist economic-social order.

The justification of the patent form of protection is questioned by many, even also in our day; a number of people think about the erosion, and crisis of the patent system.<sup>379</sup> The types of 'attacks' against the patent system are grouped by *Beier* as follows: attacks on the part of the developing countries, of the ex-socialist countries, of those representing the cartel law (anti-trust law), and by the economists.<sup>380</sup>

Advocates of the patent-orientated view do in general not dispute that the institution of patent also needs certain alterations, modernization. Their basic view is however that the institution of *patent is suitable without radical alteration* to guarantee the effective *stimulation* of the technical development and of various factors of the innovation processes. As against the negative or sceptical views, they refer to the positive experiences of practice. They call attention to the circumstance that "...the institution of patent has a stimulating effect on the development of industry, since by its implications of considerateness promotes the revealing and realizing of fruitful ideas, while the lack of this institution may lead to the concealment of significant inventions and provides the way for the proliferation of unfair competition...".<sup>381</sup> Recently it was *Jucker*<sup>382</sup> who analyzed the pro and contra arguments related to patent. A few of his statements are worthy of mention:

— Although the patent guarantees temporary and exclusive rights, it does not guarantee a monopolistic one...

— The patents, by means of their information content, have an incentive effect on research... but the lack of patents is of an inhibitive effect. Considering the relatively rare fruitfulness of the researches, their climate (trained personnel, equipment, materials) cannot be guaranteed otherwise...

— Failing of utilization may lead to compulsory licence or some other forfeiture.

<sup>377</sup> Cf. in detail *Bobrowsky* (1), pp. 45 et seq., (8), pp. 45 et seq.

<sup>378</sup> Cf. *ADRIAN, J.*: Kapitalistisches Patentrecht als Instrument staatsmonopolistischer Wirtschaftsregulierung, *N* 1981/7.

<sup>379</sup> Cf. *Jucker* (1).

<sup>380</sup> *Beier* (3).

<sup>381</sup> See, *Somorjay* (2), pp. 99 et seq. The favourable experiences gained from the patent-orientated State researches are underlined by *MOSSINGHOF, G. J.*: Zur Rolle des Patentrechts in der Forschungsförderungspolitik der USA, *GRUR Int.* 1985/3.—In the course of the 1985 joint samplings by the IFO Business Cycle Research Institute and the European Patent Office, 45% of applicants for filing considered the patent as important from the viewpoint of investment protection, and 43% for laying down the foundations of their licence policies. Cf. *OPPENLÄNDER, K. H.*: Incidences du système des brevets sur la propension de l'industrie à investir: une analyse empirique, *Prop. ind.* 1986/12. See, also, *Troller* (4).

<sup>382</sup> *Jucker* (2).



— Patent is the only means which ensures competitiveness for small firms. In Switzerland, e.g., there are four big pharmaceutical manufacturers alongside of which a hundred small firms operate.

— The prohibition of patenting medicines, e.g. does not lead to reduction in the prices of medicines. We may take Italy as an example of this, where along with the fact that medicines are not to be patented their prices are nevertheless on the average by 25% higher than in other European countries.

— The more effective the protection by patent, the higher the number of efficient new products. For example, between 1940 and 1967, the number of newly elaborated medicines was 525 in the USA; 121 in Switzerland, in GFR, France, and Japan; 41 in the UK and Canada; 14 in Denmark, India and Hungary.

— The licence fees do not influence disadvantageously the balance of foreign currency in the developing countries. For example, in 1964, Japan paid out 6396 million dollars for the introduction of technologies into its pharmaceutical industry, but... it spared 16 times the expense which would have had to be paid out otherwise. The marvellous industrial development of Japan can be attributed—according to the opinion of the Japanese Government and industry—to its balanced institution of patent...”

It seems that the balance between the arguments and the counter-arguments underlines the *positive assessment* of protection by patent, and this refers also to the consistent position taken by the Hungarian legislature. In connection with possible negative consequences, it must be pointed out with emphasis that the basic principle of the Hungarian Civil Code is the criterion of exercise of rights in harmony with their *social purpose*, and the exercise of rights in contradiction to this principle qualifies as an abuse of rights. The patentee has not only rights—with exclusive and absolute structure—but enforceable duties as well.

96. *The objective scale of protection by patent; the specification and claims.* — The protection by patent ensures a temporary monopolistic situation to the patentee. The counterpart of this is that he must publish the patented invention, solution, in an appropriate way; he should reveal it so that the invention becomes public property in case the period of protection expires (or the patent ceases earlier for any other reason). The publication thus takes place in the framework of the patent-granting procedure. In the course of this, it is of extreme importance that it can be specified what comes under the protection of patent, and what the material effect of the protection is. The possible competitor must know what kind of conduct qualified as infringement, and where is it that chances remain for him to search for new solutions. In drawing the boundaries of protection, the structure of specification and claims is of basic importance in modern patent law.

The individual legal systems attribute different significance to the character, legal effect, of the points of claims. In numerous variants, there can be found very stringent forms of practice, the strict interpretation of the points of claims just as well as broader interpretations, the protection of inventive thought (e.g. the ‘pith and marrow of invention’ doctrine of the British law, the German approach, etc.).<sup>383</sup> The patentee’s interest obviously lies in as broad an interpretation of the claim as possible, in order that he can enjoy his exclusive position in an as large sphere as possible, while his competitor’s interest advocates the narrowest possible interpretation. However, these positions turn around, can turn

<sup>383</sup> Cf. *Somorjay* (2), pp. 99 et seq.; GÖDÖLLE, I.: A szabadalmi oltalom tárgyi terjedelme néhány külföldi országban (The scale of the subject matter of patent protection in a few foreign countries). *MIE Közleményei* 18.



around. Legal security is served if the boundaries of protection are obvious to everybody, while an exaggerating stringency can be unfair towards the claimant who has formulated the claim 'unfortunately'. The essence is after all that the claims should not narrow into a mere sort of information, but serve really for drawing a boundary line around the sphere of protection.<sup>384</sup>

As regards the role, legal regulation and practical interpretation of the claims, there can be found rather differentiated solutions, concepts. No spectacular results have as yet come about in the interests of unification or harmonization, and the concern is not unfounded that in spite of the homogeneous position reached in this respect by the formulation of Art. 69 of the European Patent Convention, practice may develop a change to the heterogeneous climate, possibly reproducing thereby the traditionally different approaches.<sup>385</sup> The harmonization agreement may also interact in this regard in the unification of law.<sup>386</sup>

97. *The patent procedure.* — The granting of a patent belongs to the competency of the authorities; in the course of the procedure it must be clarified whether the invention to be protected meets the material criteria (and certain formal prescriptions) laid down in the legal rule of protectability. The public considers the granted patent as guaranteed to a certain extent even if the given authority refers to the very opposite of the case (e.g. the French letters S.G.D.G.). It is in the public interest that the exclusive legal position should exist really in respect of such inventions only as are worthy of it, that is to say, meet the criteria of patentability. Not all the traditionally established *examination systems* meet this requirement. (The given system may depend on certain traditions—related e.g. to the function of the State—or just on the standard of the conditions of the examination, the suitable organization, documentation, that of the staff, etc.)

The so-called registration system serves to examine the formalities only. By not officially examining the conditions of patentability, this system pushes the risk—originating from the lack of official examination and from the lodging of objections against the granted patent—and the costs, on the competitors. The so-called 'opposition' system provides the opportunity for the competitors' protest even prior to the granting of the patent, but the authority itself does not carry out an examination officially here, either. These systems of examination guarantee only to a lesser extent the 'originality' of the patents granted, and lead to uncertainty.<sup>387</sup> A majority of the legal systems, especially newer legislation, make a real examination of the patentability conditions an obligation of the authorities (this is the so-called system of *prior examination*), either exclusively authoritatively or as preparation for the possibility of opposition.<sup>388</sup> Undoubtedly, the system of prior examination is suitable for the granting of reliable, 'strong' patents.

<sup>384</sup> Somorjay (2), p. 120.

<sup>385</sup> Cf. ARMITAGE, E.: Die Auslegung europäischer Patente (Art. 69 EPÜ und das Auslegungsprotokoll), *GRUR Int.* 1983/4. Great importance may be attributed to the July 11th 1985 judgement of the British Court of Appeal in the case of Monsanto Co. vs. Stauffer Chemical Co., on the plant chemicals affair, in which it was laid down that the provisions of the unified European patent law cannot be interpreted on the basis of principles of earlier national rules (*GRUR Int.* 1987/2).

<sup>386</sup> See to this the experts' debates in connection with Art. 304 of the Draft.

<sup>387</sup> The solution of the French legal system is unusual. It has in principle not broken away from the traditional filing system, that is to say, its examination on the merits of the case is not a ground for decision-making but only one of an informatory character. If the inventor—leaving the facts revealed in the *avis documentaire* as destroying novelty out of consideration, and assuming the subsequently occurring risks—maintains his application, the authority does not refuse—we can say against its better judgement—the granting of the patent. The risks of the applicant who insists on attaining the patent are increased by the fact that along with the patent, the *avis documentaire*—revealing the vulnerable points in the patent—is also published by the authority. Cf. Chavanne-Burst, op. cit., pp. 100 et seq.

<sup>388</sup> The Hungarian legislature eliminated from the procedure the possibility of raising oppositions—which is, incidentally, of a positive value, undoubtedly—not on the basis of considerations in principle, but merely for practical reasons, by referring to the fact that, according to experience gained in the course of many years, the number of successful oppositions had not reached even 1% of the filings, and led to a 6–8 month 'delay' in every case of granting the patent.



A few of the newer patent laws (since 1963, in some eight countries) have adopted a particular variant of the prior examinations, the so-called *deferred examination*.<sup>389</sup> Its essence is that the scope of examination is divided into two phases leading thereby to a situation that, performance of the actually labourious and time-consuming tasks like the post-examination of novelty and technical advance (inventive level), have their turn only after a certain time has passed and normally not automatically. (All the same, the application will by any means be published after a definite time, e.g. after 18 months have passed; this early publication basically serves to provide information.) The legal systems which have introduced the deferred examination refer to the torrential increase in the flow of information, the consequent delay in examinations, the overburdening of the authorities; their experiences are in general favourable, that is to say, post-examinations are applied in cases of really valuable inventions.<sup>390</sup> In most recent legislations, the spreading out of the deferred examinations has come as it were to a standstill, in spite of certain expectations. One of the likely causes of this can also be the effect of the PCT and the EPC; a number of filing take place through these channels. (Incidentally, the solution offered by the PCT can also be considered on the basis of the non-obligatory character of the international prior examination as a particular variant of the deferred examination.)

98. *Patent or author's certificate?* — In what follows below, one of the debated aspects, the conformity of the institution of patent with the ex-socialist economic and legal systems, resp. the issues of assessment in relation to author's certificate and patent will be analyzed.

As regards the question of preference to some of the models of patents, resp. author's certificate debates on a wide scale have been going on—and not always without bias. Especially, those who take the certificate-oriented position are prepared to line up arguments which are often metajuristic in nature.<sup>391</sup> In the process of integration in the ex-Comecon countries' industrial property, the value judgement related to a preferred form of protection was also the source of numerous disputes.<sup>392</sup>

In an objective examination of the question, the point of departure must be that certain legal institutions or legal forms are not to be objects of fetishism, resp. denunciation by themselves. In evaluating them, we must examine them regarding the fulfilment of the kind of social-economic tasks, for the organization of the sorts of connections which they called to life. Naturally, in this context, analyses must be devoted to the historical factors which have had a part to play in their development, the essential or eventual character of these factors. Moreover, we must examine the extent to which they have become altered, and, accordingly, whether the given legal institutions are suitable for exercising their function in an up-to-date way, or whether certain alterations, possibly their liquidation, are justifiable.

Starting from this principle, let us attempt to set up the *criterion system* which can be put forward as containing the claims from the regulation, and relating to the *legal protection of inventions* (in general, the technical products). It seems, three essential functions can be formulated, viz. (i) the form of protection of inventions

<sup>389</sup> Such are: Australia, France, Holland, Japan, Poland, Hungary, the ex-GDR and the GFR.

<sup>390</sup> Along with the positive assessment, critical voices are also present. Cf. ARNOLD, T.: A critique of deferred examination. *Patent Law Review* 1969.

<sup>391</sup> Cf. Bobrovsky (1), pp. 133 et seq.

<sup>392</sup> So e.g. also in the course of the elaboration of the ex-COMECON licence-model agreements. To this cf. Lontai (1), pp. 65 et seq.



must ensure and stimulate the creation in as great a number as possible of such technical products of a high standard that will serve the performance of both current and long-term economic-social tasks; (ii) the chosen form of protection must ensure and stimulate the spread, the efficient introduction, on as wide a scale as possible, and at a rapid pace, of the technical solutions that have come about; (iii) finally, in connection with the foregoing criteria, the protection form must ensure the proper interest at all levels (inventor, company, national economy, integrating community) of the partners co-operating in the creation and spread of the technical products (inventions).

In what follows we shall try to find an answer of the question how the *criterion system* referred to above can be accommodated by the *certificate*, resp. *patent protection*, what the advantages, resp. shortcomings of the one, resp. the other form are.

The *characteristics of the author's certificate* will have to be analyzed primarily on the basis of Soviet patent law, in which this institution historically first appeared, and the regulation of which expresses most clearly the particular features of this form of protection.<sup>393</sup>

The Bulgarian, Czechoslovakian, and Mongolian patent laws provided regulations which were in essence identical with the Soviet solution. Formally a greater difference appears between the patent laws of the ex-GDR and of Romania. The so-called *Wirtschaftspatent* (as against the *Ausschlussungspatent* which is of a conventional content) of the ex-GDR is in content characteristic of the author's certificate. Although the Romanian patent law exclusively recognized the patent form of protection, the patent to which a company was entitled, did not provide a right of disposal in the classical sense.<sup>394</sup> Dissimilarly, the certification form of protection introduced in Algeria and Mexico is essentially dissimilar in spite of the use of the identical term.<sup>395</sup>

The first codification of the author's certificate took place in the Soviet Union in 1919, after the victory of the proletarian revolution. In that situation, the strongly centralized economic mechanism, the circumstance that commodity relations had been pushed into the background, the administrative model of the companies' activities and management, as well as the necessity of mobilizing the internal forces of technical progress—justified by the consequences of isolation and modest domestic basis—all these factors offered the author's certificate form of protection as a reasonable regulatory solution. The essence of this was the *State's exclusive right of disposal* relevant to external, international relations (first of all, through its special organizations established for this purpose), furthermore, that the State's possibility of getting *unrestricted* and—in principle—*free of charge* access to the solutions of inventions in internal relations was guaranteed, along

<sup>393</sup> Cf. Bobrovsky (1), pp. 60 et seq.; Dozortsev (1); Trakhtengerc, op. cit.; the material of the 1969 Moscow Symposium, esp. the reports by Maksariov and Sviadosc; DORKIN, A. I.: Leninskii dekret ob izobreteniyakh i ego vliyanie na vzniknovenie kachestvenno novykh otnosheniy v oblasti izobretatelstva, VI, 1975/8.

<sup>394</sup> Cf. Bobrovsky (1), Trakhtengerts, op. cit.; Eminescu (1).

<sup>395</sup> The Mexican author's certificate can be qualified rather as a patent enriched with a general licence of right, too.



with (also through the channels of plan directives) even direct obligatory utilization. Alongside of this, the moral and material *acknowledgment of the inventors* was ensured by means of appropriate instruments. Thus, the *companies* and other organizations by whom the inventions had been brought about, *did not receive a right of disposal* relevant to the invention, but as a consequence of the direct management system, namely, the centralized financing of technical development, they were not particularly interested in that.

In 1924, in the event of the proclamation of the NEP (New Economic Policy), the Soviet law returned to the traditional concept and recognized exclusively the patent form of protection; then, with the consolidation of the Soviet economic system in 1931, the certificate form was reintroduced—with a parallel possibility of retaining the patent.

The system of the author's certificate is thus built on the parallel ranking of the two forms of protection, with the difference however that the *certificate* enjoys an undoubted *preference*. This is reflected namely in the circumstance that the in principle guaranteed right of choice is limited (for employee's inventions and certain varieties of inventions it is only the protection by certificate that could be applied for). Even where this is not so, the domestic inventors applied—according to the evidence of the practice—almost exclusively for the certificate form of protection. Mention must be made here of the fact—beyond the one that the right of choice is limited—that the certificate protection is—in principle—unlimited in time. Moreover, the possibility of its cancellation, in comparison with that of the patent, is also strongly limited. (Essential alterations took place in this respect in 1978. This will be dealt with later in our analysis of the issue.)

On the basis of the criterion system defined above, we can state that in principle, the protection form of certificate also establishes suitable conditions—depending on other, mainly organizational-incentive factors—for the acceleration of creating technical results, and for raising the quantity and standards of the latter. The rapid and unobstructed flow of information on products that have been created is fairly efficiently ensured by the protection of the certificate free from the restraints of the patent. If, however, we examine the third criterion, the appropriate *stimulation* of all interest levels, it seems that this criterion is not properly met by the certificate form of protection. Stimulation does exist in relation to the inventor, the large collective (national economy), and even to the community of integration, but it is *missing* at the level of the company, *on a micro-level*. Although in the course of the economic reforms the European ex-socialist countries accepted solutions which were not completely identical, a common endeavour of these countries was, however, to make the companies interested in technical progress, so, accordingly, the weight of company inputs and the financing of technical progress increased. However, the efficiency of company interests becomes doubtful if in connection with the technical solutions which have been developed by means—at least partly—of their inputs, no right of disposal is guaranteed to them. It is justifiably pointed out in the literature that the building of the flow of technical information on the recognition of their *commodity character*, and on the synallagmatic principle,



necessarily presupposes a certain degree of *right to disposal*.<sup>396</sup> The complete lack of this can make the companies uninterested in the development and protection, and even in the spread of inventions. According to the test of practice, a fairly reasonable and automatically effective method of achieving all the foregoing aims is to put technical information (invention) on the market as a commodity. The administrative-organizing methods are only to a slight extent suitable as a complete substitute for that.

The advocates of the author's certificate refer to the circumstance that in the creation of the inventions, the part played by social factors is significant, so it is not desirable to grant such rights as are monopolistic in nature and are in favour of the socialist economic unit. Accordingly, it is the certificate that is the true, *socialist-type form of protection*. The patent—considering its inhibiting, monopolistic character—is a 'capitalistic remnant', which is at most, to be regulated in the interest of East–West relations.

This approach does not seem to be well founded, either from a practical or theoretical viewpoint. There is no doubt that in the creation of intellectual products, a considerable part is played by the conditions ensured by the (small and large) collectives, and by the social factors interacting in many ways. This is especially so in the field of technical products. From this, however, the conclusion can hardly be drawn that the protection of an absolute structure granted to an individual or a company runs counter to social interests. (As an analogy, the fact that recognition of the—in principle—integrated State property based on the ownership of the fundamental means of production does not exclude either that companies—organized on the basis of economic independence—that manage the property may dispose as quasi-owner of State property which is in their management, thereby rendering direct State intervention to occur as exceptional, as it were, occurring as a background safety measure.) Considering the property value and commodity character of technical products, the satisfactory establishment in this respect of *company rights of disposal* had even earlier been fairly consistent with the economic and legal conception of the ex-socialist countries.<sup>397</sup>

The evaluation of individual forms of protection is of course closely connected to the given State's concept of *economic management*. From the viewpoint of Hungarian law it can be fixed that the *patent form* of protection must be qualified as such an institution which is *conformable* with the Hungarian conception of economic management, efficiently expressing the interests of individuals and

<sup>396</sup> This is pointed out with emphasis by e.g. Linden, *Osterland*; in detail, by Bobrovsky (1).

<sup>397</sup> Cf. Világhy (3), pp. 92 et seq.; KOVÁRI, GY.: A szabadalom szerepe a műszaki fejlesztésben és a gazdasági versenyben (The role of the patent in technical progress and in economic competition), *UL*, 1974/12–13; most recently, and comprehensively, see Pretnar, op. cit. This author underlines that "...the institutions of the industrial property are determined by the social order and not by the normative regulation examined in isolation..."; cf. also LINDEN, W.: Immaterielle Produktion und Volkseigentumsrecht, *St. u. R.* 1977/4 and *Eminescu* (1). These authors underlie the role of synallagmatic obligations; furthermore, SOLTYSINSKI, S.: *Szabadalmak és innovációk a fejlett gazdaságú keleti és nyugati államokban* (Patents and innovations in the Eastern and Western States with developed economies). (MIE—AIPPI Conference in September, 1979.) The latter author takes an unambiguous stand in favour of the patent form.



of the micro-level economy alike, and is able to ensure by means of patent-comformable institutions the safeguarding of social interests. Such institutions are: the compulsory licence, the possibilities of expropriation, and the exceptional application of supervision could not be excluded either.

The circumstance that in my judgement the *patent* form of protection is—in principle—more *suitable* for the purpose than are the legal frameworks offered by the author's certificate does not mean that a certain functional *approximation* of the two legal institutions would not in my mind be desirable. The incentive and interestedness may be served by the introduction—even if not easily and consistently—of synallagmatic elements into the certificate system,<sup>398</sup> on the one hand, and the—in principle—inhibiting consequences of the patent system may be moderated by the introduction of the licence of right (*Lizenzbereitschaft*) or some other similar institution.

Finally, one more context needs to be referred to here. The Soviet Union joined the PC in 1965. Partly, it was the result of this that in the course of the Stockholm revision, the author's certificate was introduced into the text of the Convention as—from the viewpoint of union priority—of an equal rank with the patent, a convertible protection form. In the course of the *timely revision*, initiatives took place on the part of the ex-socialist countries in the interests of a full equalization of the certificate. Opponents have raised basically three objections, viz. (i) they referred to the circumstance that unrestricted period of time for the validity of the certificate, and the modest chances of cancellation in its case gave the certificate an unjustifiable advantage in comparison with the patent. (ii) they deemed the equalization acceptable only in case the choice between the two forms of protection is absolutely free; (iii) with the implication that identical technical areas are to be covered by the two forms of protection.<sup>399</sup> The Soviet legislation took a positive step in the interest of eliminating the first two objections when, in its domestic law, it brought its regulation on the conditions of protection time and the cancellation of the protection to equal levels.<sup>400</sup> It appears to be more difficult to solve the problem of completely identifying the spheres of protected invention varieties, and it is also a supportable view that for the group falling beyond the generally occurring product varieties, the national law may grant special protections, probably such that is based exclusively on the certificate form.

The above explanations qualify as merely *historical* in nature. The reform of the Soviet law of invention broke away radically from the certificate model. This was seen in the draft patent law published in December 1988, and constituting the subject of vehement professional debates.<sup>401</sup> The move away from the certificate model obviously leads to similar consequences (considering the political changes, possibly even before the Soviet legislation) in other legal systems also following the 'Soviet model'. This obviously also makes the initiatives put forward in connection with the timely PC revision in the interests of the 'equalization' of the certificate, superfluous.

<sup>398</sup> There are certain endeavours in this direction also in the Soviet law (cf. *Bobrovsky* (1)), and the significance of the synallagmatic criterion is emphasized strongly by *Osterland* and *Linden* (op. cit.), too.

<sup>399</sup> Cf. *Bobrovsky* (2); (3).

<sup>400</sup> Cf. CHISTIYAKOV, R. P.—PAPKO, V. V.: *Pravovye i organizatsionnye voprosy sotrudnistva s zarubesnymi stranami v oblasti izobretatelstva*, VI 1980/3; BOGUSLAVSKIY, M. M.: *Mezhdunarodnie ekonomicheskoe i nauchno-tehnicheskoe sotrudnichestvo i razvitie sovietskovo zakonodatelstva v oblasti izobretatelstva*, VI 1980/8.

<sup>401</sup> The newer draft, elaborated on the basis of the debates, was published in the 7 April, 1990, issue of *Izvestia*. Also in connection with this, the debate on the commodity character of inventions was renewed. Cf. *Linden*, op. cit.; LITVAK, B. G.: *Izobretenije kak tovar*, VI 1988/1; idem earlier: *Izobretenije i hozraschot*, VI 1966/7; ZENIN, I. A.: *Tovarno-denezhnaya forma nauchno-tehnicheskoi produktsii*, VI 1989/7.



99. *Patent varieties.* — The enrichment of the forms of protection, and the possibility of adjustment to particular claims are served by the statutory legal solutions, and concepts as well which create specific varieties within the category of the patent.<sup>402</sup>

Ranking among these, the most widespread is the *patent of addition* (supplementary patent, patent of improvement). This patent variant, which shows common characteristics—even though with a shade of differences—inferable from the regulations of the individual legal systems, basically serves to reflect also legally on the basis of the patent law, the technical interconnection among given patents, resp. that the inventors are the same persons. In many cases, in respect to the solution which is protectable by such a patent of addition the criterion is lower, and there is no need for a given solution to also be patentable independently. The requirement is that the patent of addition should express the perfection or further advancement of the invention protected by the main or basic patent. Occasionally, although there is some possibility for the patent of addition to become independent, in typical cases the connection with basic patent is very close, thus, e.g. the term of the patent of addition is adjusted to that of the main patent. It can also be considered typical solution that it is only the patentee of the basic patent who is entitled to make a claim for the patent of addition. (In the legal systems where protection by the author's certificate is also regulated, similar provisions are also directed to the certificate of addition.)

In the Hungarian legal literature there are some who have suggested the (re-)introduction of the patent of addition. In the ranks of their arguments special consideration is to be given to the references indicating the severe practice in relation to the specification and claims and to the rules of employee's inventions.<sup>403</sup> Naturally, the problem which arises in practice can be solved not only by the introduction of the patent of addition or improvement. A solution can also be imagined that does not attach an independent protection of absolute structure to the further developed technical solution; however, from the viewpoint of the inventor's claim for remuneration draws these sorts of improvement into the subject sphere of the basic solution, thereby putting an end to the counter-interest which at present undoubtedly exerts its effect in this respect.<sup>404</sup>

In the sphere of patent variants reference must be made to the patent of *importation* (confirmation), already mentioned above, which is recognized by some of the legal systems. Some patent laws regulate also the so-called patents of *dependence*.<sup>405</sup> Certain special patents like those of *plants* (US) or *medicine*<sup>406</sup> can also be considered such variants. Here can belong also the *caveat* referred to above, the *secret* patent, also belongs here, and the so-called *registration* patent. The latter, which means the naturalization by mere registration of the patent granted in the

<sup>402</sup> Cf. *Baxter*, op. cit., pp. 1–35.

<sup>403</sup> Cf. *Kende* (1); similarly, the material of the MIE 1981 Siófok debate-forum. (See our Note 214.)

<sup>404</sup> Eventually, the modification in 1983 brought a decision in favour of the second variant.

<sup>405</sup> So, the Czechoslovakian and the Austrian patent law.

<sup>406</sup> The patent law of Egypt, Kuwait, India and Libya. Also the French legal system had recognized up to the reform in 1968 a kind of special patent for medicine.



'mother country', can be traced back in typical cases to colonial relationships, but a part may also be played by a sort of practicality arising from the order of size of the countries as in the cases of Italy-Vatican; Switzerland-Liechtenstein.

In essence, the differentiated regulation of the patent is also reflected by the solutions which *differentiate* in respect of the *terms of protection*, on the basis of partly the significance and weight of the patent, partly on that of its character. The shorter or longer terms of protection depend by upon choice of the applicant, not rarely however on the judgement by the authority granting the patent.<sup>407</sup> Certain legal systems (mainly common law jurisdiction) also make an extension of the protection term possible.

In the course of the revision of the PC the possibility repeatedly arose for certain countries to introduce particular patent varieties into their institutional systems that express their national interests with greater emphasis, e.g. the patents of *technology transfer* or *development*. A detailed elaboration of the conditions of the technology-transfer patent has been treated within the framework of WIPO (and in an adjustment to the model patent act designed for developing countries). This kind of patent actually constitutes a particular variety of the patent of importation.<sup>408</sup> Its condition is a patent which has already been granted abroad and based upon this, the entitled person holding the foreign patent can lodge the filing exclusively in a joint application with a citizen or legal person of the country of registration. It is also a prerequisite that, preceding the joint registration, a contract on the technology-transfer must be concluded between the foreign entitled party and the local partner (his joint patentee-to-be) that also guarantees the transfer of the right of disposal on the know-how adjusting to the patent (this is the model of the up-to-date licence contracts). The foreign and local joint patentees can only decide jointly on questions of utilization, within certain limits of public interest. An essential provision is that it is exclusively the putting into practice in the country of registration that qualifies as working of the patent, importation alone does not. Moreover, it leads to the lapsing of the patent if an importation is effected by means of the patentees' permission, similar to the circumstance if no utilization takes place within two years of its granting. The term of protection is ten years counted from the date of granting (but at most 15 years from registration), and the criterion of the maintenance of the protection is not merely the payment of annuities or renewal fees, but also that the patentees annually and satisfactorily prove a proper degree of exploitation of the patent. Naturally, the lapse of the original foreign protection also leads to a similar result for the local one.

100. *The utility model* (petty patents). — It is a disputed question whether the utility model should be placed in the hierarchy of technical products or among the variants of forms of protection. Theoretical and practical arguments alike can be brought forward for both of the viewpoints.

In general, such technical products can be protected under this category which —compared to 'true' invention—show a *lower degree of technical advance*, moreover, their scope is generally narrowed down to a certain area (structural design, assembly of an article, etc.). The novelty requirements are usually the same as the degree of absolute novelty prescribed for patentability, although occasionally the requirement of local novelty appears. The application of a less demanding *exami-*

<sup>407</sup> So, the patent law of Iran and Libya. A similar concept is reflected by O. Somorjay's interesting suggestion on a form termed sectional patent protection.

<sup>408</sup> In detail, see Parragh (8); for such a historical approach to the patent of importation, see DÖLEMEYER B.: Einführungsprivilegien und Einfuhrpatente als historische Mittel des Technologietransfers, *GRUR Int.* 1985/11.



nation system (e.g. that of a registration system) is typical; moreover, also the *term of protection*—compared to that of the patent—is in general shorter (6–10 years).<sup>409</sup> Considering its structure, the protection for utility models is of an *absolute structure*, the same as that of the patent.

This form of protection is known in a relatively large number of legal systems.<sup>410</sup> This fact is for thought, it is not just in the industrially underdeveloped countries where this form is applied—and, according to the evidence of practice (in many of the cases in a convertible relationship with a patent) not unsuccessfully. The experience gained in the GFR deserves special attention, where in the event of the introduction of the deferred examination the inference could have been made that the popularity of the utility models would be radically reduced, and this did not happen.

In the last analysis we can reasonably rank the utility model protection as a *particular protection form* applied to certain categories of inventions, thus—if you like—a patent variant. (Many call it also a ‘petty patent’.) Its application makes the universe of protection forms more differentiated and more rich. As regards Hungarian law, there were also many who *de lege ferenda* have taken a stand in favour of the introduction of this form of protection.<sup>411</sup>

#### (d) The legal protection of know-how

101. In spite of the practical importance, and growing role in licence practice,<sup>412</sup> of know-how, we cannot find a uniformly accepted *definition* of this form of protection. Opposing viewpoints clash in theoretical debates especially around two questions, stands occurring at local and international levels alike. The first disputed question is whether know-how is merely a by-product, that is to say, it is the smaller knacks and technical solutions which are to be regarded as know-how—which do not reach the invention level but advantageously promote the practical exploitation of the invention—or it is a broader definition that is embraced by this category. The second debated issue is to what extent secrecy is a necessary element of know-how.

By omitting even only a sketchy presentation of the several attempts at producing a definition,<sup>413</sup> a few of the characteristic concepts will be clear. There are first

<sup>409</sup> Although terms of quite short periods (4 years in Italian law), and relatively long (15 years in Japan) periods for protection can also be found.

<sup>410</sup> So, the laws of Brazil, South Korea, the Philippines, Japan, GFR, Italy, Poland, Portugal, Spain, etc. There are many who list also the institution of the French *certificat d'utilité* under this category. Cf. Baxter, op. cit., pp. 29 et seq. For the German experience see HÄUSSER, E.: *Le modèle d'utilité; l'expérience de la République fédérale d'Allemagne*, *Prop. ind.* 1987/7–8.

<sup>411</sup> So Világhy (1); Bobrovsky (1).

<sup>412</sup> Cf. Lontai (1), p. 100.

<sup>413</sup> For a more detailed presentation see Lontai (1), pp. 101 et seq. of the debated questions, and attempts at definitions e.g. the standpoints of Gazda, Dessemontet, Világhy, Eminescu, Fiodorov, Pálfalvi, Sebestyén, Szatmáry. Still, a special mention is deserved by Bobrovsky (8); GAZDA, I.: *Az ipari know-how* (The industrial know-how). Budapest 1969; DESSEMONTET, F.: *Le savoir-faire industriel*, Lausanne 1974; Eminescu (3); cf. also the material of the September 1973 International MIE-AIPPI Conference, and of the VIIIth Congress of International Comparative Law (Pescara, 1970).



of all positions based on very pragmatic approaches which deem the act of defining know-how as superfluous. This is especially characteristic of the common-law systems which are of course not definition-oriented in any way. In occasional court decisions of course various views are taken in their turn; it is difficult, however, to infer from these, some homogeneous, abstract notions. It is also a general phenomenon that there is almost not a single legal system in which the legal definition of know-how can be met. As regards the notion of know-how, we have thus to rely on the attempts made mainly in theory, in the legal literature.

As an illustration, let us present here some of the attempts which have been made to find a definition: According to the definition elaborated by the International Chamber of Commerce in 1961, "... industrial know-how means the data necessary for the practical realization or execution of the processes serving the applied technical knowledge, methods and industrial purposes... The know-how is to be considered as a secret in nature, if it is not published in a form accessible by the public and the company which has elaborated it or lawfully obtained it takes every reasonable step for the obstruction of its unlawful transfer...". The definition elaborated by the Hungarian group of the AIPPI determines know-how in the following way: "... the industrial know-how is such a technical knowledge, experience data, method, resp. the summation of all these, that represents value and is taken or can be taken into practical use and which is exclusively known only in a limited trade circle not spreading from that circle, and as a whole it is not placed either under the protection of any other kind of industrial property, or published anywhere". According to Világhy's definition,<sup>414</sup> know-how "... is a kind of technical-economic knowledge which appears as an article of trade, irrespective of whether this knowledge is protected, and if it is, in what sense, by some kind conventional industrial property institution, moreover, whether the given knowledge is at all suitable for such protection or it is not". According to Troller,<sup>415</sup> "... the notion of the know-how means such a knowledge in practice that is useful for the owner of the know-how, and which ensures an advantageous situation for him in the economic competition".

The various viewpoints can be declared homogeneous with respect to the fact that know-how is such a *technical* solution, *information* as has a use value, and an exchange value based on the former, and is *transferable*. The information value means that the receiver of the information saves costs and time which have gone into experiments and trials. The views built on this common position diverge, however, depending on what sort of part they intend to assign in the course of concept creation to the institutional protection of the technical products. According to the so-called *remnant theory*, the technical solution which receives special, institutionalized protection (patent, model protection, etc.) cannot be considered a know-how. According to the so-called *abstraction theory* (Világhy), the know-how is a concept of a wider scale, all kinds of transferable technical solutions will have to be included in this category, independent of its possible institutionalized protection. The second position seems more convincing. In the final analysis, know-how is not a certain (lower-level) category of technical solutions, as it were a 'lunar halo' of the invention protected by the patent, not a group of smaller knacks, but a comprehensive designation of all kinds of technical solutions which surpass the level of certain routine activities, are utilizable in practice and are

<sup>414</sup> Világhy (1), p. 116.

<sup>415</sup> Troller (3).



accompanied by useful results. Part of these solutions enjoys special protection, e.g. a patent protection. However, the presence or lack of patent protection can—according to the experience gained in practice—by no means be traced back to the inferiority of the level of the technical solution (occasionally it can be traced also to that), but e.g. to the particular criteria of patentability accepted in the given legal system (e.g. to the exclusion of certain solutions), or—fairly often—to the inventor's economic considerations, business policies. (There are inventions, the materialized utilization of which unambiguously reveals the essence of the solution, while in the case of other inventions, however, the solution cannot be inferred—or only with very great difficulty. In the latter case, the patent specifications possibly make it easier for competitors to go around the patent or make it more difficult to uncover and prove an infringement. This is especially characteristic of the chemical industry.) Naturally, we must agree with advocates of the remnant theory so far as if know-how taken in the wider sense of the term, is also protected by a special legal institution, obviously, the realization from a practical point of view, more efficient protective measures will have their turn. (Here reference must again be made to the principle of the realization of parallel protections—acknowledged also in Hungarian law.)

Further questions also arise in connection with the notion of know-how. One of them is whether it is indeed only technical types of knowledge which are to be considered know-how, or whether the acceptance of a notion broader than that is justified as well. A majority of the definitions indicated above conceive of know-how in a narrower sense, but the fact that attributives are used (technical, industrial) implicitly indicates a more abstract category, too. It can hardly be doubted that the economic, financial, organizational, etc. kinds of knowledge, can also be of 'property value' so, the notion of a broader sense is well grounded. In the present section, however, only the task of analyzing technical-type know-how will be undertaken. (The protection of other types of know-how belongs to the competence of the norms in the law of competition, and probably to that of copyright; these are apt to ensure the protection.)

It is customary to classify know-how according to how far it is laid down or how far it is of a personal type (this has a part to play mainly in the course of laying down the conditions of licence contracts also covering the know-how). At this point we must distinguish know-how from other technical—and property value—types of knowledge, information, as e.g. the engineering or technical assistance. In my judgement, these categories can also be listed without any concern about the sphere of notion related to know-how, taken in the proper sense of the term.<sup>416</sup>

A further grouping may however have a greater significance on the part of the inventors. There are admittedly kinds of knowledge qualifying as know-how the creators, authors of which are known, nevertheless, the material of accumulated knowledge forming on the basis of practice and experience of long years, and in the cases of which the person of the 'creator' is uncoverable (or, at most, only for certain elements of the know-how, but not for its entirety can the creator be traced) is also considered know-how. Such material constitutes a sort of independent 'intellectual property of the company', without the possibility that the original or derivative character of the property could be doubted.

There are many who believe that the notional element of know-how lies in its *secret character*, while others doubt this. In my opinion, the conflict between the secrecy-oriented views and those opposing them is not by any means as deep as stated in the debates. (A part in this is played by the fact that the legal category

<sup>416</sup> For an opposing viewpoint cf. *Chavanne-Burst*, op. cit., pp. 273 et seq.



of the notion of secrecy is often approached by a direct transposition of similar notions elaborated in other branches of law.) In my opinion, those who also consider the economic, proprietary value, the transferability in one word commodity character of know-how as a necessary element and at the same time sufficient to constitute the notion elements, implicitly mean certain elements of secrecy here as well. If, namely, with a considerable simplification, by admitting the transferability of the given solution, we suppose that the one who pays for it, does not—at least as to certain elements of it—know the solution, it is for him ‘relatively’ secret.

102. The character of *legal protection for know-how*, or the existence of it at all, is also disputed. There are views according to which know-how is *de facto* a monopolistic situation. That is a mere fact, but not a right; it does not enjoy a legal protection. In my view, this is not sound. The right of disposal on know-how is an actual situation which has legal relevance. (By analogy, I can refer to the legal institution of possessory entitlement, which attaches significant legal consequences to a sort of ‘mere fact’.) Its legal protection is ensured by the legal norms of competition, the general rules of civil law, e.g. the provisions with relevance to liability, the prescriptions of protection for secrecy, etc. A very efficient protection is guaranteed by the careful contract-makings.<sup>417</sup> Thus, know-how receives legal protection. This however is undoubtedly not as strong and efficient as the protection obtainable by patent. The character of the protection for know-how is debated. The majority of those participating in the debate deny the absolute character of the protection; even if we agree on this, it must be emphasized that here the possible absolute character is very ‘relative’.<sup>418</sup>

The solution chosen in the course of the 1977 reform of the Civil Code of Hungary, which is in principle laid down in Para. 3 and especially in Para. 4 of § 86 the protection of know-how is the achievement of a unique attempt of codification. It is a separate question that the laconic provision is to be filled with content in the process of the application of law and in this respect not a few of problems await solutions;<sup>419</sup> especially in the field of adjusting the financial rules to the significance of know-how (although the solution of the Hungarian patent law as regards the transformation of the patent into know-how is apt to eliminate the detrimental financial discrimination), or, in connection with the legal position and remuneration of an employee’s know-how (in case it is not treated as an innovation).

In any event, on the basis of the above explanations, it can be fixed that know-how is an ‘institution’ of industrial property,<sup>420</sup> and—although it is undoubtedly Janus-faced, still—it means a *particular form of protection for the given technical products* rather than serving the marking of certain product varieties. A different question is whether it is advantageous or disadvantageous to choose the protection of know-how in comparison with the otherwise—in a given case—

<sup>417</sup> Cf. LINDEN, W.—WAHLICH, J. J.: Grundfragen des vertraglichen Rechtsschutzes für Know-how, N 1979/2.

<sup>418</sup> Troller (1), Vol. I, 9. 81, calls it an “unvollkommenes Ausschliessungsrecht”.

<sup>419</sup> Cf. Bacher (4).

<sup>420</sup> Thus, on the basis of the proprietary rights, the theory’s usage is industrial ‘property’. For the worries and arguments related to this qualification, cf. Cornish (1), pp. 289–291.



applicable patent protection. From the viewpoint of the company, the strategy's advantageous—not free from risks—aspects have already been mentioned above. It is doubtful however whether by an approach on a macro-level, and in comparison with the patent, the more dynamic development of know-how can be evaluated as an advantageous tendency. Patent protection, at any rate, goes together with publication of a new solution, while the treatment of know-how continues to keep the advantageous technical information secret.<sup>421</sup>

### (e) Variants of the legal protection of innovations

103. Innovation as a technical product is differentiated from invention by the required degree of novelty, the so-called *relative novelty*, on the one hand, and by the *lower standard* required in relation to the level of the solution—in close connection with the former—on the other. The conjunctive prevalence of these criteria thus draws the technical solutions of very high level into the conceptual circle of innovations if the fulfilment of the criterion of absolute novelty is not met (but e.g. nationally the solution is new), or if although absolute novelty is present but it does not reach the level of invention. Following from this the category of innovation comprises the broadest scale of technical products, from the solution just overstepping the routine level to that which is not really an invention.

Even defining the lower limit of innovations results in a problem. In general, the regulations related to innovations do not merely require novelty and standard, and utility of the given technical solution, but they pay attention also to the qualification, or more exactly, to the *sphere of work* of the person who submits the suggestion. In the case of certain routine activities, the creative attitude (engineer of research and development) is possibly an imminent element. The standard related to this can vary by countries, even by companies; it cannot easily be freed from subjectivism.<sup>422</sup>

In the last analysis, the innovation is also a technical intellectual product even if it lies on the lower level of the creation-hierarchy. The individual legal systems draw legal consequences from the character of creation with more or less consistency. The elements of the *labour-law-related* and of the *civil-law-related approach* are combined here. As regards the capitalistic legal systems (where innovations receive legal regulations at all), it is regulation by labour law which is typical, although—in the newer codifications—more modern solutions can also be found.<sup>423</sup> In the ex-socialist legal systems, the creation character, thus, the accep-

<sup>421</sup> Attention to the possible dangers here is called upon with emphasis by LINDEN, W.: Theoretische Aspekte des Wirtschaftsvertrages über wissenschaftlich-technische Leistungen. *St. u. R.* 1974/10; similarly, Bobrowszky (1), p. 164.

<sup>422</sup> The solution qualifying as employment duty, which implies that finding the solution is part of the applicant's job, was traditionally excluded from the circle of innovations by Hungarian law. The latter is nevertheless moderated by the fact that it is added to the exclusion, 'with the exception of the solution being—though an employment duty, but within it—a significant creative performance'. The 1983 reform of Hungarian innovation law eliminated from the notional circle of innovation the relevance of employment duty, by taking it into consideration merely through the rate of remuneration.

<sup>423</sup> Cf. Röpke, op. cit.



tance of classifying the innovation as belonging in the institutional system of the industrial property, is more noticeably expressed, namely, in the generally prevailing principle according to which the innovator as a creator is entitled to an extra allotment beyond his wages; the protection of the innovator's personality rights is also being efficiently established in these countries.<sup>424</sup>

In the course of the principle being put into practice, different *variants of regulation* are found. The Hungarian legal regulation which is in force strengthens e.g. the features characteristic of the civil law, while in other ex-socialist legal systems, the labour law approach is still dominant (in the system of author's certificate this approach has a strong inherent logic).<sup>425</sup>

Finally, we have to point out the connection between innovations and know-how. At any rate, the innovation is such a useful solution that has property value, transferable, that is to say, it is virtually —on the basis of the abstraction theory—a kind of know-how. By simplification we can say that the solution which in a given company's inner activities, in the relation of the innovator and the small collective, is qualified as *innovation*, after having stepped out and on the market, in the inter-company transfer of goods, becomes *transformed into a know-how*.<sup>426</sup>

## 4. Contracts in the field of industrial property

### (a) The increasing role of contracts

104. Contractual methods play an increasing part in the organization of co-operation, of the innovation chain, falling into the field of industrial property. The research contracts or those concluded with innovators, resp. inventors' (e.g. contracts on experimentation) enjoy an increasing popularity in bringing about new, significant achievements. The application of licence contracts—which serve the spread, the transfer of 'intellectual products'—taken in a broad sense of the term—also shows a *dynamic growth*, in internal and international relations alike.<sup>427</sup>

Conventionally, the *codification* on industrial property placed the emphasis on the relatively detailed codification of the legal protection of individual product varieties and showed a smaller degree of interest in regulating the dynamics of these relationships. The legislative concept has not changed considerably even today. Nevertheless, in the newer codifications—in connection with the increase in the actual, practical significance of contracts—occasionally such tendencies can be met that tend to regulate in more or less detail, the more significant contract varieties and which can be used in the field of industrial property, with more relevance in the field of research contracts, and less so in that of licence contracts. A phenomenon which belongs to this trend is the so-called *general conditions*, fixing

<sup>424</sup> Cf., in detail, *Bérczi*, op. cit.

<sup>425</sup> Cf. *Eminescu* (1), pp. 22 et seq.; MAMIOFA, I. B.: *Osnovy izobretatelskogo prava*. Lenizdat, Leningrad, 1976.

<sup>426</sup> By taking an opposite stand: *Eminescu* (1), pp. 22–23.

<sup>427</sup> Cf. *Mádi*, op. cit.



and elaborating the typical, usual stipulations applied in relation to these contracts, efforts for the latter appear in international level as well.

In what follows below, the questions of some characteristic contract varieties, resp. the problems of some customary but disputed contract stipulations, will be touched upon.

## **(b) Particular contract variants**

105. The creation of new products is served and stimulated by the *research contract*.<sup>428</sup> This contract variety, which became widespread after World War II—by relying to a great extent on US experiences—not only provides a suitable method for the organization of a relationship between the research organizations and potential users, but it has also proven its suitability as an up-to-date, flexible instrument of *State research control* in the capitalist and ex-socialist countries alike.

Examples of regulation by *statutory law* can mainly be found in the ex-socialist legal systems. In the capitalist legal systems the regulation is normally provided by the application of fairly detailed *general conditions* issued by the authorities and covering widespread practice. (In the framework of the ex-COMECON, the model conditions and model contracts relating to certain types of research contracts were also elaborated.)<sup>429</sup>

On grounds of the regulation and practice related to research contracts, certain *particular*, generally applied *conditions* of these contracts can be established. The clauses for limiting liability, which reflect the risks of research, resp. the passing of the latter on the commissioner, in typical cases, can be mentioned as examples here. A similar general feature is the fixing in contracts of the increasing role of personal elements, the constant and intensive co-operation between the contracting partners. The particularities of research activity make the view that the content of the research contract is extremely elastic, is formulated as it were 'in the course of progress'. An outstanding role is played in research contracts by the intellectual products, either as the starting point of the research activity, or the result of research (this is what actually provides the ground or assigning research contracts to the field of industrial property). An essential criterion in relation to these contracts is that it should unambiguously fix which one of the partners is entitled to the right of disposal (e.g. in case of applying for patent) regarding the intellectual products produced in connection with performing the contract.

In the Hungarian practice, it can be noticed that while e.g. previously, neither those commissioning research nor the researchers put a great weight on obtaining the right of disposal of the results of contract-based research. Those commissioning it often considered the research commissions as sort of 'incense' on the altar of science, and the researchers did not insist on it. The typical university research staff often were afraid of obtaining such rights, not having either experience or risk-taking strength, or source, for obtaining a patent. In the newer contract-practice a serious fight is indeed on in connection

<sup>428</sup> In detail, Lontai (4).

<sup>429</sup> Cf. Lontai (10).



with the inclusion of contract clauses regarding the right of disposal on the research result. The clause can be called fairly typical which prescribes joint-disposal, e.g. in the case of patentable results, the patent-partner position is stipulated.

In practice, different *variants* of the research contracts can be seen; thus, the achievement of a definite result may just as well be the condition of the research fee (a type of the work-contract), as in the case of an unsuccessful research of the so-called negative result, when the researcher is similarly entitled to the stipulated fee (contract of type of a mandate contract). In the statutory regulation and in practice alike, the "mandate" contract variant is *dominant*.<sup>430</sup> Especially in the regulation and theory of the western legal systems, the dominant viewpoint is that research contracts are to be categorized (at least in the cases of research commissions by State organs and authorities) among the *administrative* (government) *contracts*.<sup>431</sup>

106. The practice concerning *licence contracts* looks back on a greater tradition; still, its regulation by statutory law is even more rare than that related to research contracts. We can regard as a typical solution the case, e.g. when the patent acts fix the patent owner's right to give a licence but the elaboration of the stipulations for the licence contracts is left by the law to practice. In the legal systems of a few ex-socialist countries, and of developing countries, examples of a more detailed *statutory regulation* can be found.<sup>432</sup> *International efforts* are also aimed at the unification of the licence-contract stipulations.<sup>433</sup>

Up-to-date licence practice (and occasionally also the statutory regulation) testify to the fact that the classical model, the licence contract built purely and simply on patent, is out-of-date. In the licence contracts, the importance of *know-how elements* keeps increasing. The typical licence contract tends to allow the licence buyer to apply and utilize in practice at a determined standard the defined—complex—technical solution. In the interest of this, the licence seller is liable not only to grant licences but also to perform positive prestations. In order to enable the licence buyer to get into such an actual and legal situation in which the object of the contract can efficiently be put into practice, the licence seller must also provide, in typical cases, detailed documentation and training for the interested parties. The view is reasonable that a *model-shift* in relation to licence contracts, and the proper reflection of know-how elements in their definition are needed.

Because the know-how elements have been brought to the foreground some *characteristic elements* of the licence contracts can be highlighted. Such are, e.g., in

<sup>430</sup> *Lontai* (8); (4).

<sup>431</sup> Cf. *Harmathy*, op. cit.

<sup>432</sup> Of the formerly socialist countries, in §§ 29–50 of the Government Decree No. 351/1973 issued for the enactment of the Polish patent law, resp.—comprehensively and in an up-to-date fashion—in the GIW of 1976 in the ex-GDR. Cf. MÜLLER, M.—SCHÖNFELD, G.: Gesetz über internationale Wirtschaftsverträge — ein konstruktiver Beitrag zur Verwirklichung der Prinzipien der Schlussakte von Helsinki, *N*, 1976/6; also see, comprehensively, *Lontai* (1), pp. 54 et seq.

<sup>433</sup> Such model contracts were elaborated within the framework of the Comecon Legal Conference (cf. *Lontai* (11)), and the unification of the practice is also served by the 'Guide' elaborated by WIPO (see Note 109).



addition to the obligation to grant the necessary documents and to provide the training-in the specifications in adequate detail, especially on the confidential treatment, on maintaining secrecy. The permanent and intensive co-operation of the contracting parties is also characteristic of the terms of licence contracts. An outstanding example of this is the obligation to mutually provide information related to the progress and improvement of the solution which is the object of the contract (and normally, also to grant the right of disposal on the perfected solution).

Similarly, as in the case of the research contracts, even if not to such an extent, risks—technical and informational risks alike—also have a part to play in licence contracts. That is the reason why it is justifiable to draw the liability limitation lines in respect to these contracts.

Both of these contract variants establish permanent, confidential relationships between the contracting partners. The part played by *sanctions* here is only of secondary importance; the partners' interest and risk oriented association is to be assured first of all by detailed terms for the co-operation, and especially by selecting suitable fee-terms in connection with the licence.<sup>434</sup>

107. The above two basic types of contracts which can be used with success in the field of industrial property, often occur jointly, or combined in contracts of mixed character. The content of other contracts is also often enriched fairly with elements, or particular contract terms characteristic of these contracts.

Especially the contracts on co-operation and on launching various *companies* play a dynamically increasing part in the organization of economic-technical co-operation today; these constitute the legal grounds of the so-called joint ventures, the mixed enterprises (either accompanied by legal personality, or without it) which are embodied in various company forms. In such joint ventures, intellectual property plays an important part in two respects. In part, they constitute important elements of the company apportion, in another part they can be the achievements produced by joint, company activities. The popularity of the joint venture in the organization of the transfer of modern technology cannot be doubted. A number of legal systems grant preference to the establishment of joint ventures (e.g. easy terms for import, investment protection, tax reduction).<sup>435</sup> Nevertheless, the fact is not negligible that in the cases of these contracts a thorough elaboration of the actual civil law conditions, moreover, the establishment of appropriate methods of assessment related to the intellectual property, furthermore, an unambiguous regulation—with special regard to the cases in which the joint activities cease to operate (e.g. in the case of bankruptcy)—of the right of disposal on the results produced by the joint activities, hereincluded the obtainment of legal protection, too—all these are indispensable. According to experience, the thorough formulation of the contract terms is not in proportion to the euphoria related to joint ventures.<sup>436</sup>

<sup>434</sup> Lontai (12).

<sup>435</sup> See to this in more detail the Moscow Conference material referred to in our Note 19.

<sup>436</sup> For the recent Hungarian experience see, Lontai, Lecture delivered at the Conference referred to in our Note 19.



### (c) Debated contract stipulations

108. In international practice, certain *customary clauses* of licence contracts have become established. Whether the individual clauses are advantageous or disadvantageous is not easy to decide. In the complex contract, they have first of all place values; it can be misleading to formulate a value-judgement in relation to individual clauses by taking them out of context. With these reservations, nevertheless, the objectionable clauses can be outlined.

The debatable contract clauses emerge mainly in connection with licence contracts, but also on a broader scale, in general, in the cases of different *contract variants*, concerning *transfer of technology*, so e.g. in contracts of investment, of granting technical aids, of delivery, etc.<sup>437</sup>

The issue of one-sidedness, the 'exploitative' character of certain contract clauses, is raised primarily in the *developing countries*. The law of a number of countries—and not only that of developing countries—definitely prohibits the application of a few such clauses and applies sanctions to render them null.<sup>438</sup>

Such negative value judgements are reflected not only by the legal systems of certain individual countries; the group of developing countries launched a frontal attack on the *international plane* against the incriminatory clauses on which the contracts on technology transfer are based. Their aim is to establish a universal *Code of Conduct* which is obligatory in nature, that would prohibit the stipulation of such clauses on grounds of general principle.<sup>439</sup> The likelihood of the acceptance of the code is another question, especially obligatory character. Here only some of the typical clauses, the prohibition of which is requested will be presented.<sup>440</sup>

The clauses which reflect the so-called restrictive trade practices, the prohibition of which is requested, are in part of such character which results in the non-justified *economic-legal binding* of the licence-buyer, and/or such that reflect the licence-seller's *abuse of his dominant position*.

Clauses like the ones mentioned above are e.g. apt to cause that the licence-buyer is turned by them in a direction of *forced track* when it comes to the buying of materials, machines, instruments necessary for the manufacturing of goods, based

<sup>437</sup> A comprehensive list is published by *Stumpf*, op. cit.

<sup>438</sup> Such restrictions are contained in the law of Nigeria, Brazil, Mexico, and Argentina; furthermore, the patent law of Malawi and Sri Lanka, but e.g. the British patent law as well. Cf. LONTAI, E.-MÁDI, Cs.: *Licenciaforgalmi ismeretek* (Experience in licence transfer). Budapest, 1989. (MIE course notes.) NEUBAUER, H.: Marktwirtschaftlicher Ansatz bei der Neuregelung des Technologietransfers nach Argentinien, *GRUR Int.* 1981/10; RANGEL MEDINA, D.: L'application de la Loi sur les inventions et les marques en Mexique, *Prop. ind.* 1982/1; *Aracama Zorraquin* (2).

<sup>439</sup> On the history of development and detailed content, etc. in a comprehensive approach of the Code of Conduct, cf. *Parragh* (1), esp. pp. 43–60; *Erasmus*, op. cit. pp. 229 et seq.; *Transfert de technologie et développement* (red. P. Judet-Ph. Kann-A. C. Kiss-J. Touscoz). Librairies techniques, Paris 1977; *Kunz-Hallstein* (7); *Greif*, op. cit.; *Fikentscher-Kunz-Hallstein*, op. cit.; *Finnegan's* main report of 1976 at the MIE-AIPPI International Conference.

<sup>440</sup> The number of conditions which were requested to be prohibited in the course of the formulation of various drafts, varied between 8 and 40; some 20 of them appear in the actually accepted draft, in 1980. Cf. especially, *Transfert de technologie*... (Note 439); *Parragh* (1); and *Bokor*, op. cit.



on the licence, thereby leading to the circumstance that the materials can exclusively be bought only from the licence-seller or the source appointed by him. Similar obligations can follow from the clauses which ensure a controlling and decision-making role for the licence-seller in the organization and control of the manufacturing process. The contract terms which set up *quantitative barriers* as concerning manufacture based on the licence, or which narrow the sphere of utilization, resp. restrict or exclude the *export* of products manufactured on the basis of the licence, are objectionable, too.

There is a request to prohibit such contract terms that *restrict* the licence-buyer in his *purchase of technology* possibly under more favourable conditions from sources other than the licence-seller, or, in the deployment of *research and development activities* of his own in the given field. Clauses are included, which prohibit the licence-buyer's activities if the latter engages—directly or indirectly—in a kind of *competition* against the licence-seller.

Strong objections are raised by the developing countries against the contract terms which restrict the licence-buyer in the development of the technology, or which unilaterally oblige him to transfer the improvements. These countries wish to prohibit the clauses which obstruct the buyer in calling into doubt or *attacking* the licence-seller's patent.<sup>441</sup>

A number of objections are raised in connection with setting the measure and ways of the *licence fee*. The countries wish to prohibit the obligation of fee-payment in case there is no actual utilization behind it or when it burdens the buyer even after the protection has expired.

An objection is raised against clauses which guarantee the giver a right to *quality control*, or oblige the buyer to indicate the licence-seller or use his trademark, on the product.

The developing countries wish to introduce as a general prescription the *principle of most favoured treatment*. This would imply that the 'more favourable terms' applied by the licence-seller in his contracts subsequently concluded with other buyers would automatically extend to the earlier buyer as well.

Part of the contract practice which is objected to, and of the complaints raised in respect of the contract terms, are indeed *well founded*. According to the evidence of practice, they originate from abusing the buyer's weaker position by creating non-equitable, unilateral barriers for the latter. It must not be forgotten however, that the licence agreement is a contract of typically *complex content*—and this is generally valid also for other contract variants which are directed towards technology transfer—so, the individual terms must not be assessed in isolation. Attention is justifiably called to the fact that in given cases it can serve the buyer's real interest if the licence-seller himself is enabled to guarantee the availability of materials and equipment which are indispensable for the production. If, in the manufacturing

<sup>441</sup> Of the abundant literature on the clause of non-attacking, cf. *Reimer*, op. cit., pp. 523 et seq.; *Troller* (1), Vol. II, pp. 951–952; CLINE, J. E.: The overruling of the licensee estoppel doctrine. *Patent Law Review*, 1969; SOLTYSINSKI, S.: Der Nichtangriffseinwand im amerikanischen Patentlizenzrecht —Lear vs. Adkins und seine Folgen, *GRUR Int.* 1974/11.



process conducted on the basis of the licence, an important part is played by personal know-how, it is indeed justifiable to place the task of providing for the training, control, and supervision of the appropriately qualified workers in the hands of the licence-seller's professionals. The extent of the territorial, quantitative, etc. limitations set in granting the licence for utilization, can in part be influenced by the territorial implications of the protections which serve as a basis for the contracts, and in another part it is not negligible either, from the viewpoint of determining the licence fee, whether the licence provides simple rights, exclusive rights, or such as are restricted to local use only or provide for entitlement to export as well. In other words, the extent of the *utilization possibility*, and the *rate of the licence fee*, are to be assessed on grounds of a close interconnection between them. (Similar considerations emerge for example with respect to the urged legal warranty, and the guarantee for accessories. As is justifiably said, a warranty is also a sort of commodity, thus, a request for stronger compliance is a factor increasing the fee.) The stipulation of the right to quality control is built—in the case of trademark licence—on justifiable licence-sellers' interests. The stipulation of the most favoured treatment is also based on a principle that is hardly to be realized with a general validity. It is not easy to decide—not even on the basis of a complex analysis of the given contracts—which one of the terms is more favourable, resp. the seemingly more favourable formulation of one of them can be countered by some other disadvantages. There are terms, e.g. the exclusion of the possibility of research and development, the clause of non-attacking, the unilateral liability of improvements' transfer, etc., which—it seems—are to be prohibited with a blanket rule. However, a large number of the terms require a considered approach, and *case-by-case evaluation*; their prohibition on principle and as a general rule is indicated to a lesser extent.

109. Whether the stipulation of several of the contract clauses—referred to above as objected to by the developing countries—is valid also raises problems in connection with the rules of anti-trust laws and with those raising barriers against cartels. In the practice of our day, such issues have arisen especially in the field of the EC.<sup>442</sup> Articles 85–86 of the Rome Treaty—which in principle *prohibit such stipulations as hinder free competition*, and such agreements as lead to exclusive, monopolistic situations—have been sources of conflicts since the beginning, with a few of their clauses usually applied for licence contracts, superimposed on the absolute structure of industrial property institutions. In practice, not always consistent decisions reflect this contradiction. In the practice, there has been established a list of contract terms which were judged by the competent fora of the EC as conflicting with the articles of the Rome Treaty referred to above.<sup>443</sup> A newer problem has evolved in the wake of the ratification of the Munich Treaty especially the Luxemburg Treaty; the latter definitely makes it possible for member

<sup>442</sup> Cf. comprehensively, Cawthra, op. cit.; SCHLIEDER, W.: Die Auswirkungen des EWG-Vertrages auf die gewerblichen Schutzrechte, *GRUR Int.* 1973/9; WOLTZ, J.: Der Einfluss des Wettbewerbsrecht der EWG auf die Patentlizenzverträge, *N* 1978/7–8; Mádl (1), esp. pp. 205 et seq.; BOKOR, J.: Licenciakereskedelem és a Római Szerződés (Licence trade and the Rome Treaty), *UL* 1977/18–19.

<sup>443</sup> Cawthra, op. cit., enumerates 12 such typical contract clauses.



countries to grant exclusive licences, obviously establishing thereby a monopolistic situation.<sup>444</sup> Most recently, the EC Commission has accepted a Draft, which in part states as a matter of general validity which of the contract terms are not in conflict with the Rome Treaty, and also enumerates the terms in the cases of which the so-called group exemption is going to be established.<sup>445</sup>

The *prohibited clauses* relate especially to multilateral contracts (patent-pools, etc.). *Exclusivity in itself is not prohibited*, but in the case of the exclusiveness of manufacture, the 'order of magnitude' concerned is essential (e.g. in the Common Market, the number of people in the population involved may not exceed 100 millions), as it is in the duration of exclusivity (the right to cancel the contract within five years). The clauses of exclusivity in relation to transfer are more rigorous.

It is only in the case of certain clauses that the occurrence of voidness does not threaten the contract clauses, like the limitation of utilization, the indication of licence, the quality control, the different varieties of combination sale, the liability of improvement transfer, the so-called stipulations of the minimum (with respect to remunerations or utilizations), etc. A few clauses are definitely prohibited, such as the clause of non-attacking; the prescription of non-concurrence; the obligation of payment of the fee even after the protection lapses; the stipulation of price fixing on goods produced on the basis of the licence; and the exclusion of use of the know-how, after the termination of the contract.

In the cases of clauses not falling under the effect of group exemptions, resp. falling outside of the class of unconditionally prohibited clauses, the lifting of the prohibition can invariably be applied for, prior to concluding of the contract scheduled.

In connection with the present—inconsistent—practice, like the concept of the Draft, *criticism* and *concerns* are voiced. It seems that conflicts between the institutional system of industrial property and the free-competition-related efforts of the Common Market have not by any means settled unambiguously and reassuringly.

110. It can thus be stated unambiguously that in the cases concerning to contract terms in the field of industrial property, dynamic advances regarding certain contract clauses as well as the tendency toward a restrictive construction can undoubtedly be observed, too.

<sup>444</sup> Cf. ALBRECHTSKIRCHINGER, G.: Die Bedeutung der Ergebnisse der Luxemburger Konferenz über das Gemeinschaftspatent für das Recht der Lizenzverträge. *GRUR Int.* 1976/6; THEUNE, U.: Die Beurteilung ausschliesslicher Patentlizenzverträge nach Art. 85 EWG-V., *GRUR Int.* 1977/2-3.

<sup>445</sup> Cf. Bokor; Cawthra, op. cit.



## 5. The pushing forward of regionality

### (a) The characteristic areas of co-operation related to industrial property

111. As we have attempted to indicate by the survey given in Chapter II, international co-operation in industrial property comes to realization in various forms and at various levels. The survey grouped the institutional systems of co-operation on the basis of certain specific areas of industrial property (technical products, commodity marks, competition law). Here another sort of approach will be applied, by building upon the level and intensity, of co-operation when grouping and discussing current tendencies and results.<sup>446</sup>

The forms of co-operation having *procedural* and *legal technical* relevancies can be considered as the 'lower' level of co-operation. These include the agreements which are aimed at the generalization of the formalities of the applications, which facilitate the practice of examination and of the revaluation of the applications for registering by the introduction of a uniform system of classification, that is to say, which make the attainment of the protection simpler, easier, and at the same time more uniform, in the course of the proceeding-research-examination. Here we can enumerate the various possibilities of co-operation falling to the field of information and documentation.

The variants which effect the unification and *harmonization of the substantive law* can be qualified as co-operation of a higher rank.

Finally, the institutions achieving real *international protection* can be considered as the ideal 'peak' of co-operation, especially if they also establish the *organizational* conditions of attainment and 'maintenance' of the protection.

In the field of the *universal-type* co-operation in industrial property it is first of all the *legal-technical-procedural* forms of co-operation that have greater chances, and it is indeed here that the tangible results appear. Such are e.g. the agreements concluded in Strasbourg, Nice, Locarno, Vienna, and introducing the uniform system of classification; the Budapest Treaty relating to the deposit of microorganisms; and especially the PCT, with respect to both the generalization of formalities and facilitation of procedures. The forms of co-operation in documentation and providing information can also be enumerated here.

In respect to the harmonization of *substantive laws*, we can basically refer to the so-called minimum rules of the PC, namely, to the prescriptions on transit vehicles, compulsory licence, protection of well-known trademarks, etc.

The possibility of the attainment of *international protection* is ensured with a universal character, in respect to trademarks: by the Madrid Agreement; of industrial designs: by the Hague Agreement; of indication of sources: by the Lisbon Agreement. In a certain sense we can enumerate here also the UPOV, and in relation to discoveries: the Geneva Convention.

<sup>446</sup> On these, in detail, cf. Bobrovsky (2).



## (b) General characterization of the regional agreements

112. In our day, a very strong tendency is unfolding, namely, the regional-type co-operation in the field of the protection of industrial property. Several of the driving factors involved in the latter, are palpable.

We can state as a general rule that the regional co-operation in industrial property usually appears not as an independent trend but as a 'superstructure' of the closer *economic integration* among certain countries. A closer co-operation in the economic field also necessarily requires the unification of the reserves of legal instruments, a strong harmonization of the latter. A characteristic area of these endeavours to unify the law is that of the protection of industrial property.

The relationships unfolding in the course of regional co-operation in the protection of industrial property are of *different intensity*. As has been indicated in the preceding subsection, the degrees of the intensity can extend from unification of the procedural law, or possibly of substantive law up to the 'supranational' system of institutions and norms. In the characterization of individual regional agreements, the degree of unification intensity serves as a significant criterion.

The various regional groupings can be differentiated also on the basis of their 'relationship' with the PC. As has already been indicated in Chapter II, there are not insignificant countries—mainly from the developing ones—that are not members of the PC, because they consider certain principles of the PC to run counter to their interests. In effect, the function of certain regional co-operation in industrial property is in part to express particular joint principles and norms, and in part to make up for the frames of co-ordination ensured by the PC.

Yet another type of regional co-operation is created within the PC's framework, with a *PC-conformable* character. Along with a kind of assimilation to the general prescriptions of the PC, it unfolds the particular interests, possibilities of a closer co-operation of the integrating community of the region, and state these in a more detailed regulation.

In what follows, a sketchy survey of the efforts to establish regional integration<sup>447</sup> which can be observed in industrial property, will be presented along with a closer investigation of the integration of the industrial property that has been taking place within the Common Market.

## (c) Regional agreements on industrial property

113. The proximity of economic structure and geographic situation, as well as conventional connections, were the factors that led the Scandinavian countries (Denmark, Finland, Norway and Sweden) in 1967 to adopt patent acts of a uniform text. The agreement, called *Nord-patent*, was to be PC-conformable and

<sup>447</sup> It should be mentioned here that the attribute 'regional' is not accurate with respect to all the terms of the agreements and unions discussed here. International law qualifies only such groups of countries, resp. their relationships, as regional that are geographically in proximity to each other. Thus, part of the narrower unions for the protection of industrial property can be designated more accurately by the attribute 'particular' (e.g. the Buenos Aires Agreement, or indeed the COMECON).



directed toward a closer unification of the substantive laws. The practice proved that '*si duo faciunt, idem, saepe non est idem*'.<sup>448</sup> However, the obstacle in a rich unfolding of the Nord-patent system was rather that by pushing the issue of unification of laws on a wider scale, towards the direction of a West-European integration, the preparations for the European Patent Convention have virtually drained the matter of integration on a narrower scale.

A similar fate has come along (or rather may come along) for the joint *trademark* law of the *Benelux countries*. For the time being, however, the joint trademark law signed in 1971 (revised in 1975), is in force. The agreement has brought about not only the unification of substantive law, but also the regional protection of trademarks.<sup>449</sup> A similar agreement was concluded between the Benelux countries in 1970, with respect to industrial designs, too. Evidently, these agreements also honour the PC provisions.

114. The *Latin-American* regional integration of industrial property qualifies characteristically as being outside the PC, and even—to a certain extent—as an integration *opposing the PC*. Here we can enumerate the so-called *Pan-American unions*. The most important of these is the Buenos Aires Convention of 1910 (among the 14 member countries we can find in addition to the Latin-American countries, also the US).<sup>450</sup> The agreement refers to patent and industrial designs; to this extent its sphere is narrower than that of the Paris Union, while it is broader in the sense that it regulates the most essential material conditions of patentability, too. Incidentally, it fixes such regulations as are in many respects identical with the PC provisions—we can say, such as are supplementary to the PC regulations—e.g. the principle of national treatment, or the prevalence of union priority. The other two agreements—of a narrower sphere—namely, the Montevideo Convention of 1889, and the Caracas Convention of 1911,<sup>451</sup> virtually establish the possibility of patent nationalization, guaranteeing one, resp. two years as grace periods. In harmony with the Buenos Aires Convention, the above two Conventions set forth the essential conditions of patentability and inventors' rights. These conventions are by no means so active in their functioning as the PC, and in part they are 'prologues' to the newer regional agreements to be touched upon below.

The efforts of the *Central-American Economic Integration* can look back to a relatively old past. The economic co-operation of the integrating community established in 1960 (then its members were Guatemala, Honduras, Nicaragua, El Salvador; Costa Rica joined in 1962) has considerably slowed down since 1970, and this is reflected in their co-operation for the protection of industrial property. The

<sup>448</sup> Cf. KARCZAG, GY.: Az északi országok szabadalmi törvényei az EPC és a PCT után (The patent laws of the Nordic countries after the EPC and the PCT), *MIE Közleményei*, 18; JACOBSSON, M.: Le droit des brevets dans les pays nordiques, *Prop. ind.* 1985/7–9.

<sup>449</sup> Cf. BRAUN, A.: L'oeuvre de la Cour de justice Benelux dans l'interprétation de la Loi uniforme sur les marques. *Prop. ind.* 1981/2.

<sup>450</sup> Its members are: Bolivia, Brazil, Costa Rica, Dominica, Ecuador, Guatemala, Haiti, Honduras, Cuba, Nicaragua, Panama, Paraguay, US, Uruguay, of which—in part, subsequently—also PC members are: Brazil, Haiti, Cuba, US and Uruguay.

<sup>451</sup> Members of the Montevideo Agreement are: Argentina, Bolivia, Paraguay, Peru and Uruguay; members of the Caracas Union are: Bolivia, Ecuador, Columbia, Peru and Venezuela.



Central-American Industrial Property Convention, signed in 1968, was basically intended to unify substantive laws. For the time being, it covers the areas of trademark and the law of competition (the clauses and the control of contracts on technology transfer). Regarding a comprehensive unification, extending to patent law as well, there are only drafts at present (showing many similarities to the terms which have come along from the Cartagena Agreement; see below).

Another regional community which is outside of the PC is the *Group of the Andes* (Bolivia, Chile, Ecuador, Columbia, Peru; Venezuela joined in 1973; Chile renounced its membership in 1976). The *Cartagena Agreement* of 1969, which established the 'common market' of the group, prevised in its Art. 27 the integration of industrial property. On the basis of Resolutions No. 24 of 1970; No. 84 of 1974; and especially No. 85 of 1974, a comprehensive and *unified substantive law* was established in the member countries, concerning an almost complete spectrum of industrial property.<sup>452</sup> (Organizational unification appears only in the long-term goals.) Its essential provisions—among others—are as follows: they prescribe particular, shorter (six months) priority; the term of the patent protection is only five years; it can be lengthened for further five years only if the utilization, exploitation of the patent is certified, the patentee cannot restrict the importation (the same refers to the holder of a trademark); strong sanctions inflict the injury of the liability for working, that is to say, in addition to compulsory licence, also by the withdrawal of the protection. (Some of these terms also indicate its lack of synchronicity with the PC.) Although the time has supposedly been short for a comprehensive evaluation of the integration results so far, experience shows a radical decrease in the number of foreign applications.

115. The *African* integration endeavours actually remain within the *framework of the PC*. As a result of the great decolonization process in the 1960s, the African-Madagascar Union of Industrial Property was established in 1962 (OAMPI; at present, after Madagascar renounced its membership, *OAPI*). It is mainly the industrial property union of the Central- and West-African (francophone) states; at present it unites twelve countries, but several other countries are considering membership in the Union. A relatively high degree of integration for the protection of industrial property is realized by the *Libreville Agreement* (revised in Bangui, 1977). It has realized not merely unification of substantive law, but also *organizational uniformity* which was necessitated by the backwardness of the infrastructure for industrial property, and so, by the modest chances of establishing an independent, parallel organization; as a result of a procedure before the authority of industrial property with headquarters in Yaounde, protection is attainable for all of the member countries. (Further schedules are directed towards making the organization more operative, enlarging its competency, and possibly, the establishment of a common court.)

A recent outcome of the regional efforts to bring about the industrial property is the union of the anglophone African states, the ARIPO (earlier: ESARIPO). The

<sup>452</sup> Cf. in detail: *Aracama Zorraquin* (3); also: SCHWAIGER, P.: Entwicklung und aktuelle Probleme des gemeinsamen Patentrechts im Andenpakt. *GRUR Int.* 1982/1.



regional community, established by the Lusaka Union in 1976 (with ten members at present), appears on grounds of modest endeavours for the time being; it is actually targeted to perform tasks of consultation, and *co-ordination*, moreover to promote professionals' training or the organization of the exchange of information.<sup>453</sup>

116. In the cases of earlier economic communities, with only a fading role today, the consequences of a kind of co-operation in industrial property can survive. So, as regards the *Commonwealth* countries, certain of their acts and documentation can have effect in circles exceeding the given country, while it can be made possible for non-PC members (e.g. India and Pakistan) to make indirect use of certain union preferences granted to PC members.

The Agreement signed at The Hague in 1947 (revised in 1961), concerning the establishment of an *international patent bureau*, may also be considered as a regional agreement for the protection of industrial property. Other States later acceded to the agreement between the Benelux countries and France (Monaco, Morocco, Switzerland, the UK, Turkey and Yugoslavia). The well-equipped Institute, known for its examinations of high standard, became an organic part, the important examination organ, of the European Patent System, after the latter was established.

#### **(d) The system of industrial property of the Common Market**

117. The European Economic Community, brought to life by the Rome Treaty of 1957, is an extremely close regional, integrated community of a geographically closely placed group of countries, with similar economic structures and standards of development. Among the initial targets of the closed community, ensuring the—in principle—flow of capital and workforce, also establishing a customs' union, there occurred also the unification of law which promoted and reflected the economic integration.<sup>454</sup> In the field of industrial property, the most spectacular example of this is in the patent law.

Certain *partial results* had already showed up as early as the initial period of integration. In 1953 an agreement was signed on the unification of formalities relating to patent applications; in 1954, on the classification of patent (this became included into the 1971 universal agreement); in 1963 on the material criteria of patentability (the latter entered into force eventually only in 1980, and, as it were, in the role of an intermediate 'work matter' in part was amalgamated into the Munich Agreement).<sup>455</sup> After the first draft, elaborated between 1959 and 1962, a longer period of stagnation ensued and the preparatory work only became intensive in 1970.<sup>456</sup>

<sup>453</sup> To these, cf. *Bobrovsky* (2); see also MILLS, D. M.: Les premières années de l'ESARIPO. *Prop. Ind.* 1984/5; CAZENAVE, B.: L'Organisation africaine de la propriété intellectuelle (OAPI) de Libreville à Bangui. *Prop. ind.* 1989/7-8.

<sup>454</sup> Cf. *Mádl* (1).

<sup>455</sup> The Agreement, containing 14 articles, determines in a modern fashion the terms of patentability: absolute novelty (with exceptions allowed in connection with unlawful publications and display at exhibitions), susceptibility of industrial application; inventive activities; the characteristic cases of exclusions (plant and animal varieties); the function of disclosure and of specification and claims. Cf. *Somorjay* (2); *Baxter*, op. cit.

<sup>456</sup> Cf. *Bobrovsky* (2), and *Bentham* (2).



The European Patent System comprises a wider group of the *West-European* countries than does the Common Market, recognizing however the fact that the 'hard core' group of the members of the Munich Agreement consists of the EC countries. Moreover, the preparation for the Munich and Luxemburg Agreements and the PCT took place parallel to each other, the European Patent system can also justifiably be accounted for as an achievement of the Common Market.

The *Munich Agreement* (or more exactly the European Patent Convention, abbreviated EPU, EPC) signed in 1973, has so far been ratified by 14 countries, and entered into force in June, 1978. This Convention is to be counted among the more intensive variants of integrations. It realizes a considerable unification of *substantive law*, on the one hand, and produces also *organizational unification*, on the other. In the course of the procedure conducted before the European Patent Office, the European Patent is granted on the basis of the certification by the Office, with effect to the member countries indicated by the applicant and to an equal rank with the national patent of the given country.

To the basic agreement (178 §§) belong various other documents too, so e.g. the Enacting Clause consisting of 106 §§, the protocol on issues of jurisdiction; on organizational immunity and privileges; on centralization; moreover, even on the comprehensive 'definition protocol'.

The essential questions of *substantive patent law* (§§52–74) were touched upon earlier, in another context. Thus, the material conditions are regulated by the Agreement—in accordance with the PC, but in more detail than the latter does—in a way that it requires absolute novelty (with exceptional allowances granted in cases of unlawful publication and display at international exhibitions), susceptibility of industrial application, as well as inventive activity. The Agreement excludes from the sphere of patentability inventions the publication or exploitation of which would be contrary to some legal rule, to public order or morality, moreover, the discoveries, the plant and animal varieties, the solutions of aesthetic character, and software. As has also been indicated, the Agreement honours the product patent (pharmaceutical product patents included), and the patentability of microbiological inventions. The term of protection is 20 years.

A sketchy description of the procedures necessary for the *obtainment of patents* will be presented. The procedure can be classified as a variant of the deferred examination. In the first phase, the examination of the formalities and the preparation of the research report have their turn; in the end of that phase, after 18 months have passed, counted from the date of filing, the publication of the application and the report search follows. In the second phase, an examination of the essential criteria takes place on the basis of the application, after six months have passed, counted from the date of publication. This phase is completed by the announcement of the granting of the patent, subsequent to which, during a nine-month term, any opposition can be made. This phase is closed with the granting, or rejection, of the patent, and this is followed by an appeal phase if applicable.

Thus, from the filing of the application to the time it is granted, an *international procedure* takes place, the result of which is an *international protection* that enters into force parallel with the local patent(s) and is—in principle—convertible. After the protection is granted, national laws govern, as e.g. in cases of infringement



procedures or when cancellation requests are decided, although the conditions of substantive law for the cancellation are regulated by the Agreement.

The Munich Agreement entered into force in 1977, and the European Patent Office began its activity in 1978.<sup>457</sup> Filings are submitted in growing numbers year by year; by the end of 1982 about 60 000 filings had their turn. This—by taking into consideration that in one filing there are on the average more than six countries indicated—amounts to some 360 000 national filings. There is no doubt that the European patent system's popularity and its *dynamic perspective* are demonstrated by these facts, which is underscored also by the fact that in the same period the number of local filings decreased on the average by 36%. Incidentally, 60% of the filings are submitted from member countries (an outstanding proportion is from the FRG, 25%); in the case of the non-member countries, the participation of the USA (24%) and of Japan (13%) is considerable. Some 50% of the applicants are big companies, but the percentage of small- and medium-sized companies is also considerable. More than 50% of the filed inventions fall to the field of chemistry and electrotechnics. In about 63% of the applications filed, a patent is granted. The number of the oppositions is relatively low, about 9% (mainly from the FRG against applicants from the FRG), and for the time being the number of appeals is very low. The system has also met expectations with respect of keeping shorter transit time (3 years and 4 months on average) than it is in the cases of national filings (4 years and 3 months on average).

Indirectly, the Munich Agreement served the unification of law in its member countries. Obviously, to make two patent institutions of different systems 'carry on work' in parallel in a given country would be practically impossible. In an overwhelming majority of the member countries, the EPC-comformable modification of the local patent law, their re-codification, has been carried out recently, resp. such codifications as are being prepared.<sup>458</sup> With the expansion of the practice, expected or unexpected problems of definition, etc. arise, which the international and national authorities (courts of justice) have to cope with.<sup>459</sup>

<sup>457</sup> To the results of the Munich Agreement achieved so far, cf. EGRI, J.: Az Európai Szabadalmi Hivatal eddigi tevékenységének néhány tapasztalata (A few of the experiences gained so far from the achievements of the European Patent Office). *MIE Közleményei*, 21/1; also Leberl, op. cit.; SZABÓ, G. S. A.: Az Európai Szabadalmi Hivatal és annak működése (The European Patent Office and its functioning). *MIE Közleményei*, 23; FRESSONNET, P.: Die Entwicklung der nationalen und europäischen Patentanmeldungen aus französischer Sicht, *GRUR Int.* 1983/1; WALLACE, N. W. P.: Die Europäische Patentorganisation heute. *GRUR Int.* 1983/4; BRAENDLI, P.—HAERTEL, K.—SINGER, R.: La Convention sur le brevet européen a 10 ans: bilan et perspectives. *Prop. ind.* 1987/10. BRAENDLI, P.: The Dynamism of the European Patent System. *IIC* 1991/2.

<sup>458</sup> Incidentally, the Agreements of Munich and of Luxemburg did not prescribe such obligations; it was merely the Strasbourg Agreement of 1963 that did so (it entered into force in 1980) subsequent to that of Munich. The modification of the internal law has so far had its turn in most of the member countries, while in Austria, Belgium and Luxemburg the modification is only in its preparatory phase as yet. In effect, a few of the non-member countries have also adjusted their patent law to the European system, so e.g. Sweden, and in further countries similar preparations are taking place (Greece, Spain, Portugal). Cf., in detail, HAERTEL, K.: Die Harmonisierung des nationalen Patentrechts durch das europäische Patentrecht. *GRUR Int.* 1983/4.

<sup>459</sup> The Max-Planck Institute wished to promote the unification of practice by organizing a symposium in October 1982—for the judges of patents (cf. the material of *GRUR Int.* 1983/4). The different traditions prevailing in the course of devising the definitions or just the issues which have been left open will obviously raise no few legal problems. Cf. OSTERBORG, L.: Gedenken zur Vereinheitlichung des Vorbenutzungsrechts für Erfindungen im Gemeinsamen Markt. *GRUR Int.* 1983/2; MANGINI, V.: Die rechtliche Regelung des Verletzungs- und Nichtigkeitsverfahrens in Patentsachen in den Vertragsstaaten des Münchner Patentübereinkommens, *GRUR Int.* 1983/4. The second such symposium was held in Strasbourg—organized by CEIPI—in September 1984 (*GRUR Int.* 1985/4). See also DÖRRIES, H.: Az újdonság eltérő fogalmáról a német és az európai szabadalmi jogban (On the different notions of novelty in German and European Patent law). *MIE Közleményei*, 30.



118. An even more closely knit patent community is created by the *Community patent system*, extending over the countries of the EC. This patent system was established by the 1975 *Luxembourg Treaty* (contrary to the earlier optimistic prognoses, it has not yet entered into force). By building on the Munich Convention, it considers the Common Market as a unified system. This means that—after the Convention has entered into force—a European Patent can be obtained, as regards Common Market countries, only in this unified manner. If thus the applicant indicates an EC country in the application for the obtainment of a European patent, he is automatically granted (or if not successful, not granted) the patent, in relation to all member countries. This unified treatment is valid not only for the phase of obtaining the protection but also for transfer, cancellation, or any other lapse of protection.

The Luxembourg Treaty internationalizes not merely the unification of the material conditions and the granting of the protection, but its effect extends over the *'further' life of the protection*, too. The cancellation of the protection can also be initiated before a Common Market forum. The content of the protection is also regulated in more detail, namely, it sets forth the possibility of granting a licence (exclusive licence included); moreover, it introduces with a general character, the institution of licence of right.

It is worth calling attention to the *'dual linkage'* of these agreements. The Luxembourg Treaty's background law is the Munich Agreement; the latter refers to the PCT and the PC, while emphasizing the priority of universal agreements on a wider scale. In fact, the Luxembourg Treaty endeavours to conform to the prescriptions of the *Rome Treaty*. The chances of conflicts which can arise from the effect of sets of legal requirements have been referred to in the foregoing chapters, in connection with the debated clauses of contracts. According to the original concepts, the Treaty should have been entered into force ten years after the ratification—i.e. in 1985. This has not taken place, in part because Denmark and Ireland have not ratified the Treaty, and also partly because the entry of Spain and Portugal into the EC has made the situation slightly more complicated. The Conference held in December 1985 stated this and accepted a report on the handling of debated matters, resp. carried out certain—moderate—modifications in the basic agreement.<sup>460</sup> In reality, the effective date of the Treaty can be reckoned with by an adjustment to the establishment of the *'real inner market'* projected by 1992. In any event, the development which presents the prospects for *'Europeanization'* of the really significant inventions in the European patent situation, while maintaining national patents for inventions of lower levels (or just pushing them towards the utility models), is certainly predictable.

119. As regards the *law of trademark*, the Common Market's efforts can be considered less successful. The initial dynamism, which was reflected in suggestions as early as 1958, soon broke down; it was at most the literature that on the pretext of a few debated decisions kept the problems of Common Market trademark law on the agenda, especially concerning the conflicts between trademark law and competition law.<sup>461</sup> Recently, the preparatory work has become more intensive,

<sup>460</sup> See to this, HAERTEL, K.: Die Luxemburger Konferenz über das Gemeinschaftspatent 1985 und ihre wesentlichen Ergebnisse. *GRUR Int.* 1986/5; KRIEGER, A.: Das Luxemburger Übereinkommen über das Gemeinschaftspatent. *GRUR Int.* 1987/11.

<sup>461</sup> Cf. JOHANNES, H.: Zum "Kaffee Hag"-Urteil des Gerichtshofes der europäischen Gemeinschaften, *GRUR Int.* 1975/4. MAK, W.: Warenzeichen und der Gemeinsame Markt, *ibid.*; KRAFT, A.: Die



and eventually, the position of the Economic and Social Committee of the EC on the harmonization of the member countries' trademark laws, and on the guidelines of regulating the Common Market trademark law, was proclaimed in 1980.<sup>462</sup> After the 1988 amendment of the above guidelines, the Council promulgated—in form of decree (OS L 11/1)—the Community Trademark Law.

The regulation reflects the modern tendencies observable in the field of trademark law.<sup>463</sup> It recognizes any variety of marking which is suitably distinctive; it protects the service mark; it recognizes the collective and the certification mark; the protection by trademark is effective upon registration; it grants particular protection for well-known trademarks; the holder is liable for compulsory utilization. The decree—by building on the principle of the *exhaustion of rights*—provides that merely on the basis of trademark law, the importation of goods lawfully bearing the mark cannot be obstructed. The decree entered into force from 15 March, 1994.

120. As regards the Common Market *competition law*, we can say that this is the most established norm system, with the oldest tradition, in the EC law—so far as industrial property is concerned.<sup>464</sup> An active competition policy, widely perceived in principle, is sought here, the aim of which is a gradual amalgamation of the national markets. Accordingly, the competition policy of the Common Market places emphasis not only on the traditional rules of competition, but also includes many other subjects—tax-policy, endowments, norms relating to company structures, etc.—in the interests of 'equal chances'. Evidently, the regulation by competition law taken in the strict sense of the word is also significant, especially its antitrust and cartel-prohibitive provisions. In effect, principles are realized not easily and, mainly, not consistently, if only we refer to the real contradiction which straightens between the necessity of co-operations and the possibility of harmful consequences of market dominance. In principle, the EC organs (the Commission or the Court) positively evaluate the concentrations which serve the better supply, technological advancement, modernization, but, to forecast the result of a comparison between the advantages and disadvantages in a given situation (e.g. in connection with a licence contract leading to a monopolistic situation, or with a co-operation contract) is very difficult.<sup>465</sup> Consequently, in the practice we often

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Stellung des europäischen Gerichtshofs zum Warenzeichen im Lichte des Hag-Urteils, *GRUR Int.* 1975/8–9; *Beier* (4); (5); HEYDT, L.: Benutzung und Benutzungszwang im europäischen Gemeinschaftsmarkenrecht, *GRUR Int.* 1978/1.

<sup>462</sup> Doc. KOM (80) 635.

<sup>463</sup> THRIERR, A.: Les travaux de la Commission pour la création d'une marque communautaire et pour le rapprochement de certains aspects du droit national dans le Marché commun, *Prop. Ind.* 1980/1; SCHWARTZ, T.: Das Markenrecht in der europäischen Gemeinschaft—Eine Zwischenbilanz, *GRUR Int.* 1981/1; TATHAM, D. H.: A nemzetközi védjegylajstromozás és a közösségi védjegy (International trademark registration and the community trademark), *MIE Közleményei*, 30.

<sup>464</sup> Cf. in detail *Mádl* (1), esp. pp. 78 et seq., 205 et seq.; *Vörös* (1), pp. 225 et seq.; *Ulmer* (3).

<sup>465</sup> Some orientation is ensured by the periodic reports of the EEC Commission on competition policy (e.g. *GRUR Int.* 1983/10), on the tendencies of decisions. Cf. also MAILÄNDER, K. P.: Vereinbarungen zur Know-how-Überlassung im Wettbewerbsrecht der EGW. *GRUR Int.* 1987/7–8; LEIP, W.: Die kartellrechtliche Beurteilung von Know-how-Verträgen nach EG-Recht—ein Diskussionsbericht. *GRUR Int.* 1987/11.



encounter several uncertainties, with the distortion of principles. Common Market competition law has nevertheless also produced a certain regional harmonization of laws; the domestic competition laws of the member countries have in many respects been adjusted to the Community concept. More recently, forceful attempts to include consumer protection aspects to realization have been noted.<sup>466</sup>

121. Finally, it must be mentioned that there are concepts on harmonization at the Common Market level of legal protection for the *indication of sources and origins*, too.<sup>467</sup>

### (e) Integration in the field of industrial property within the ex-COMECON

122. As is commonly known, the COMECON as an integrated unit has virtually ceased to exist. Nevertheless, the consequences of certain law-unification activities which had been performed in it will survive for a time. A brief presentation of integration efforts, and of their results, in the area of industrial property—and, in part, for allowing the historical approach to prevail—the following survey seems worthy including here.

As many as *three organizations* within the ex-COMECON dealt with issues of industrial property,<sup>468</sup>—occasionally producing borderline conflicts as well of course. Several documents issued by the *Permanent Committee on Science and Technology*, touched upon questions of inventions; in the framework of the *Legal Conference*, model contracts were elaborated in relation e.g. to licence and research. The *Meeting of the Presidents of the Invention Offices* accepted several suggestions, resp. was the preparatory forum for three agreements.

123. The 1973 *Moscow Agreement*<sup>469</sup> regulated some aspects of legal protection for inventions, industrial designs, utility models and trademarks, created in the course of economic and scientific-technical co-operation, that is to say, of the question of *joint inventions*. The agreement has proved to be of only minor practical use, in part because of a lack of interest, and also because the model of the author's certificate received preference. The 1975 *Leipzig Agreement*<sup>470</sup> unified the formalities of patent applications; the PCT had virtually exhausted the latter. The 1976 *Havanna Agreement*<sup>471</sup> brought a regulation for the mutual honouring,

<sup>466</sup> Cf. WITH, DE H.: Vereinheitlichung des Wettbewerbsrecht in der EWG und Verbraucherschutz. *GRUR Int.* 1976/7.

<sup>467</sup> Cf. BEIER (6); MATTERA RICIGLIANO, A.: L'indication d'origine sur les produits et les règles sur la libre circulation des marchandises à l'intérieur de la Communauté. *Diritto Comunitario e degli Scambi Internazionali*, 1975/2. Recently BEIER, F. K.—KNAAK, R.: Der Schutz der geographischen Herkunftsangaben in der Europäischen Gemeinschaft—Die neueste Entwicklung, *GRUR Int.* 1993/8–9.

<sup>468</sup> Cf. comprehensively, BOBROVSKY (1); (2); SIMANOVSKII, S.—CHERVIKOV, I.: A KGST tagországok együttműködése a találmányügy területén (Co-operation among COMECON member countries in the area of patent matters). *SZK* 1979/6; LONTAI (13); SCHÖNFELD, G.: *Die Zusammenarbeit der Mitgliedstaaten des RGW auf dem Gebiet des Erfindungswesen*. Potsdam–Babelsberg 1978.

<sup>469</sup> Promulgated in Hungary by the Law-Decree No. 8 of 1975. For its evaluation cf. MÜLLER, M.—SCHÖNFELD, G.: Rechtsschutz gemeinsam geschaffener Erfindungen, *N* 1981/10.

<sup>470</sup> Promulgated in Hungary by Decree No. 22/1977/VI.27/ Council of Ministers.

<sup>471</sup> Promulgated in Hungary by Decree No. 3/1978/I.18/ Council of Ministers. For its evaluation, cf. JONKISCH, F.—PULSKWIK, H.: Gegenseitige Anerkennung von Urheberscheinen und andere Schutzdokumenten für Erfindungen in den RGW-Staaten, *N* 1978/5.



domestication of the protection documents. The Havana Agreement is basically legal-technical in nature; it enhances the domestication in the rest of the countries of inventions which are already protected—depending only on complementary examinations, the most—in a given country.<sup>472</sup>

124. As regards the *infra-structure* of industrial property, intensive and fruitful co-operation was taking place within the ex-COMECON, namely, in the field of patent information research and recording; furthermore, the elaboration of certain methodological materials had been carried out; co-operation also existed in respect of patent expert training.<sup>473</sup>

125. The integration achievements mentioned above have not been put to use satisfactorily. The number of applications submitted for the protection of joint inventions was extremely modest (although, according to the statistics, an intensive scientific-technical co-operation was taking place).<sup>474</sup> Domestication based on the Havana Agreement did not even reach 1% of the protected inventions. The connection remained rather on a macro-level and bilateral. The co-operation also in general, was lagging behind declared expectations,<sup>475</sup> however, the cause of this could not be found in the possible faults in the legal instruments. It was rather related to the lack of interestness, to the different economic policies, which eventually led to the demise of the organization.

126. An interesting chapter among the attempts at integration was the concept of introducing a *uniform document on protection*. Accordingly, a joint form of protection would have been introduced, for its administration (for the granting of the protection) a joint authority would have been established. The relevant concepts greatly resembled the clauses applied in the European Patent Convention. As is known, the introduction of such a uniform document has not taken place, mainly on account of the disputes which related to the forms of protection (the differences in evaluating the author's certificate and the patent).

127. In summary, it can be stated that obviously the co-operation which had been produced in the field of industrial property could not achieve a higher level than that attained in the economic one. The existing agreements had hardly been brought to realization in practice. Neither were the unification and the harmonization, of the member countries' substantive laws. It was the 'external adaptation' rather than the exercise of an essential influence on the internal legal norms that can be mentioned.

<sup>472</sup> Cf. Bobrovsky (1), pp. 122 et seq.

<sup>473</sup> Such is the International Patent Information System, or the one which is established for banking and exchanging—incidentally, in co-operation with the INPADOC—of bibliographical data on patents.

<sup>474</sup> Let us refer here only to the fact that the number of scientific-technical cooperative actions is more than 1000, and, on the basis of these, in more than 100 international (inter-ex-COMECON) organizations (research institutes, co-ordination centers), more than 3000 qualified researchers and developers perform joint activities; nevertheless, the ratio of jointly filed inventions to those filed in ex-COMECON member countries is altogether 1%. The statistical data on patents also testify to the fact that the number of filings, which originate from ex-COMECON member countries, also represent only a fairly low ratio in the ex-COMECON countries.

<sup>475</sup> Cf. NYERS, R.: Hagymány és újítás a KGST-együttműködésben (Tradition and innovation in the COMECON co-operation). KSz 1982/4; Köves: op. cit.



Partly for safeguarding a few of the results obtained in the industrial property co-operation of the former COMECON, partly for establishing an up-to-date industrial property organization for the Community of Independent States, the WIPO prepared a draft of a regional agreement on the measures on the protection of industrial property (so-called *Eurasian Patent Convention*). The Agreement will be signed—in all probability—by the possible member-states (Armenia, Azerbaidjan, Belarus, Georgia, Kazakhstan, Kirgisistan, Moldva, Russian Federation, Tadjikistan, Ukraine, Uzbekistan), in the second half of 1994. The Agreement establishes an Administrative Council and an Eurasian Patent Office. The system of the Agreement could be qualified a regional patent co-operation somewhere between those of the Munich, resp. the Luxembourg Conventions. The regional patent granted by the Office will have effect—identical with of the national patents—in all member-states. Decisions on the validity of the patent, on infringement or compulsory licences belong to the competence of the national authorities. The Agreement is in full harmony with the provisions of the PC and the PCT.<sup>476</sup>

## 6. The erosion of traditional principles

128. *Main principles of the co-operation in the international protection of industrial property.* — The traditionally established principles, and rules of this kind of co-operation have been analyzed in a relatively detailed manner in Chapter II. These common principles are fixed mainly in the PC. Such principles of outstanding significance are: that of national treatment; independence of the protections; freedom of importation; institution of union priority, etc.

The concerns, resp. attacks, related to the conventional principles have in part been touched upon in Chapter II, in connection with the timely revision of the PC; and in Chapter III—in the context of particular interests related to individual countries, resp. group of countries. The evaluation of these principles—especially on the part of the *developing countries*—often allows us to infer that these principles run counter to the national interests of a number of countries—which are partly PC members, partly non-members—or at least they do not adequately reflect their particular interests. The erosion of the traditional rules and principles of the patent law, or in a wider meaning of the term, of the protection of industrial property is reflected in the codification and practice of a number of countries, but the relevant concepts and endeavours receive forceful representation in the international arena as well. In what follows—without a claim to completeness and not without some overlap—three such areas will be examined.

129. *National treatment vs. preference.* — As has been indicated earlier, the PC norms do not prohibit in principle the concluding of narrower—either bilateral or multilateral—agreements in the field of co-operation for industrial property that by building on the closer connection, hold out the prospect of particular preferences for the partners. Although certain doubts may arise concerning the PC conformity of such agreements, especially as regards the possible injury to the principle of national treatment, still, the viewpoint seems to be convincing which judges these preference-providing special agreements to be in consonance with the principle of national treatment, provided that the particular preferences are counterbalanced by suitable liabilities, that is to say, by burdens too, and that—in principle—it is possible—by undertaking all the consequences—for anybody to accede to such agreements.<sup>477</sup>

<sup>476</sup> Cf. *GRUR Int.* 1993/12.

<sup>477</sup> Cf. *Pálos* (1).



However, the demands for preference raised by the *developing countries* are of a different type. As is reflected also by the formulation of principles which are intended to replace that of national treatment, these countries wish to realize 'without reciprocity' the preferential treatment which they are to share in.

As a basis for their claim of unilateral preference, in the above term 'without reciprocity', the developing countries' arguments indicate citations to their backwardness, poverty, the underdeveloped state of their industry and economic structure, their lag behind in these areas, the lack of information and of trained professional workers. As a basis of principle they emphasize in their political arguments that technical and scientific achievements constitute the public property of the whole of mankind; that in the developed countries the results accumulate not to a small extent only because—owing to the exploitative colonial system—the necessary cover could be produced at the expense of the developing countries, indeed. Following from the above, they demand that part of the results—produced by means of the exploitation—must be given back to them; they must be share in the technical achievements on advantageous conditions.<sup>478</sup> This demand of the developing countries organically fits into the trends of concepts related to the new economic order, and into the ranks of arguments serving as a basis for that order. In the course of these arguments it is dramatically pointed out not only once that the economic 'gap' is widening, becomes increasingly deeper, namely, modern products and technology itself, are more and more expensive, while the prices of the raw materials transported by the developing countries are in general falling (except that of crude oil).<sup>479</sup>

The attempts to obtain preferential treatment precipitate in various *areas* of industrial property. As has been indicated also in Chapter II, the developing countries wish to be granted unilateral preferences with respect to dues; terms of protection, and priorities; the possibility of introducing stronger utilization sanctions to protect home industries and inner domestic consumption (this is addressed in the next subsection, Point 130). They wish to break away with the independence of protection, and want to obtain the possibility of particular forms of protection which will support the concept of protecting system home industries, etc.

The advocates of the *traditional concepts* align their misgivings, and counter-arguments against the attempts outlined above. In principle, they admit the backward condition of the developing countries, the justification of the desire to narrow the gap in technologies; however they hold the view that all these are related to the interests of not merely the developing countries, not merely to the particular, emphasized national interests of the developing countries, but to those of all countries; the narrowing of the gap is dictated by the general interests attaching to international co-operation. The ex-socialist countries—while acknowledging the appreciable interests of the developing countries—strongly refuse to accept their 'historical responsibility' in this respect, by qualifying the undifferentiated treatment of the conflict between North and South as a mistaken generalization.

A number of countries emphasize that in order to support their genuine interests, the developing countries do not 'strike' at the right place, do not target the really responsible institutions. It is pointed out in the arguments that e.g. a bulk of the

<sup>478</sup> Mangalo, op. cit.

<sup>479</sup> Cf. *Tanulmányok az új világgazdasági rendről* (Studies on the new economic world order). Budapest. Editor J. Bognár. Especially the studies by I. Dobozi and B. Bojkó. See also, for a vivid description of this tension: SERVAN-SCHREIBER, J. J.: *Le défi mondial*. Fayard, Paris 1980.



patented solutions is freely accessible—as a consequence of the expiration of the protection term, resp. of the abandonment (owing to the acceleration of technics) of the protection before the term expires—, namely such procedures that, by taking the present technical standard of the developing countries as a basis, can still make possible a fairly significant advancement, without the restrictive effects of the rights related to the solutions. For this, first of all, an adequate *data bank*, *professionals* with training of a satisfactory level and in enough volume as well as *reception ability*, are requested. This is the area where the developing countries should mainly proceed and to this the powerful help of the developed countries or indeed of the international organs can justifiably be demanded.

Consequently, it is *not* necessarily the solutions of *traditional institutions of industrial property*—which undoubtedly are not always tailor-made for developing countries—which constitute the primary impediments in the way of technical progress. It is possible and indeed necessary to craft the norm and institutional system, which is in effect, to refine it—by taking into consideration also the developing countries' requests—without breaking away with the cardinal principle of national treatment is admissible. The advocates of this view point out that also by building on the *traditional* principle there are a great number of possibilities for the developing countries (and for others as well) to introduce such particular regulations of industrial property which will reflect their national interests. Notably, the PC assigns the regulation of the terms of protectability; the cases of exclusion from protection; certain elements of the protection; the term of protection, etc. to the competence of national legislation. The developing countries can thus exclude from the protection (and they indeed do so, and not merely the developing countries that do it) such product varieties—of vital importance from the viewpoint of the national economy—e.g. medicine, foodstuffs, etc., concerning which they qualify the inhibiting possibilities of the exclusive protection dangers (it is another question—as has already been indicated in Chapter III—to what extent this is in harmony with the interests of long-term progress). They can prescribe a short-term period of protection, and even that—let us say—with intervals, e.g. by making it dependent on the degree of utilization. They can introduce such special protection forms which take into account the interests of the public to a greater degree. All these need not however result in a departure from the principle of national treatment. The possible more rigorous regulation or practice should equally relate to nationals and foreigners alike; the weight of the limitations will anyway be carried by the foreign applicants representing an overwhelming proportion.

There are often hints at the fact that the relationships in the field of industrial property are mainly *micro-level*. Even for the western States, testifying to increasingly more intensive intervention by the State, it would be difficult to force their companies to carry on a type of practice which would endanger the interests of the latter, or that these should provide unilateral advantages. (It is another question that in a given case some company strategy holding in mind some long-term, or indirect advantages—e.g. breaking into the market; creating a basis for co-opera-



tion—can provide the foundations for providing certain preferences.)<sup>480</sup> Virtually, it is not—not even in the ex-socialist countries—easy to realize such a concept. The policy of granting subsidies by the State, the transposition to company level of preferences approved from political viewpoints, require the application of particular methods; e.g. the technological aids granted free of charge or by preferential conditions need to be compensated from State budget resources.

A number of the partners contributing to this debate hold the view that the principle of national treatment must be continued to be maintained. The granting of various preferences should rather be channelled into *bilateral* agreements. In the institutional system at a universal level, the benefits can be recognized only in a narrow sphere with an exceptional character, and only for a transitional period. (Suggestions of this character have already been formulated in the revision course of the PC.)

130. *Home utilization vs. importation.* — The endeavour to put the protected solutions into practice by means of drawing in the country's inner resources, is also a noticeable tendency, serving the strengthening of national industry. Accordingly, it *cannot* be considered a satisfactory *utilization* if the partner entitled to the protection transports the product embodying the invention (or bearing the protected mark) in the form of *importation* to the country which is the seat of the patent, but does not produce. This endeavour, which is also reflected in the various countries' codifications, undoubtedly runs counter to the traditional principles fixed in the PC.

Certain preliminary results of the above endeavours have become manifest—as has been demonstrated in detail in Chapter II—in the course of the PC revision. In what follows, the colliding of arguments and counter-arguments will be demonstrated and be subjected to an indepth analysis.

The development of home industry, the technics, undoubtedly dictates that we should qualify only such application of inventions as are of 'full-value' utilization and at the same time also serve the development of the home basis, that is to say, the partner entitled to the protection establishes a manufacturing base in a given country, by applying and training the local workforce there, and by establishing joint enterprises there, and by transferring the relevant know-how in the framework of licence contracts, etc. These are undoubtedly fairly appreciable and weighty interests. The question arises here whether they can be realized in every case.

The social-economic-political significance of developing the home industry, and of raising the home technical niveau can hardly be called into doubt. As an instrument of this can serve the strengthening of a national basis of research and development, on the one hand, and the transfer and adaptation of the foreign technologies, results of research and development built out abroad. The weight and proportions of the two channels should be measured by the science political factors

<sup>480</sup> Cf. the September 1982 Conference material of the MIE-AIPPI, entitled 'Industrial Property and Economic Efficiency'; especially, the report by A. M. LIGNAC, entitled 'Technology transfer and industrial property'. See also the contributions to this report.



of the given State. It is obvious that in the developing countries—and not only there—the second channel seems to be more significant for the foreseeable future, that is to say, the utilization of foreign results, the '*intellectual import*'. This is also indicated by the characteristic data of the international licence transfer, the proportions of flow between the individual 'segments'.<sup>481</sup> From the viewpoint of the receiving country, it is undoubtedly more advantageous if the pure intellectual product is imported than if it gets to its market embodied as consumer goods. The latter solution goes together with higher costs and for the home development with lesser advantages. However, if a given country wishes to import only the technology, a *receiver basis* is needed on its part. In a number of the developing countries, this basis is given to a lesser extent, their technical infrastructure is of a low standard, they lack in trade experience, and in teams of professionally skilled workers. Not merely the economic interests of the partner entitled to the protection is ensured by the institution of industrial property in relation to the given solution, but also his professional prestige that attack to the standard of realization of his invention. The strengthening of the specialization of production, the *rational volume* of manufacture and the economic strength of the patentee (or trademark owner) does not always make it possible, reasonable and economical for him to set up sister companies. From his point of view the exportation of consumers' goods is thus more advantageous.

It should be noted that—as has already been indicated—the consumer's interests can in a given case dictate against home production, possibly, the importation of the product should be put into the foreground, which sometimes results in even better quality and more favourable prices. In any event, here several interests are to be weighed.

There are several possibilities of developing home industry, or of mobilizing the importation of technologies. Favourable financial rules, State subsidies, and the advances in constructing an infrastructure, etc. can stimulate the inclination of patentees to extend their right to protection, to conclude agreements on co-operation, to set up joint ventures, or in general lead to a more direct exploitation of local potential. Facilitating these processes are the availability of a cheap work force and the accessibility of local resources of raw materials, saving the costs of transportation. In a word, a *favourable economic atmosphere* can act as an efficient incentive in the importation of appreciable intellectual products.<sup>482</sup>

The technologies desirable for obtainment are often surrounded in the country of importation by bastions of industrial property institutions, patents, trademarks. In principle, the proper regulation of these, namely, the obligation of utilization, the prescription of compulsory application, can stimulate the actual exploitation. The norms of industrial property also can be used for the enforcement of the actual, local application of the invention, that is to say, when importation is qualified as such that is to be considered an actual utilization.<sup>483</sup> Attention must

<sup>481</sup> Cf. Mádi, op. cit.

<sup>482</sup> Cf. Aguilar, op. cit.

<sup>483</sup> In this context, cf. in detail, Stumpf, op. cit.; Greif, op. cit.; Kunz-Hallstein (6).



be called to the fact, however, that on the one hand, the institutions of industrial property are not exclusively suitable for the attainment of such purposes. The *norms of administrative type*, price regulations by the authorities, supervision and control of foreign trade, in given cases can be more efficient than the provision of industrial property. On the other hand, the exaggeratedly radical sanctions can also exert a deterring effect. Some developing countries' more rigorous regulation has resulted in a significant reduction of technology importation. It is fairly thought provoking whether on a long-term basis the severing of the sanctions serves genuine interests. As is testified by international statistics, the proportion of transfers between the developing countries' own, independent inventions and of technologies among themselves is fairly low.<sup>484</sup> Their development would hardly be served by a radical interruption in and narrowing to a solely domestic technology flow. The establishment of an agreeable atmosphere is more likely than the severing of sanctions to an undesirable extent, that holds out results in this respect.

131. *Commodity marks, geographical indications*. — It could justifiably be stated earlier about this area that their significance is on the increase, the spectrum of mark variants drawn in the circle of protection is expanding, and a more enriched selection of the protection variants can be met. Certain efforts are however also made here against traditional solutions.

It is also in this area—especially in the regulation of *trademark law*—that the efforts mentioned above are strengthening for a more efficient realization of compulsory utilization, for the limitation of importation, on the one hand, while—as could be seen in our analysis related to the Common Market practice—the facilitation of parallel importation, the enforcement of the principle of exhaustion of rights is being pushed into the foreground, on the other.<sup>485</sup>

It is not primarily the trademark law, or the area of markings attaching to companies where the more radical concepts prevail; it is the legal area of marking variants that reflect collective interests, and indicate a kind of belonging to wider regions, the area of indication of source and appellation of origin. Special protection is due to these *geographical indications*, expressing the interests of the given region's producers, merchants and consumers, alike. (The modern trademark regulation and practice, in general, refuse the protection of such marks that can confuse and misguide the consumer regarding the origin of the product.) The request to build out a more efficient way of protecting the geographical indications is not a phenomenon of erosion, it even is in the direction of *universality* for the institution. However, on the part of the developing countries, particular wishes have been formulated.<sup>486</sup>

To sum up the relevant requests in a concise manner, the essence is that they want certain geographical indications or denominations to enjoy the *protection* irrespective of whether any concrete *economic interests* attach or do not attach to the protection. The suggestions in this respect are directed toward their claim,

<sup>484</sup> Cf. Mádi-Lontai, op. cit.

<sup>485</sup> Cf. Ullrich, op. cit.

<sup>486</sup> Cf. Bognár, M. (3), Benson, op. cit.



according to which the names of geographical units listed and filed by them with international organizations should not be used by other countries, and this *list of prohibition* would be effective irrespective of whether in the filing country such economic activities are carried out as from the viewpoint of increasing their competitiveness, need the use of the filed indications. They wish to make it possible that 200 such '*bianco*' denomination can from the beginning be filed, with periodic additions and this preferential chance for the developing countries should be ensured. (This is again only a particular aspect of requests for preferences.)

In principle, the suggestion is defensible. It is in the appreciable interests of those who are active in the territory of the given country or region, that for the propagation of their activity they can enjoy exclusive rights to use the geographical indications which have general appeal. However, there are great numbers of those who call into doubt the justifiability of blocking such geographical indications in those cases in which there is now—or at least in the foreseeable future—no underlying actual economic activity. They refer to the fact that modern trademark laws are capable of providing effective protection against abuses related to this while in the cases of geographical marking used as phantasy words the construing of prohibitions with reference to geographical indications is justifiable only if actually existing economic interests are at issue. The viewpoint is also raised that in so far as this work is grounded, the position is hardly defensible according to which this possibility would be affordable only to the developing countries. Other countries may also have internationally known geographical indications the prohibition of the use of which is desirable, even if no economic production activity using the indication is carried on, at the moment.

Earlier, the suggestions of the developing countries also implied that the prohibiting of indications, denominations that appeared in the list should be retrospective, in other words, the trademarks containing such geographical indications (originally used as phantasy words) should for example be revoked, or the renewal of the protection should not be made permitted.

## 7. New aspects, new profiles

132. *The expansion of the traditional model.* — As has already been detected in earlier sections, there appear such phenomena in the field of industrial property which indicate the enlargement of the old model; e.g. the overlapping of technical circles, with an implication of stretching over to those of biology in the territory of protectable product varieties, or, the increasing involvement in the issues of dynamics (contracts) along with statics. All these are related to the fact that the scientific and practical activities have become more complicated; that the number of problems in the borderline areas has increased; the complex-type approaches and interdisciplinarity have become intensified.

In what follows, the realization in the field of industrial property of some such particular aspects will be touched upon the role of which—even if they are, possibly, not entirely '*systemfremd*'—and the fact that they are taken into consideration amount to be unusual novelty-like.



At the first sight, e.g. it seems to be fantastic that there is a relationship between the protection of industrial property and the *cosmos*, but if we consider that e.g. the utilization of artificial satellites does already raise current problems in the field of copyright,<sup>487</sup> we should state that probably in the not-too-distant future also in that of the industrial property such issues will have to be dealt with. Patent law problems already emerge in the literature,<sup>488</sup> and possibly the trademark law, and that of the competition cannot be indifferent either, facing the unusual questions emerging here.

133. *Approach from the side of consumer protection.* — As has already been repeatedly indicated in other contexts, the traditional model of the protection for industrial property; as well as the PC terms built on the model; and the norms of various legal systems; the international organization of the protection for industrial property; the WIPO activity—all these keep the relationship between competitors to the fore. Indirectly, of course—possibly in the mantle of public interest—consumer interest appears in the above conception, too, but in our day, the direct appearance of these interests can also be noticed. The PC Executive Committee, on its 1977 meeting (No. 13), commissioned the Director-General of WIPO to investigate the relationship between consumer protection and industrial property. The experts meeting, held in July 1978, outlined the main areas and institutions of industrial property in relation to which the approach from the aspect of consumer protection could have importance. Thereafter, WIPO commissioned the areas' internationally acknowledged experts to prepare case studies, which resulted in the comprehensive report compiled in part on the basis of the case studies that was put forward at the experts' meeting in January 1980.<sup>489</sup> The summary material examines in detail which are the consumers' special interests in the various institutional areas of industrial property, and what kind of—national, international—level measures are necessary for the more energetic realization of consumer interests, resp. what kinds of methods are for this purpose at the WIPO's disposal.

As regards the general legal measures, serving the *interests of the consumers*, namely, the 'list' of consumer interests, let us recall here the explanations included in Chapter III, where the particular interests appearing and recognized in the field of industrial property are scrutinized.<sup>490</sup> (The territory of protection for technical products will be neglected here because the consumer interests of the relevant sphere can be reflected only indirectly.)

A primary part is played by consumer protection in *trademark law*.<sup>491</sup> By taking the essential functions of trademark as a basis (differentiating-individualizing function, quality guarantee and advertising function), we can say that the institu-

<sup>487</sup> Cf. FICSOR, M.: A tudományos-technikai forradalom és a szerzői jog válsága (The scientific-technical revolution and the crisis of copyright). *JK* 1981/12.

<sup>488</sup> Cf. SARAGOVITZ, H. M.: Das Recht des geistigen Eigentums im Weltraum. *GRUR Int.* 1976/12; Parragh (9). The suggestions directed towards the development of industrial property in the US deal with the issue seriously. *GRUR Int.* 1986/5.

<sup>489</sup> Cf. WIPO DOC. COPR/II/4.

<sup>490</sup> In detail, cf. Lontai (5); Aracama Zorraquin (1).

<sup>491</sup> Cf. Gabay, op. cit.; Eminescu (4); similarly see the material of the Krakow Patent Symposium (1974) (*Fonctions et protection des marques de fabrique dans les pays capitalistes et socialistes*) and that of the 1979 Budapest Patent Symposium (*MIE Közleményei*, 15).



tion of trademark represents undoubted advantages from the consumers' viewpoint; it is suitable for providing the *information* necessary as regards the sources (indirectly, the quality) of the goods. It follows from the basic function of trademark that no such mark can receive protection that has already been used or registered by somebody else in an identical form or in one similar enough to be confused (as a trademark or without it). As regards the detection of *confusion* and the drawing of the consequences of this, the practices applied by various countries are of different strictness, with consideration to the typical consumer's general education, and to language factors, etc.<sup>492</sup> The essence is that the consumer should be sure of the origin of the goods. In the majority of cases, the objection against confusability is justified by the fact that the marked goods are identical or of similar purpose; for, in the case of products targeted for applications falling far from each other in nature, even the confusable mark does not, in principle, mislead the consumer. However, this point of departure needs to be refined. A well-introduced mark with acknowledged reputation is in itself of value (function of advertisement), and even if it is used on another product variety different from the outset, the trust in the prestige can arouse a desire to purchase on the one hand, and in the last analysis the user shares free of charge in the prestige-advantage which has been struggled for with the investment of significant cost by the partner entitled to the trademark, on the other. The special rules directed toward protection of the notorious trademarks are assigned to safeguard such abstract values of goodwill. The registration of such marks as can be confused with *well-known trademarks* in a given country are prohibited in a number of legal systems, based on the PC, even if no application for registration has been filed in this respect.<sup>493</sup> In the typical areas, similarity to the notorious trademark is only a relative prohibitive factor, that is to say, it is realized only in respect of goods similar to a given product variety; in Hungary it is e.g. of an absolute character, thus, it is a cause for prohibition in relation to any of the product varieties. The consumer's interest obviously justifies the latter practice. It should be noted that the regulation, or practice, which examines confusability objectively, as a prohibitive factor in itself, or more exactly, investigates the issue from the consumer's viewpoint, and considers it irrelevant whether the earlier trademark-owner objects so to the use of the mark, or indeed even approves of it, should receive approval.<sup>494</sup>

The consumer's interest in information dictates that he should be protected from mistaken information not only in respect of the individual origin of goods, but also in general from all such marks that may mislead him with respect to any essential

<sup>492</sup> As regards the trademark practice of the ex-socialist countries, cf. the material of the symposia referred to in Note 491; furthermore, BOGNAR, M. (5); and the paper by SZENTPÉTERI, Á., in *MIE Közleményei*, 14; resp. SÜMEGHY, P. (Mrs.), in *MIE Közleményei*, 16; NEUMANN, K.: Letter from Czechoslovakia, *Ind. Prop.* 1973/4; HIERSE, K.—HOFFMANN, E.—SCHRÖTER, S.: *Warenzeichenrecht*. Berlin 1967.

<sup>493</sup> They point out however that in given cases this solution offers disproportionate advantages to foreign companies. Cf. ARITA, H.—BRAGA, H. C.: Der Schutz der berühmten Marke in Brasilien. *GRUR Int.* 1983/10.

<sup>494</sup> Cf., e.g., Judgement No. Pkf. III.20.800/1971. of the Hungarian Supreme Court.



information. In principle, every legal system prohibits the protection of *false* and *misleading marks* as trademarks. The latter can occur in relation to the quality of goods, or use, but practically the greatest part is played by the kind of misleading related to origin—taken in the widest sense of the term—especially by a false indication as to the foreign origin of goods. (Misleading can come about also by such marks that bear some State label, or coat-of-arms of an authority, since this may arouse the image in the consumer that the State or the authority would guarantee the quality of the marked goods. The prescription built for Art. 6<sup>ter</sup> of the PC also serves consumer's interest, prohibiting the protection of such marks as trademarks or as part of the latter.) Misleading can be direct or indirect (e.g. simply the application of a name with foreign tone), and in this respect there are in practice different levels of strictness in individual legal systems. Consumer's interest here again favours a stricter practice.

It is primarily in the interests of the competitive partners, but also of consumers, that no empty, defensive trademarks exist. The prescription of *compulsory utilization*, implying certain sanctions, namely, the cancellation of the trademark, also serves the consumer's interest. It is therefore desirable that actual—and not merely symbolical—utilization should be prescribed, and compliance with this obligation should officially be examined—securing of course actoratus for the competing partners, and for the consumers. Let us remark here that some legal systems also prescribe compulsory registration for trademark in the case of certain goods, which again serves the consumer's interest in information, but it is rather the system of compulsory signs of authorities that functions for this purpose.

The trademark indicates the relationship between the product and the manufacturing (trading) company. It is an essential interest that in this regard, the consumer should have correct information. This interest is reflected in those clauses which make the *transfer of trademarks* possible only with the company (or part of it), or if they qualify the trademark as transferable also independently—inflicting in this case (similarly as in that of trademark licence) the sanction of nullification for such transfers that imply the danger of misleading the consumer. In case of necessity it is desirable, e.g. to prescribe the use of compulsory supplementing marks. It is not rare that identical or similar goods are put on the market bearing different trademarks or, while part of them bear a trademark, possible with the trader in a form which has not been applied being the same. There can be several causes of this, e.g. considerations of market policy, language factors, or the circumstance that some of the goods are only in an experimental stage, and without assurance of a stable quality, the entitled does not wish to endanger the prestige of his trademark.<sup>495</sup> It is in the consumer's interest if the goods' variety is expanded, so in principle, *parallel marketing* is advantageous for the consumer, provided that it does not imply the danger of misleading the consumer (e.g. in respect of the joint source), and that the goods without trademark also can offer a minimum quality level and its being without a trademark goes together with other advantages (e.g. it is cheaper).

<sup>495</sup> Cf. *Vida* (2).



According to the prevailing standpoints, it is *only indirectly* that the trademark function of guaranteeing the quality legally realizes. However, certain varieties of trademark are suitable for expressing this in a more direct way, the *collective* and *certification marks*. In the case of collective trademarks, a group of companies uses identical marks, and guarantees at the same time a sort of control as regards the stable quality standard. The certification mark implies a similar function. It is virtually a special variety of service mark. Usually, there is some organization commissioned to carry out quality examinations that verify in this way the appropriate quality of the registered product, authorizing at the same time the user of the trademark enjoy the attaching rights. In the case of such trademarks, the individual legal systems often prescribe particular rules, e.g. the transfer of such trademarks is limited or excluded, or, the criterion of the granting of the trademark is the elaboration of such inner regulation that guarantees the trademark owner's right to control the quality and to revoke the right to use in case the quality is substandard. Even the trademark itself can be cancelled if the owner fails to use his right mentioned above. The establishment of such varieties of trademarks unambiguously serves the consumers' interests.

134. The trademark serves to distinguish the goods, the *trade name* serves to distinguish the companies, or economic organizations. A well-known, established trade name represents some non-undestimable economic value, an advantage in competition. The interests attaching to this are suitably protected—by means of general norms (name-rights) or special ones (occasionally a criterion of this can be certain registration, too). The protection of trade name, the adequate regulation of the latter, along with the right to the name (right to the personality) and the protection of the fairness of the competing partners, are not without interests from the consumers' viewpoints either. Adequate regulation must be provided so that the consumer is protected from the dangers of confusion and misleading (e.g. foreign-sounding names) on the one hand, and that he is kept adequately informed on the persons with whom he will enter into economic contact, on the other. These interests are better served by a system in which the registration of economic organizations is compulsory and which in the course of this officially examines whether the trade name which is to be registered is not misleading or likely to be confused with that of other companies.

135. The consumers' interests related to being fully informed also comprises the claim for being informed about the country or region of origin. Consequently, besides the rules relating to the trademark and trade name, also the appropriate legal regulation of the *indication of source and appellation of origin* directly attaches to consumer interests. If the marking on the product leads in this respect to confusion and deceit, essential consumer interests will be injured. In the course of institutional—national and international—regulation, the approach should be pressed which builds on consumers' interests. On an international level, this is well served by the concept of the Lisbon Agreement, which e.g. endeavours to prevent the indications of sources becoming generic names.

136. The up-to-date regulation of *competition law* also provides a number of chances of protection—along with the competitors' interests—for the interests of consumers.<sup>496</sup> One of the methods to be used here may be the application of the so-called *general clauses* in a way that the properly controlled (e.g. by means of legal-political directives) application of the law in practice can express within these framework more strongly the interests of consumers.

<sup>496</sup> Cf., in detail, *Vörös* (1).



Some particular 'market conduct' varieties deserve special attention. The advertisement, or *propagating* activities have become one of the main instruments of arousing and increasing the claim raised by consumers. These methods are not always free from features resembling the cases of abuse. Certain persuasive, often aggressive methods, often building on the greed or mean instincts of consumers (by making use of the results of modern psychology, and sociology), can manipulate the requests of consumers and make them buy things unnecessarily. Especially dangerous are the advertisements containing false, *misleading* statements which relate to the quality and origin of the product, by the assertion of false facts or by remaining silent about important facts, either directly or indirectly. The consumer's right to correct, full information must also be protected in the course of advertising activity. It can rightly be expected, demanded that an advertisement contains certain minimum information—based on the typical consumer's orientation, and the intended use of goods—as regards the quality of the goods, the way, the time of its applicability, the composition, possible harmful side-effects, etc. The rules laid down in laws of competition or in special administrative measures of a number of legal systems contain such prescriptions. The *comparative advertisement*, increasingly popular in our days, falls under particular judgement. Certain legal systems prohibit it—in principle—others do not, or do so only if it is untrue, not objective, unfair or misleading.<sup>497</sup> The advocates of the consumer's interest argue in favour of the second view.

In the case of certain *business practices*, e.g. of the peddle, the individual varieties of hire purchases, tie-in sales, the 'gifts' given or promised by the seller, prizes, the snow-ball or pyramid deals, abusing of shock effects, etc., there is an increased risk of advertising activity becoming persuading rather than informing. Naturally, these deals can mean several advantages as well for the consumer, but the chance of abuse is above average. Because of this, such activities are supervised, and bound to prescribed conditions in several legal systems.

137. *Industrial property protection and environment protection*. — People in our day are increasingly aware of the role, importance, of the environment. This is in part in connection with the general increase in living standards, with the fact of the importance of quality of life, and in part with the increase of our responsibility towards the fate of future generations, of our planet. The protest against the harm caused to the environment is an efficient ammunition, even an inspirational instrument, not in one case, for political struggles, occasionally even with counter-technical slogans as well. In the task of environment protection, defining the environment which deserves protection is taken now in the narrower, then in the wider sense of the term. Factors qualifying as environmental harms are first of all air and water pollution; the deterioration of the landscape, of nature, and in general that of the biosphere; the harmful—occasionally very direct effect—of noise damage; radiation, etc., and even 'aesthetical' injuries to the environment. The environmental

<sup>497</sup> So, the Belgian, GFR, Italian and the French practice takes the first view, while the British, US, Danish and Swedish the other one. Cf. also FRANCO, B.: Die vergleichende Werbung. *GRUR Int.* 1977/3; Aracama Zorraquin (3).



attempts are often related to, and occasionally overlap with the consumer protection approach, or indeed with the tasks of work and health protection.

It can hardly be doubted that environmental injuries have become more severe significantly due to the increase and development in technics, and it can also be safely stated that the destruction of environmental harms, and their reduction can also be expected more from the advancement of technics than from its elimination. However, preventive measures against environmental harms cannot function without the arsenal of legal measures either. To this testify—both in Hungary and abroad—the making of law, applying the law, and of course the theory and the literature on law.<sup>498</sup> A kind of efficient prevention cannot miss the international co-operation either—indeed the harmful effects do not always recognize the boundaries of countries either (polluted rivers, the so-called acid rains, atomic pollution, etc.)—and the adequate legal frameworks, organizational conditions of this co-operation are also in the process of formation.<sup>499</sup>

Let us refer here to the legal rules and sanctions, that can be used in the service of environment protection only by example. Comprehensive laws on the environment (nature) protection have been created in a number of countries.<sup>500</sup> The arena of legal instruments belonging to the law of state administration (licences prohibitions, supervisions, penalties, etc.) can also successfully be applied, and in the most extreme cases, even criminal sanctions are employed. Civil-law methods and institutions are particularly suitable for the resolution and occasionally, prevention, of the consequences of environmental harms.<sup>501</sup> Here, the modern rules of responsibility, and the role of insurance should be mentioned. From the procedural viewpoint, very noteworthy are the results and suggestions directed toward the establishment or the widening of the scope of possibilities for endeavours to arrange public or popular actions; the protection of the environment also provided a basis for such concepts that envisage the unfolding of a newer branch of law, namely, the law of the environment. Without providing an indepth analysis of the theoretical problems related to the branches of law—which was, incidentally, already touched upon earlier, in subsection 6—in our judgement, the legal instruments applicable in the protection of the environment do not require the elaboration of a particular, new branch of law; the complexity of this area would make it shoreless from the beginning; it is more to the point if we offer a particular approach which ensures co-ordination of the means and methods of the various legal branches; this kind of co-ordination can expressed more practically by means of certain legal-political directives, similarly as in the case of the concept formulated in the course of asserting the consumer-protection aspects.<sup>502</sup>

138. As has been seen, the struggle against environmental harms and the claim for the protection of the environment, have also made the means of the law enter the service of this cause. The endeavours using the means of industrial property

<sup>498</sup> In the Hungarian literature, see to this in detail, the material of the international conference entitled '*A jog a környezet védelmében*' (Law in the protection of environment). Szombathely, September 1976. Cf. also, '*Környezetvédelem és a jog*' (Protection of the environment and the law). Edited by L. Trócsányi, Akadémiai Kiadó, Budapest 1981.

<sup>499</sup> Cf. A. Bragyova's study in the volume referred to in Note 498. Concerning the endeavours and results of the ex-COMECON, cf. L. Ficzer's study, *ibid*.

<sup>500</sup> So, e.g., among the formerly socialist countries, complex and comprehensive regulation has been realized by the following acts: 1970 in the ex-GDR; 1973 in Romania; 1976 in Hungary (Act No. II).

<sup>501</sup> Cf., in detail, *Sólyom* (2).

<sup>502</sup> Cf., in detail, A. Sajó's study in the volume referred to in Note 498.



cannot avoid the challenge either. Obviously, from this point of view, the legal area of technical products is—almost exclusively—taken into consideration.<sup>503</sup>

This does not mean that, in other areas of industrial property, environment protection viewpoints do not deserve—with strong indirectness—attention. So, e.g. the tendency, palpable in the legal practice of some countries, that establishes the licence-seller's obligation of guaranteeing, taking the risk of the transferred solution, even if it is otherwise suitable for the purpose set forth in the contract, but it has harmful side-effects (notably, on the environment)—all these undoubtedly indicate a more efficient conduct in the service of environment protection.<sup>504</sup> A kind of trademark indicating the 'environmental friendly' type of the marked product, can significantly increase the consumer's inclination to purchase, consequently, a sort of increased supervision is necessitated here, so that the consumer should not be misled in this respect either. The same is to be asserted as regards the rules of the law of competition and the practice in relation to advertisement activities. The indications of sources and origins in a number of cases refer to the advantages of the environment which is in connection with the manufacturing of the given product (e.g. chemicals-free features, etc.); the environmental harms which call this basis into doubts can justify the enforcement of legal means, in the interests of consumers and mark-owners alike.

The approach is twofold. There are namely suggestions for the *exclusion* of such technical solutions which bear the risk of threatening the environment, from the sphere of protectable inventions.<sup>505</sup> From the viewpoint of effective Hungarian patent law, this is a consequence which can be built on the exclusiveness of the criterion of progressive character, or because an infliction of the legal rule (the law of environmental protection) is stated. An a-shade-more-refined approach restricts the consequences of exclusion to such cases when the invention filed for the granting of a patent cannot at all be realized without effects harmful to the environment. If only the risk of such harmful side-effects can be stated as probably, this—according to the present view—must be given a detailed consideration in the specification, resp. in the course of the examination.<sup>506</sup>

In other approaches there are objections raised in respect of the above view.<sup>507</sup> The advocates of this approach refer to the circumstance that the invention does not harm the environment but the way in which it is utilized does. The progressive character of a technical solution can be estimated on the basis of comparing their advantageous and disadvantageous consequences, and balancing them. According to their view, it is *not* the task of the *law of patent* to protect the environment; it should be assigned to the competency of the *state administrative organ's* decision in licencing the carrying on of the concrete economic activity—probably also using an invention. In the course of this, the dangers of environmental harm must be

<sup>503</sup> Cf. *Kopff* (2); SZENTPÉTERI, Á. (jr.): Környezetvédelem, iparjogvédelem (Environmental protection, industrial property). *UL* 1978/10; *Szendy* (2); BÁNDY, GY.: Az iparjogvédelem lehetőségei a környezetvédelemben (Possibilities of industrial property in environmental protection). *JK* 1981/12; MAGYAR, Á.: Innováció és iparjogvédelem a környezetvédelem nézőpontjából (Innovation and industrial property from the viewpoint of environment protection), *MIE-AIPPI Conference*, September, 1979.

<sup>504</sup> Cf. *Lontai* (1), pp. 225 et seq.

<sup>505</sup> So especially, *Kopff* (2).

<sup>506</sup> *Szendy* (2).

<sup>507</sup> *Szentpéteri*, op. cit.



examined, the proper criterion of providing the licences must be set; the latter must be controlled and effectively sanctioned. They also refer to the circumstance that the patentability of inventions which are accompanied by certain environmental risks can indeed have a stimulating effect—if other advantageous qualities adequately compensate for this—on the elaboration of such newer inventions which can exclude or reduce the risks mentioned above.

There are greater chances for the protection of the environment through the possibilities of patent law (and, of course, analogously, of the law of innovations), which stimulate, by means of a *positive approach*, the creation of environmentally friendly solutions or such that are suitable for the elimination or reduction of existing harms. Such suggestions have already been formulated; e.g. for the out-of-turn assessment of inventions possessing the advantages referred to above; possibly, for granting fee-reduction, etc.<sup>508</sup>

In connection with this, the 1983 modification of Hungary's law of patent and innovation included several suggestions. Let us refer here to the possibility of the out-of-turn assessment of the filing<sup>509</sup> as a condition of which abstractly the presence of 'an important national economy's interest' is set by the legislature and in the case of which, nevertheless, it can hardly be doubted that while measuring the weight of this interest and the justifiability of the out-of-turn treatment, the viewpoint of environment protection is taken into consideration with emphasis. The directives related to innovation-invention activities also refer to the tasks of environment protection, as being among the most important areas of activity development.<sup>510</sup> It is not doubted either that among the factors that can be taken into consideration—and which, in given cases can play a part in increasing the fee—when rewarding innovators or inventors, the national economic preferences that can be ensured by the environmentally friendly solutions (capable of expression monetarily with difficulty only)—can play an outstanding part.

139. *Innovation and industrial property.* — The term innovation shares the fate of quite a few other categories (e.g. know-how), that is to say, they are used, referred to, and—in given cases—even significant documents, even in legal rules, without having a uniformly accepted definition at our disposal in this respect. Its use here as well as in a number of other examples leads to misunderstandings (e.g. that of the licence) that those working in the technical professions, or the economists, or lawyers, do not understand the same thing by the term. I will not even attempt to present the various formulations relating to the notion, or to take a position in relation to the debates; I intend only to indicate what kind of *concepts*, or *variants* can be encountered.<sup>511</sup>

<sup>508</sup> Szendy (2).

<sup>509</sup> § 24, para (3) of the Enacting Decree of the Patent Act.

<sup>510</sup> OTH-SZOT Directives 7001/1983/SZK 6, pp. 1, 3.

<sup>511</sup> Of the extremely rich literature, let us refer here only to the already classic works, by Schumpeter, Bright, Káldor. Of the also rich Hungarian literature, of SZABÓ, K.: *Innováció és adaptáció* (Innovation and adaptation). *GJ* 1978/1–2. Summarizing report delivered at the 1978 Meeting of the Department of Economics and Law of the Hungarian Academy of Sciences; BUCSY, L.: *Az innovációk rendszere és a vállalati fejlődés* (The system of innovations and company development). KJK, Budapest 1976; KÁDAS, K.: *Innováció és hatékonyság* (Innovation and efficiency). *MIE Közleményei*, 18 (the basic report at the September 1978 MIE conference); *idem*: *Innováció és iparjogvédelem a kutatásban és fejlesztésben* (Innovation and industrial property in research and development). One of the principal



Innovation is usually delimited from the simple reproduction, resp. adaptation. We can differentiate among innovations in the wider and in narrower sense of the term, that is to say, between the cases of introducing a new product, technology or of a process, on a comprehensive macro- or micro-level. The evaluation of novelty is also different, according to whether a given enterprise activity's revival (or of that of a part area) can be qualified as a 'true' innovation or only that which is also evaluated as a pioneering achievement on the world market. The term is also applied to the designation of a given system, a cycle; for indicating an innovation process, chain, or innovative approach. The theory discusses the factors which have significance in the innovation process in dependence upon the narrower or broader concept. The innovation chain can be approached either merely from a technical-economic aspect, or the analysis and evaluation can be expanded to sociological, psychological or even to political or philosophical viewpoints. The type of the approach determines the evaluation of interests, and conflicts of interest, as well as the methods used for their solution.

The notion of innovation simplified for 'legal purposes'—building rather on the wider sense of the term—can be defined as "... all kinds of technical-economic action... which brings a *qualitative change* in the quantitative growth, or results in a greater quantitative change..."<sup>512</sup> Thus, the *innovational approach* is an attempt to bring along something which is new, improved and more efficient. This characterizes modern *company activity* and also prevails in domestic *economic management*.

The innovational approach considers the economic process in unity, from research activity through the phase of realization, marketing and based on the fundamental principle that the well-oiled, intensive connections between the individual phases, links in the chain, must be ensured. The efficient innovational activity requires a *complex approach*, and the establishment of an adequate system of organizational, economic and legal terms.<sup>513</sup>

140. In the establishment of the *organizational* and economic conditions (in that of the psychological and sociological ones less so) a part not to be underestimated is played by *legal instruments*. Only as examples, let us present a few of the possibilities here.

The establishment of the *organizational* preconditions of the innovation process can be promoted by a rational legal regulation. So, the position of the domestic economic management, on the desirable company size (centralization or decentralization); on the company variants (e.g. non-profit companies, research institutes financed from company or from state budget, etc.); on the drawing of foreign organizations into the innovational link (the domiciliation of the right to foreign trading, e.g. its multi-channelled regulation) is transmitted through the State administrative norms. In the establishment of favourable organizational conditions some part can be played by the civil-law regulation,

reports at the September 1979 MIE-AIPPI international conference, entitled '*Innovation and Industrial Property*'; SZÁNTÓ, B.: A termelés szerkezetének korszerűsítése a tudáspolitikai szemszögből (Modernization of the structure of production from the viewpoint of science policy). *G* 1979/4; *idem*: A tudás-átadás felgyorsításának lehetőségei az innovációs folyamatban (Chances of acceleration in science transfer in the process of innovation). *KSz* 1982/3; *idem*: A technológiai innováció gazdasági és társadalmi összefüggései (Economic and social connections in technological innovation). *MJ* 1981/4; in the same issue cf. also the studies by J. Andics, A. Nagy and other pieces of information.

<sup>512</sup> BUJTÁS, L.: Hogyan lehetne gyorsabb és hatékonyabb az innovációs lánc? (How can the performance of innovation chain be quicker and more efficient?). *UL* 1981/22–23; *idem*: A vállalati struktúrára ható főbb innovációs tényezők (The principal innovation factors that affect company structure). Akadémiai Kiadó, Budapest 1980.

<sup>513</sup> See Lontai (17); Bobrovsky (8), esp. pp. 83 et seq.



making the variants of the associations among companies or indeed the different forms of small ventures possible and enriched. The labour-law regulations (in a wider sense, company-law regulations), can facilitate the adjustment of the company's inner structure to the requirements dictated by the innovation (the relative independence of the company's inner units, resp. the connection between them; the establishment of a rigid, permanent structure, resp. flexible solutions of organization rendered to given projects or tasks).

The *economic indices* (taxes, price-rules, customs duty reductions, subventions, favourable loans, etc.) ensuring (possibly preferentially related to) the innovational approach receive their legal forms in the financial law norms.

The legal frameworks of the *co-operation* among the individual elements of the innovational chain are established by the rules of civil-law contract (suitable contract variants; contract terms promoting the development of associations with common interests and jointly assuming the risks). In securing the subjective conditions of innovation, in the stimulation of *creativity*; the modern performance-based wage system (labour-law norms) has a part to play, just as well as the rules adequately reflecting the interests of the creative man (the law of intellectual property).

141. From the viewpoint of *innovation*, probably the most important legal area is occupied by *industrial property*. They are in close *correlation* with each other. The instruments offered by institutional and norm systems of industrial property can be used with success in all the phases of the innovational chain; consequently it occupies a honourable place in the instrumental system of innovation. On the other hand, the institutions and rules of industrial property can also be advanced usefully by a complex, innovative view.

Let us again present examples only here. A useful incentive and directive of the development of new results which make innovation possible can be the research contract. The transferability and security of research results are favourably influenced by legal protection (e.g. patent). The appropriate contract varieties (licence contract, co-operation contract, etc.) offer expedient legal framework to the flow of the new solutions among the individual links of the innovational chain. In the area of marketing, stable legal protection of certain marks (trademarks) affords some advantage. Marketing activity requires correct secure terms (rules of competition law). The stimulation of creators is served by the modern terms of industrial property (employee's inventions, stimulation of the creation of innovations). In establishing the strategy of innovation—and also at its later phases—some orientation of outstanding importance can be obtained from the documents of industrial property, first of all from those of patents, e.g. on the research trends of possible competitive partners, etc. As far as the other side of the connection is concerned, it must be pointed out that in developing a company's patent or licence strategy, great assistance can be provided by an innovational approach. This means that as early as the research phase, the whole process is in mind and while weighing (and preparing) for the likelihood of marketing, the preconditions of these are organized (e.g. by choosing the trademark, or by surveying from that viewpoints the union priority of putting into effect the possible markets for export); or, the individual—possibly diversified—research is launched in such a manner that by the time an invention reaches the marketing phase, there should be a few other competitive solutions in reserve, in a word, that the favourable situation for competition can become stabilized.

This close and organic relationship between industrial property and the innovation was *well perceived*, and especially was perceived *in time*, by *Hungarian theory and practice*;<sup>514</sup> the underlying reasons for this—the latter even in the concrete

<sup>514</sup> Cf. the material of the conference referred to in Note 511; also, REMSEY, N.: *Innovatika* (Innovation). MIE, Budapest 1986; LÁSZLÓ-DUKAY, M. (Mrs): Az iparjogvédelem és az innovációs folyamat összefüggései (The connection between industrial property and the process of innovation). *MIE Közleményei*, 26.



economic mechanism—are observable as well.<sup>515</sup> On the international plane, the recognition and admission of this positive correlation manifest themselves usually by traces only.

142. *Information; professional training.* — The activities with implications for industrial property become increasingly more complex, on national and international levels alike. Besides the traditional ways of putting legal and technical aspects into effect, such relevances come to the fore like the economic approach, an examination of the economy of the solutions and also the application of the methods of information become increasingly important. Neither the development of company strategies on industrial property, nor the state guidance of the activities in the field of industrial property can function without a modern information base, and a unified, systemized, possibly automatized, system of patent documentation should also be constructed. The elaboration of all these cannot take place if only outer experts are applied for the purpose; the construction of the applicable system also requires a special knowledge of industrial property. It is in effect more correct to state that *patent information* and *documentation* constitutes an organic part of the activities in the area of industrial property, expanding furthermore the conventional boundaries.<sup>516</sup>

The same can be said about the *training of professionals* in the area of industrial property. The activities carried out in this field increasingly require more professionals, on a mass-scale, with complex training (in technics, legal, economic and informatical matters). The organized training of such professionals—usually in the postgraduate form—can be met in increasingly more countries, and we can even witness to an international co-operation of this type.<sup>517</sup>

<sup>515</sup> See, ULLRICH, H.: L'importance de la législation sur la propriété industrielle et d'autres mesures juridique pour la promotion de l'innovation technique. *Prop. ind.* 1989/3. See, also the so-called US innovation law (Stevenson-Wydler Act 1980–1986); or, the TPB directives on the development of the economic organs' activities in industrial property.

<sup>516</sup> Cf. Bobrovsky (1), pp. 76 et seq.; HORVÁTH, S.: Iparjogvédelmi dokumentáció és információ (Industrial property, documentation and information). MIE lecture notes, Budapest 1982; *Kincses*, op. cit.

<sup>517</sup> Cf. Parragh (4); Straus (2); BOBROVSKY, J.—REMSEY, N.: Situation and Trends of Further Development of Industrial Property Training in Hungary. *Proceedings* 11–12; Palágyi (5).



## Prospects of the Unification of Law

### 1. Fact of departure and principles to be followed

143. *The necessity of co-operation.* — As has been strongly emphasized in Chapter I—and as we have attempted to illustrate in consecutive chapters—from the aspect of industrial property, a precondition of Hungary's economic development is a strengthened putting into effect of an innovational approach. The requirement of continual revival necessitates close and intensive relationship between science and practice; moreover, the encouragement of new results; and the spreading of the latter as rapidly, and in as wide a circle, as possible.

Hungary cannot afford it, either on the basis of the level of development, or the size of the country, to rely in the above endeavour exclusively on her own scientific resources. Incidentally, the striving for self-sufficiency, autarchy, is unrealistic even in the cases of countries that have achieved higher levels of development. Following from what has been said, the correct concept of development must necessarily include a co-operation of increasingly stronger intensity.<sup>518</sup> Unambiguous facts testify to the circumstance that—evidently with different weights and characters, and proportions—scientific-economic relationships develop with greater dynamism than do traditional economic ones—reflected mainly in the exchange of goods—and this trend can by all means be extrapolated.<sup>519</sup>

The part played by the necessity of *co-operation* is thus such an *essential basis* of departure that it constitutes one of the driving motives of the endeavour to unify the laws. Such co-operation may be realized on various levels and in different directions. We can mention intra-company co-operation, that is to say, within the company, which secures harmony among various areas of the company's activity, among the different phases of the links of the innovational chain. Inter-company co-operation is necessitated in horizontal and vertical directions alike. Finally, international co-operation is indispensable for bilateral relations, of regional and universal character alike, and for that matter, not only on the microlevel, but also on the inter-state plane.

144. *Harmonization of interests.* — The desirable development of innovation has a strongly *complex system of conditions*. Besides the technical factors taken in the

<sup>518</sup> Cf., especially, *Izik* (Mrs), op. cit.

<sup>519</sup> Cf. *Mádi*, op. cit.



strict sense of the words, there are structural-organizational, economic- and plant-management, moral and legal conditions which have (or can have) a part to play, in positive and negative directions alike. Here the weight of only one factor should be emphasized: the necessity to establish a suitable level of *interest*—motivation.

By not depreciating the moral driving forces, and by admitting the importance of reward by material means, *legal instruments* are first of all suitable for reflecting and regulating material incentives, and for constructing the legal guarantees of the interest.

In Chapter III a detailed analysis has been provided regarding the particular interests of the persons and organizations representing the links of a chain which play a part in the unobstructed and efficient completion of the innovation process. Such a system of conditions should also be established by means of legal instruments that ensure the *adequate interest* and motivation of *all the factors*.

All the interests, of course, cannot be preferred to at the same degree. In the earlier sections we have attempted to illustrate what conflicts of interests should realistically be reckoned with; in effect, the interests of competing partners, of co-operating partners, of the producers and consumers, etc. are not identical. Particular problems are raised by the attempt to secure the adequate interests of the creators or by the special interests of certain countries, or groups of countries (developing countries). Consequently, the realistic endeavour in the *optimal harmonization*—or such that which approximates it—in relation to the interests that can be reckoned with. As has been pointed out, the balance of interests is dynamic and varying, the decisions must be made—with an adequate weighing—without depending on the given level of development and on various other circumstances, which are the interests that are worthy of—possible temporary, transitional—preferential treatment, in a manner however which does not lead to a complete neglect of the other interest levels; they should as far as possible resolve or at least alleviate, the risks of conflicts. The elaboration of the right proportions necessarily demands a strong preparedness for compromise.

The establishment of an adequate interestedness, the ensuring harmonization of interests, depend first of all on *economic conditions*. The degree of effectiveness of the latter can be far-reachingly increased by a legal system reflecting the interests, by building up an up-to-date and adequate *legal bastion* around the interests. Although the interest can—for a shorter or longer time—be substituted with administrative organizational measures, it seems however to be more efficient and promises greater success if regulatory methods are applied which express the interest and incentives as if it were automatical. To fulfil this task, mostly civil-law methods are apt, which build upon the partners' (the interested partners') equal position. This again underscores the basic *civil-law approach* of the legal area to which industrial property belongs.<sup>520</sup>

145. *The role and necessity of the unification of law.* — International economic relations on different levels and of various types also wear a kind of suitable legal dress. Partly a precondition to, partly a consequence of, the unfolding and develop-

<sup>520</sup> Cf. Világhy (3).



ment of such international relations is the harmonization and unification of their legal regulations. The likelihood and results of a unification of law are not identical in the individual fields of law.

As has been pointed out in details by *Eörsi*, the chances of law-unification are to a great extent influenced by the individual legal systems' different traditions and particular aspects of approach; by a given legal institution's 'system-related' or 'system-neutral' character; by the degree of indirectness in its relationship with the forces of production. The chances of convergence are evidently smaller in respect of institutions attached more closely to a given country's social economic system, and political character, than in respect of regulations or institutions which have more of an instrumental function, or are legal-technical in nature. Consequently, endeavours to unify the law promise success to a lesser extent in the 'public law' sphere (but not e.g. in the field of family law either, which is strongly influenced by traditions) than in that of private law. The weight of realization of commodity relations plays a significant part in the uniform or harmonized regulation of certain legal institutions. In effect, there is no chance of convergence or uniformization of complete legal systems; practically, only partial areas can be considered.<sup>521</sup> This is also incidentally seen in the outcome to date, e.g. in the areas of transportation; or of securities, etc.; recently, The Hague Agreement on Purchases; or the Vienna Convention elaborated within the framework of UNCITRAL.<sup>522</sup> It cannot be left out of consideration either that along with the tendency towards convergence, that of divergence also has an effect—influenced by various factors—and it has occurred more than once that the practice which is formally built on a uniform legal regulation diverges from the latter.

Consequently it can be stated that the likelihood of unification of the law is not uniform, and that in the case of certain civil-law institutions, with special emphasis on industrial property, which is traditionally of an international character, likelihood is—in general—above average.

It was especially in Chapters II and IV that an attempt was made to survey the results, trends of progress, and contradictions in relation to the desirable *unification of law* regarding the *industrial property*. The minimal unification, which is necessitated the most, is ensured by the *PC* system of institutions and norms (with respect to certain specific areas, and on a lower level of universality, also by the attaching subsidiary agreements). More intensive results related to law-unification are produced by the *regional integrations* of *industrial property*. Both the universal and regional agreements—occasionally indirectly—lead to a strong approximation of certain individual countries' legal institutions. We must not underestimate the results afforded by the law-unification processes which have been instituted in the field of industrial property.

The increase in co-operation in this field justifies, and at the same time, makes further development of this law-unification process desirable. It was especially in Chapter IV that an attempt was made to outline the characteristic trends, thereby drawing the possible contours of the endeavours at issue. In what follows, a prognostication of the further chances of law-unification will be attempted, resp. the strategy to be worked out in its interests will be offered.

<sup>521</sup> Cf. *Eörsi* (1), esp. pp. 342 et seq.; SZABÓ, I.: La comparaison des institutions juridiques, *AJ* 1973/1-2.

<sup>522</sup> Promulgated in Hungary by Law-Decree No. 20 of 1987.



In the course of projecting further desirable development, distinctions must be made according to whether we can expect the possibility of a general, *universal* unification or a narrower, *regional* circle. A distinction should also be made between goals of law-unification which are achievable within a relatively *short term*, resp. such that can be formulated only as *long-term* endeavours.

While contemplating the likelihood, we shall follow the conventional manner of dividing the areas related to industrial property (technical products, commodity marks, etc.) and within these, we will attempt to throw light upon the likelihood of law-unification in general, and its probable (universal, regional) level and foreseeability in time.

## 2. The chances of unification in the legal area related to technical products

### (a) Inventions, patents

146. *The criteria of protectability.* — The criterion of *practical applicability*, as it seems, shows—with occasional differences in approach and definition of terms, —there is a kind of unity on a universal level concerning the element of the concepts of inventions worthy of protection.

The clause of *absolute novelty* can be qualified (with a few and decreasing number of exceptions) as quasi-universal. The co-operation unfolding in the fields of procedures and examinations (cf. subsection 149) is apt to successfully alleviate the difficulties of novelty-examinations, as well as the meeting of time- and manpower requirements which arise in connection with the inflation of information. Apart from certain forms of protection (e.g. patents of importation), we can say that with respect to the universal-level unity of the criterion of absolute novelty, the likelihood is very good, in the short term.

Certain *exemptions* from the requirement of absolute novelty already show a kind of universality or its availability in the near future. Such are first of all the institutions of union priority (even if as regards its duration modifying suggestions indeed become formulated), resp. the exhibitions priority, etc.

A majority of legal systems—as has been seen earlier in our explanation—do not include illegal publication in the factors for destroying novelty. The acceptance of this principle on a universal level is desirable and the real possibility of this can be envisaged.<sup>523</sup>

The experts' views are more divided concerning the favour granted for the inventor afforded in applying for protection within a certain grace period following one's own publication. The recognition of the creators' interests justifies this solution; however, the viewpoint of legal security also deserves attention, which ensures the protection of intermediary pre-users' interests—possibly by setting up special rules.<sup>524</sup> Considering the draft harmonization agreement referred to above, it seems that there is strong likelihood of a universal acceptance of this exemption.

<sup>523</sup> So, the patent law provisions of Finland, France, Japan, etc.

<sup>524</sup> Cf. the related debates, and positions, in the AIPPI Annuaire, 1981.



As regards the criterion of *technical character*, again an almost generally prevailing concept is the overstepping of the circle of technics taken in the strict sense of the term (cf. also subsection 145); especially the acceptance of the protectability of inventions falling into the field of biology, even if with respect to certain borderline issues, no mention can be made of unified rules.

Finally, as concerns the *criterion of 'assessment'* of protectability, here we can by no means speak of unified principles, approaches, resp. of unified practice—let alone the case of identical rules. As has been pointed out in Chapter IV, the popularity of accepting the aspect of the case of *non-obviousness* as a criterion is undoubtedly strengthening. It appears that, even if only on a long-term basis, the universal-level acceptance of criterion building on this principle has a chance; a regional-level unification has in part been realized, and also shows short-term likelihood in another part.<sup>525</sup>

Summarizing, we can state that in respect of the general material criteria of protectability, the *universal-level* law-unification has a very *strong likelihood* and in part, is already a sort of reality.

147. *The circle of protectable products.* — As has been pointed out in Chapter IV, a majority of legal systems of today already recognize the *product protectability* of chemicals. The universal acceptance of this concept seems to be desirable; it appears, however, that its likelihood in the short term does not exist yet. Several countries, with reference to the lower level of their chemical industries from economic-political considerations, do not anticipate, for the time being, the introduction of product protectability so that it is in harmony with the interests of development in the local industry. The arguments in favour of recognizing product protectability seem to be stronger. According to them, it is right to endeavour in this respect to reach unification at least on regional level,<sup>526</sup> not excluding, however, the growing likelihood, of universal unification.

The likelihood is even smaller that—within a foreseeable time—the inclusion of *medicines* and *foodstuffs* into the sphere of protection, or more exactly the lifting of exclusions, will be universally accepted. Several countries, with reference to strong public interests, consumer's interests—if no other counter-arguments worthy of considerations are missing either—refuse to grant protection for these articles of prime necessity. Certain unification can also be imagined in this sphere.

The protectability of *micro-organisms* is not honoured by a great number of legal systems. In principle, the spread of this concept can be imagined, but its general acceptance is supposedly the reality of only a distant future. The relevant international co-operation, procedural-technical in nature, mainly the possibilities offered by the Budapest Treaty, can undoubtedly influence the likelihood of such widening of the sphere of protection. For the time being, however, we can anticipate unification only at a regional level, at most.

The acceptance of protectability for *plant varieties* has taken place in a smaller portion of the countries. The expansion of this sphere seems to be desirable;

<sup>525</sup> On this criterion is built the Munich Agreement; in the field of the ex-COMECON law-unification, its introduction was suggested by Bobrowszky (1), pp. 210 et seq.

<sup>526</sup> The Munich Agreement unified the acceptance of product protection.



however general validity of this cannot be anticipated in the short term. This can be expected to an even lesser degree in respect of new animal breeds. In this field, unification on a smaller scale can be envisaged. It should be pointed out that such unification—also on a smaller scale—tends to be realized in the direction of particular variety protection rather than that granted by patent.

By inference let us say that the *chances of universal unification are smaller* in respect of expanding the demarcation line for the list of protectable products (inventions) varieties than those of unifying the criteria of protectability. In the judgement of the present author, the endeavour to achieve a general acceptance for product protection enjoys the greatest chance, but even this may come to realization only in the longer term.

It seems that the possibility of a universal tendency, and unification within a foreseeable time, can be stated regarding the assessment of software. It may become the prevailing practice that patentability will be excluded and the issue of protection will be assigned to the sphere of copyright.

148. *Protection variants.* — Of the protection variants, the institution of the *patent of addition* may have certain chances of receiving universal acceptance. A majority of legal systems know this institution, it has particular advantages; and its introduction in wider circles than at present is urged, although a contrary tendency is also observable.

The general spreading of other patent varieties known in certain legal systems as e.g. the patent of importation, etc. can hardly be anticipated. These patent variants offer particular advantages—determined by the level of development; the application or introduction of these variants can be expected first of all in the developing countries, resp. in the regional communities of the latter.

The institution of the *utility model* is known (and applied with success) in a growing number of legal systems. Its application offers undoubted advantages; it serves the desirable requirements of expanding the scope of protection forms; the widening of the circle in which it will be recognized can by all means be expected, but its spread on a universal level can hardly be envisaged.

The *author's certificate* has been included in the institution system of protection of only a few (ex-socialist and developing) countries' legal systems. There are no chances of it being applied universally, and even its application on a regional level (COMECON) is clearly receding into the background.

The prevailing tendency towards the enrichment of the forms of protection presumably continues; nevertheless, a universal unification can be envisaged only in relation to the patent of addition.

149. *The content and limitations of the protection.* — As regards the limitations on exclusive protection with reference to public interests, the concept is strongly spreading which in principle prescribes the entitled party's *obligation of utilization*. This principle can be considered as of almost a universal character. The same result does not apply however to the legal consequences, or sanctions on failing to meet the liability of utilization.



It can hardly be doubted that there is no chance for *compulsory licence*, the variety of sanctions which presently bears also a universal character, to be complemented with further generally accepted sanctions. In connection with the PC revision, the prospects of the acceptance of certain exceptional rules relating to developing countries and strengthening the sanctions (shorter grace periods, possibly, exclusive compulsory licence) can probably be raised, however, the possibility that they will be honoured on a universal level can almost be excluded.

In the last analysis, it can be considered a generally prevailing principle that, on the basis of emphasized *public interests*, the protected inventions can be drawn into public use, or 'expropriated'.<sup>527</sup> The cases which in a given legal system are considered related to essential national, public interests, can hardly be expected to be in the list of principles receiving international acceptance. The solutions of individual legal systems present a motley picture, namely by qualifying the interests of defence, public health, public food supply, national economy, etc. as belonging to the public interests. The determination of these closely relates to sovereignty, is of a public order character, and the widening of their scope must presumably be anticipated (e.g. the views on environment protection).

The concepts of the various legal systems are very different as to whether and to what extent the meeting of local demands by means of *importation* qualifies as utilization of the invention. The principle—emphasized especially by the developing world—according to which it is only utilization actually within the country is considered utilization, can probably by no means expect universal recognition. Here the undoubtedly weighty interests linked to the development of home industry, collide with other interests which should also be appreciated (consumer's interests, those of the entitled, etc.). The recognition of universal, unified norms is not likely; the chances of certain compromises, in the course of the current PC revision, can be imagined.

In summary, it can be stated that the sphere of sanctions ensuring a satisfactory utilization of inventions, supposedly, will not be enlarged either universally or regionally (here, of course, certain possibilities cannot be doubted).

150. The relatively drastic sanctions are less efficient for the promotion of the utilization of the patented inventions. Rather—as is testified also by the 'frequency' of the compulsory licence (cf. subsection 46)—they are apt to fulfil the function of a kind of Sword of Damocles in principle. This can also be traced back to the fact that the information provided in the patent specification is increasingly less today. As has been heavily emphasized in connection with licence contracts (cf. subsection 104), to a really successful (economic) application, the attainment of know-how-type information attached to the patented solutions is indispensable, and to guarantee this, the sanctions referred to above are in general inappropriate. The possibility of greater success is held out by means of elaborating legal instruments which provide a favourable framework and conditions for the voluntary transfer of technical solutions, thereby appropriately recognizing the interests of the patentee and the user, ensuring at the same time adequate incentives as well. Such a part is played by the institution of *licence of right* already referred to, in the case of which, in different ways—usually by granting a fee-reduction—the law offers incentives for the patentee to conclude licence contracts even from the beginning—under reasonable criterion—with anybody, by means of as if it were a non-addressed declaration. Such

<sup>527</sup> Cf. Bodenhausen, op. cit.



a solution also in principle conforms more to the civil-law character, and, according to the experience gained in practice, serves more efficiently the flow of technical solutions than do sanctions which are administrative in nature. (As a not too distant analogy, the consequences of economic reforms also reflected in the Hungarian Civil Code can be referred to, namely, the institution of preliminary contract.) The institution of licence of right shows an increasing popularity, although there are also differences among its regulatory variants.<sup>528</sup> One of the essential issues relating to different regulations in the various countries is the possibility of revoking such declarations. Non-revokability undoubtedly offers greater security, but it anticipates a change in circumstance to a lesser degree. Revokability of the licence of right reflects the changes in interests characteristic of given conditions, thereby building into the regulation, from the outset, as it were, the '*clausula rebus sic stantibus*'. (In effect, it is justifiably remarked that the institution of licence of right strongly distorts the efficiency of the monopolistic situation belonging to the essence of the patent.) There are also differences in relation to the kind of legal mechanism applied by a given legal system in order that the licence relationship can come along, that is to say, whether it qualifies the licence of right merely as a declared offer, in connection with which the agreement between the interested parties is the essential factor, or it confers a greater role on the administration, by means of a sort of 'inferior law' solution (by applying registration, information and money-collection). Differences are also experienced in the part played by e.g. a given authority in the formation of reasonable conditions, in so far as there is a dispute in this respect. In effect, no universal unification can be expected in the short term in relation to the institution of licence of rights (or even more so, to the variants of such regulation, or its details). Nevertheless, its popularity is undoubtedly growing and there is a chance for its unification on a regional level.<sup>529</sup>

151. *Procedural and technical co-operation.* — The possibility of unification in the areas of rather legal technical norms is evidently greater, and this is also confirmed by the results achieved so far. The unified solutions falling into this sphere not only serve the facilitation of co-operation and that the procedures of industrial property become easier, quicker and cheaper, but also—probably indirectly—promote the unification of substantive law.

The adoption of the unified patent *classification*, resp. the unification of filing *formalities* can be included in such results. As has been indicated, the unified classification is also applied by countries which are not formally members of the Strasbourg Agreement. In this field, universal unification can be realized in a very short time.

As regards formalities, the results of regional integration are also significant (e.g. the Leipzig Agreement in ex-COMECON relations), but the essential possibility of universality can be ensured by the spreading of the PCT model. Certain problems here also await solutions (e.g. differing evaluations of the unity of patent, or of the function of claims); in essence, however, there are possibilities, again, on a short-term basis, and of a universal character, that filing formalities will receive unified regulation.

The ever-increasing quantity of information data-banks renders patent examination very time-consuming, and labour- and cost-demanding. The endeavour *to unify the procedure*, and to carry out examinations in a concentrated way, would

<sup>528</sup> Basically, there are two variants, viz. the German *Lizenzbereitschaft*, and the British 'licence of right', that are distinguished here, but a number of lawyers also enumerate the 'open licence' used in the Polish patent law.

<sup>529</sup> The Luxemburg Agreement, and the newer West European patent codifications, which adjust themselves to this Agreement, too, have already realized this, in part.



significantly promote international co-operation in the field of industrial property. An outstanding significance attaches here to the PCT, which, by the introduction of international research and pre-examination, establishes the likelihood of making well-founded decisions for the individual national authorities. It is here that the effect of procedural co-operation on the unification-harmonization of material criteria is most obvious. The PCT system becoming universal can again be expected to be a good and short-term possibility.

Procedural-type unification—in harmony with the PCT—can become more intensive, and it shows an ever closer connection with the unification of substantive law in relation to *regional* integration in industrial property. For example, the European Patent System (cf. subsection 152) can be qualified as such an achievement.

As has been indicated, the interests attaching to stable, strong patents are increasingly pushing formal examination methods into the background, so the introduction of an actual, prior examination system can become a universal solution in the long run. As regards a particular variant of the latter, viz. the deferred examination, as reflected in newer legislation, it seems that its prominence had receded, and even the likelihood of regional unification can be viewed in this respect. This can also be observed in connection with the fact that in the case of more significant inventions, such flickering chances that extend beyond the boundaries of the given countries, the international (universal or regional) examinations are increasingly more to the foreground.

Although it does not belong to the sphere of law unification taken in the strict sense of the term, the widening co-operation realized in the field of *patent documentation and information* deserves mention. It can virtually be considered as the 'background industry' of procedural-type co-operation and unification; its role is not negligible.

The procedural, legal technical methods are relatively 'neutral'; in principle the unification of law in this field meets only a few obstacles. The chances of universal-type unification can be considered as very favourable here.

152. '*Supranational*' unification. — The optional ultimate aim of unification endeavours is a solution which allows the attainment of a kind of unified—if you like—supranational protection under identical terms and contents, within the framework of unified procedures. The universal likelihood of such a 'world patent' cannot be anticipated. The possibility, however, does exist for the establishment of a closer, *regional* co-operation. Essentially, such unification has been realized in the EC patent system (see in this respect the Munich Treaty and even more so the Luxembourg Agreement). It need not be specially emphasized that such a system also necessarily involves an essential approximation, and unification of the given countries' patent law, not excluding of course the divergence of the practice in given cases.<sup>530</sup>

<sup>530</sup> Cf. to the unification consequences of the introduction of the European Patent System, *Haertel*, op. cit.



## (b) The protection of other technical creation varieties

153. *Discoveries.* — The particular, institutionalized protection of scientific discoveries—as has already been referred to—is recognized in only a few of the legal systems of ex-socialist countries. Even though there are indeed elements in these regulations that are not easily transferable which are part of a given country's particularities, nevertheless, it can be stated in principle that the introduction of such an institutionalized protection bears undoubted advantages.

The attempts at universally unifying the rules related to the particular legal protection of discoveries do not promise success, although, the possible expansion of the membership circle established by the Geneva Conventions may have an indirect stimulating effect on them.

154. *Innovations.* — An important mass-basis of technical development is constituted by lower-level solutions of smaller importance, from the innovations. Their role in practice is of a considerably wider sphere than is reflected by statutory regulation, undertaken mainly—although not without exception—by the ex-socialist legal systems.

Supposedly the relevant institutionalized regulation by individual countries is realized on a broad scale; nevertheless, no possibility can be envisaged here for realization of law-unification on a universal level.

The ex-socialist legal systems are unanimous in the outstanding importance attached to innovation relations; accordingly, they regulate them in detail. Nevertheless, regarding the approach to be pursued towards the institution, and consequently, towards the method of regulation, significant differences are encountered. In several of these countries, the organizational-administrative-labour-law approach is dominant, while in others the civil-law approach is gaining ground. The weight of civil-law regulation precipitates the regulation of the innovators' rights, remuneration and of the fora for possible legal debates, too.

There are differences among the individual ex-socialist countries also regarding the classification of solutions that can be qualified as innovations.<sup>531</sup> A majority of the legal systems restrict the scope of innovations to technical solutions, while in other systems (especially in the Hungarian regulation), organizational solutions also qualify as innovations. Differences can also be seen with regard to the level that can be expected from the innovation, or the definition of the lower limit of creative activity. This can first of all mean the exclusion of members of certain professions (engineers, technicians) from the circle of possible innovators, resp. the advocates of this view attribute basic importance to the obligations attaching to the sphere of work. In a typical case, the lack of obligation belonging to the work-sphere is an element in qualifying the suggestion as innovation (on the solution of the new Hungarian regulation, and the foundations of its principles, see subsection 53).

155. *The protection of know-how.* — The positions of the importance of know-how in practice, and especially the part it plays in the transfers of licences, are unanimous. However, as to its definition and sphere, possibilities of its legal protection and of methods, the positions diverge to such an extent that—in the absence of statutory regulations, not including the attempts made by the Hungarian Civil Code—no formulation of a concept establishing the foundations of

<sup>531</sup> *Eminescu* (1).



unification either on a universal or regional level can be envisaged within the foreseeable future. It can also be expected on a long-term basis that the protection of know-how will have to be ensured in an *indirect* way, partly by taking into account the instruments from industrial property (e.g. the norms of competition law), so the *heterogeneous* character of the field at issue will persist.

### (c) Contracts serving the flow of technical information

156. *Contracts and law unification.* — In the sphere of contractual connections, there is a relatively great tradition of endeavours to unify the law, and these were indeed accompanied by undoubted achievements. Of the civil-law institutions, it is probably the contract which reflects most directly the structure of commodity goods relations, and this raises to a large extent identical problems, resp. leads to identical or near-standing solutions in all commodity producing economic systems.<sup>532</sup> It is not by mere chance that the early 'spontaneous convergence' appears in the legal regulation of trade relations, characteristically in the sphere of trade contracts, primarily in relation to sale and purchase. The 20th century endeavours to unify the law, so e.g. the international legal agreements on the sale of goods, in The Hague, 1964 and in Vienna, 1980,<sup>533</sup> can rely on very old traditions, business conditions, and usances. (Evidently, no small part is played here by the common Roman-law traditions, also.) Generally, law-unification has a strong likelihood in the legal regulation of contract relations. This is testified to by the universal agreements referred to above, as well as by the results of regional co-operation, e.g. the ex-COMECON GCD (General Conditions of Delivery). It is a separate question whether these chances are evidently greater in relation to individual concrete contract types than in the field of general terms of contracts.<sup>534</sup> If the general problems of nullity or of warranty are examined, the divergent solutions and approaches, outline the difficulties of a general unification.<sup>535</sup> In a word, the unified formulation of the general part of obligation—even if only in regional dimensions—is obviously a reality of the far-distant future only.<sup>536</sup> It is reasonable to target here, primarily the harmonization and unification of the regulation, of the system of terms related to individual characteristic contract varieties.

157. *Research contracts.* — It can be stated that the practice in this field shows a widening tendency and increasingly more often—especially in the ex-socialist legal systems—that its regulation in statutory law can be met, too. An analysis of regulation practice leads to the conclusion that in individual legal systems, the characteristic terms of research contracts show strong similarities, often identical, although no mention can be made of unified theoretical viewpoints as to the type of contract, or occasionally, of its place in the branches of law (government contracts).<sup>537</sup>

<sup>532</sup> Cf. Eörsi (1).

<sup>533</sup> For a detailed analysis, see RÉCZEI, L.: *A nemzetközi gazdasági kapcsolatok jogának időszerei problémái* (Current problems of the law of international economic relations). Doctoral thesis, Budapest 1983.

<sup>534</sup> Cf. Vékás (3).

<sup>535</sup> Cf. e.g. Lontai (14).

<sup>536</sup> The codification of 'the general part' of the contracts serving especially the scientific-technical development—and even that of a relevant comprehensive 'general part'—was considered possible and desirable, within the ex-COMECON, e.g. by BRAGINSKIY, M. T.: *O soblizenii i unifikatsii natsionalnykh pravovykh norm stran chlenov SEV, TPP. Materialy sektsii prava*, 34 (1983); similarly, Kanda.

<sup>537</sup> To this, in detail, cf. Lontai (4).



On the chances of law-unification it can be said that in practice supposedly further convergence is expected in the field of the usual characteristic conditions of research contracts. Nevertheless, no formal unification of a universal type can be envisaged, if for no other reason than because the area falls outside of the conventional sphere of interests to which the co-operation in international industrial property belongs. More concrete possibilities offer themselves on a *regional* level; namely, within the framework of the ex-COMECON—as has been indicated—report can be given on concrete results related to the unification of typical contract variants, and their terms, on research co-operation.<sup>538</sup> Similar endeavours emerge in the Common Market framework, even if not aimed at direct unification, but e.g. EURATOM research contract terms can exercise a direct influence on the local legal regulations.<sup>539</sup>

158. *Licence contracts.* — Virtually, the same points are valid here as have been made in the foregoing point. Widespread international practice has established very long-standing, customary, typical contract terms and clause-variants, consequently, we can speak about *unified arrangements in practice* even already today, but, formal unification on a universal level cannot be expected. Again, greater possibilities can be envisaged only on a *regional* plane, as an example, the bundle of model contracts elaborated within the ex-COMECON framework.<sup>540</sup>

159. *The terms of contracts on technology transfer.* — The endeavour to create the Code of Conduct referred to above, which has been motivated by the negative value-judgement related to certain terms of licence and allied contracts, taken in the broad sense of the term—and which is forcefully emphasized primarily by developing countries—raises the issue of the chances for law-unification as to certain banned clauses.

As has been explained in Chapter IV, there is a chance for the creation within a foreseeable time of a *universal* agreement that takes an unanimous stand concerned with the ban on *certain contractual terms*. (It is another question as to what extent the cogent character of the agreement will be acceptable or forcible; it is more likely that its character will be that of a recommendation, and moral weight for voluntary adherence will be prevalent.) A universal law-unification can thus be expected in this field, at least as to certain clauses of the banned list which has been suggested (e.g. the non-objection clause; or those restricting the transferee in his research activities or in purchasing parallel technologies). The banning of certain other clauses requires—in our opinion—a much more considered approach, and is to be assessed in connection with different criteria, not in isolation (e.g. links in material supply; certain market restrictions, e.g. related to some exportation). After all, with respect to certain banned clauses—supposedly in a narrower sphere than that appearing in the developing countries' concept—a universal unification is a reality of the future.

<sup>538</sup> Cf. Lontai (15).

<sup>539</sup> Cf. CARPENTIER, M.: Les contrats de recherche d'Euratom. *Aspects juridiques de la recherche scientifique*. Nijhoff, La Haye 1965.

<sup>540</sup> Cf. Lontai (15).



#### (d) Protection for industrial designs

160. *Practically universal* unanimity can be expected here. The material criteria of protection are—apart from small differences in regulations, resp. the strictness and consistency of the practice—in essence, identical. Accordingly, the aesthetical approach (the model of *Geschmacksmuster*) is dominant. The requirement of absolute novelty is strengthening, along with the introduction of particular forms of design-protection (although, even if only in a narrowing circle, there are still legal systems which by judging the norms of copyright sufficient, neglect the special regulation, resp. offer the protection in the form of patent). Thus, as to the content and criteria of the protection, the universal approximation of law has possibilities here in the short term. In the area of procedures and examinations this approximation is likely only in the long term, in spite of the fact that the number of legal systems which vote for the introduction of prior examinations is on the increase (the obstacles of this may be a result of the undeveloped form of the underlying information system, and the short-lived tradition of the latter).

The universal-type, supranational form of *protection* can also be met in the area of industrial design.<sup>541</sup> This provides a basis for assessing positively the chances of unified solutions in relation to formalities and procedural rules, too, even though endeavours in such direction have not been expressed as yet.

### 3. Law-unification and commodity marks

#### (a) Trademarks

161. It is in relation to trademarks that the PC clauses contain the most detailed prescriptions. Following from this, the chances of universal law-unification are essentially stronger here (in a certain circle it is a reality already today) than that detected in the legal area relating to technical products of creative work.

In what follows, some issues of detail will be surveyed.

162. *Mark-variants applicable as trademark*. — Earlier we referred to the strengthening tendency which along with the traditional marks (words and figurative designs) admits the adoptability for protection as trademarks of three-dimensional marks, of sound and light effects. It seems the adoption of this concept has a *chance of universal application* within the foreseeable future, that is to say, every mark-variant which is suitable for distinguishing articles, commodity goods, industrial products, can receive protection as a trademark.

163. *The sphere of application of the trademark*. — As could also be seen above, besides the marks applied on products, and indicating the producer or trader, the applicability of trademarks to different service variants is also covered in a majority of legal systems—also on the basis of the PC. The introduction of the *service marks* is by all means such an endeavour as promises results of a universal type.

<sup>541</sup> Based on The Hague Agreement.



164. *Protection terms.* — As regards the general conditions of protection, resp. the *impeding clauses* on the exclusion of marks from the protection, the solutions of individual legal systems show by and large an identical picture, not independently of the relevant, rather detailed PC prescriptions. In principle the legal unity on a *universal level* is already being realized here. Accordingly, no protection can be granted, e.g. to marks which imply risks of misleading or confusion.

However, *unity in principle* may often disguises *different practices*. The protection of the interests of consumers deserves to be taken into consideration with greater weight here. Although the realization of a more emphasized *consumer protection approach* can be expected, a full identity of practice cannot be anticipated. The level of the average consumer's orientation, his cultural standard, traditions, language, characteristics, etc. obviously justify the application of different measures according to an assessment of the risks of misleading or the chance of confusion.<sup>542</sup>

The widening of the global transfer of consumer goods, resp. the dynamism of tourism, thus, again—even if not exclusively—only primarily nevertheless, especially underlies among the consumers' protectional viewpoints, the effective protection of the so-called *well-known trademarks*. The 'grand' solution codified by Hungarian trademark law, that is to say, treating the possibility of confusing a given trademark with a well-known one as an absolute cause for banning it, can hardly be expected to be spread on a global level. However, the approach according to which it can be taken as a relative cause for impediment (in relation to identical or similar goods) admits of the formulation—again, not independently of PC prescriptions—that universal unity can be considered as a real target on a short-term basis.

165. *The coming along of the protection.* — As has been indicated, in the competition of two related traditional concept—viz. registration, resp. binding it to utilization—the forceful primary of the concept which advocates the constitutive character of registration can be noticed. However, the reserves, and arguments of the other concept are worthy of consideration, and not negligible, either. In spite of the registration concept gaining ground it seems that its becoming universal cannot be expected within the foreseeable future. There are, however, strong chances of such solutions becoming a basis for regional unification.<sup>543</sup>

In the course of long-term universal unification, we can with all probability anticipate a *compromising* solution. Incidentally, a majority of codifications professing the constitutiveness of registration does not interpret this principle in a very strict sense of the term either, and in the cases when registration of the trademark is neglected but the latter is actually utilized, the law provides protection ensured partly by trademark law and in part by the law of competition.

166. *The content and limitations of the protection.* — In the course of regulating the limitations in relation to the exclusive character of trademark protection, a

<sup>542</sup> To the presentation and evaluation of Hungarian court practice, cf. *Vida* (3).

<sup>543</sup> The principle of constitutive registration has become prevailing also in connection with the unified trademark of the Common Market. Cf. *Beier* (4); (5).



collision between the interests which deserve and demand recognition can be observed. In given cases, different regulatory solutions are dictated by the interests of the consumers than by those of competitors, and also the developing countries' interests emerge in particular ways.

A strengthening tendency is—similarly to the case of patent law—to prescribe the *compulsory utilization of the trademark*. It seems the establishment of the latter as a universal norm in statutory laws can be expected within a foreseeable time. The same can, however, hardly be said about the sphere and method of enforcement of *sanctions*.

There are certain possibilities of attaching as a generally accepted legal consequence, the *lapse of protection* to a failure of meeting the obligation of utilization. It is however hardly to be expected that the method—advocated by many—for increasing the effectiveness of the sanction,<sup>544</sup> namely, official control over the utilization of the trademark, will become generally widespread. It is rather the increasing application of such solutions, e.g. the requiring the submission in the course of renewal of protection, proof certifying the utilization, resp., that the revocation of protection based on the failure of utilization can be initiated—in addition to the competitors—also by consumers, resp. the organizations representing them.<sup>545</sup>

In the field of judging the utilization of trademarks, certain countries apply stricter practices, and accept only *actual* utilization, embodied in the trademarked commodity goods which appear on the market in sufficient volume, while other countries carry on a more liberal practice (e.g. Hungarian law), and judge as sufficient even the indications of “*maintaining*” character, e.g. those used in the course of advertising or business correspondence. The consumer interests (and in part those of competitors) speak in favour of the stricter concept. It appears that none of the positions can anticipate a global realization within a short time; however, the possibility of regional unification may be stated.

Similar to the case of patent law, the problem of whether the importation of a trademarked product can or is to be considered as actual utilization belongs to the preceding sphere of issues. Here again, the ambivalence of interests is manifest. From the viewpoint of consumer interests, it is evidently better if imported goods are available than if there is nothing. It is however a separate question whether the price of imported goods is higher. The fact that there is a *limitation on the importation* of products can motivate the entitled to offer a licence of the trademark to a local company. This, in most cases, implies the transfer of technical solutions as well, thus, it means an advantage to local industry. From another viewpoint, it may be questionable to what extent domestic conditions exist for the production of standard-quality goods, that is to say, for the realization of the trademark functioning as a quality guarantee. In a word, *controversial interests* and concepts on this issue clash with one another, practically there is no chance of universal realization of any of the positions. It can be imagined that the present PC concept will be maintained, possibly by making exceptionally strict regulations for certain countries possible.

A similar problem is constituted by *parallel importation* of goods, with an implication that they originate from different sources and bear identical marks; in connection with this, the requirement of the unobstructed transfer of goods clashes

<sup>544</sup> Cf. e.g. *Vida* (3).

<sup>545</sup> Cf. *Lontai* (5).



with the exclusive character of the protection of trademark. This conflict is reflected in the different assessments related to the so-called *principle of exhaustion of rights*.<sup>546</sup> Here, the interests of consumers, of the trademark owner, and of competitors emerge in a complex and overlapping way. It is less likely that a general solution on a universal level will come along, nevertheless, the prospect of *regional unification*, e.g. in the Common Market relations, does exist.

In the last analysis, the problem of the exhaustion of rights emerges in connection with all institutions of industrial property which offer exclusive right. The point of departure for finding a solution in principle here should relate to the purpose of the given right and its social function. (As has been pointed out by Eörsi, the relation to function is a theoretical 'achievement' not appearing exclusively in ex-socialist laws, so the content and character of the relation of course show significant differences in various social systems.)<sup>547</sup> The patentee or trademark owner has the exclusive right to utilize the given solution, the mark, in his economic activity and anybody else can do this only with his permission. However, he who can legally utilize the solution or mark at issue—thus, primarily by permission from the entitled—can be limited by the latter's restrictions only as stem from their agreement. If somebody e.g. obtained the right to use the trademark on the basis of a licence contract and the latter does not contain market restrictions, then the entitled cannot protest with success against his licence-buyer if the latter puts the trademarked product anywhere in the market. The function of the protection by trademark is namely not the regulation of the goods' transfer; this means that by granting the right to utilization, the entitled renounces further right of approval in other words; exhausts his right. The same is valid in relation to the patent. The buyer or the further trader of the product manufactured and put on the market with the patentee's approval is not in a legal relationship with the patentee. If therefore the licence-buyer, in agreement with the contract terms concluded with the patentee, puts the product based on the patented invention on the market, the patentee has no further business (again, only the usual regional restrictions have first of all significance here). The specifically emerging practical controversions of this general principle can rather more readily be traced back to the possible collision with other principles and norms of the given integration community (e.g. Common Market), or just to some careless contract-making.

167. *Special trademark variants.* — The majority of theoretical works which analyze the functions of trademarks agree on the fact that its function guaranteeing the quality of the product can legally be reflected only indirectly. However, trademark law recognizes such an institution, a special trademark variety that is apt for the direct realization of this function. This is e.g. the *certification mark* (partly, the collective trademark is also suitable for this).

A number of legal systems have either inserted certification mark into its regulatory system or—even in the absence of a definite regulation—apply it in practice. The introduction of the certification mark is urged with emphasis by consumers' interests. As a result, we can anticipate—parallel with the consumer protection approach gaining ground—an increasing popularity of the certification mark, and that it will become *universal in the long run*.

168. *The trademark being linked with a company.* — The trademark indicates a relationship between a commodity (or service) and a company. This relationship—indirectly—offers a guarantee of the commodity's good, stable quality. It is

<sup>546</sup> Cf. Ulrich, op. cit.

<sup>547</sup> Eörsi (1), pp. 340–341.



therefore an essential interest of the consumer that he must receive correct information regarding this relationship. Basically, this interest is in favour of the traditional concept of trademark law, of the trademark being linked with the company to negate, the *independent transferability* of the trademark.

As has been pointed out earlier, a strong erosion of the traditional concept is noticeable. A majority of newer legislation recognizes the independent transferability of the trademark and also its licenceability. Supposedly, this concept has a prospect of becoming universal in the long run. However, consumer interests justify the inclusion of certain *restrictions*. Such can e.g. be—in an indirect way—linking the sanction of invalidity to transfers or licences which can lead to the confusion of consumers, resp. the elimination of such abuses by either direct prescriptions, or by making the application of supplementary marks compulsory.

169. *Procedural issues*. — As in the case of the co-operation which is unfolding in the field of patent, the harmonization of the trademark law can to a great extent also be promoted by unified *classifications*, possibly by the simplification and unification of *formalities*, or the introduction of international *procedures* similar to that of the PCT system. The latter is a more complicated task, considering the fact that in practice, the more or less uniform absolute impeding causes adjust themselves to local particularities (the chances are that confusion will occur), on the one hand, and the broader local sphere of the relative impeding causes, on the other. Here the *prospects of law unification are slight* for the time being.

Regarding the trademark procedures of individual countries, the picture is rather heterogeneous. The group of countries whose legal systems are based on the principle of application for registration have significant positions as yet, nevertheless, the contours of an increasing part played by the principle advocating the practice of prior examinations shows in modern legislation. In the sphere of prior examinations, too, the authoritative examination of first of all the absolute impeding causes is typical, while the examination of the relative impeding causes takes its turn only on request by interested, competing, parties. In the short term it is less likely that the—otherwise approvable—prior examination will become general.

170. *Trademark protection of an international character*. — International, or let us say, supranational trademark protection is also possible at present. The basis of this was established by the Madrid Agreement, and it seems with the 1989 Madrid Protocol entering into force, the utilization of this possibility will show a *more dynamic development*.

The introduction of trademark protection on a *regional* level also promises advantages. As has already been indicated, the Common Market's unified and international trademark has already entered into force, although after a long preparatory process, not free from conflict.<sup>548</sup> The success for such endeavours to unify the ways of protection cannot be excluded in relation to other communities' integration either.

<sup>548</sup> Cf. *Beier* (4); *Ulrich*, op. cit.



## (b) Geographical indications

171. An important, but delicate, sphere of problems, with an implication of common points for several conflicts of interests is the protection of geographical indication, namely, the unification of the relevant regulations.

As has been indicated in part in Chapter II, in connection with the PC current revision, and in Chapter IV, too, it has been especially by the developing countries that requests reflecting their special interests in connection with geographical indication have been formulated. The assessment of these interests implies also the indication that an approvable request for an *increased protection* of geographical indications deserves recognition if it covers endeavours *universal* in nature.

Within the framework of Chapter II, the results of the Lisbon Agreement were presented, which serve the international protection of appellations of origin and it was underscored in Chapter II that a considerable expansion of the scope of participants would be desirable. It seems that an obstacle in this way is the repeated occurrence of sharp clashes among national interests. Such *conflicts of interests* also obstruct on a regional level the more efficient and unified protection of an indication of sources and origin.

The analysis of the facts leads to the inference that—beyond the results laid down in the Lisbon Agreement, and, possibly holding out bright prospects of certain further development—no real possibility can be detected either on a universal or regional level for constructing a unified system of more detailed protection for the appellation of origin. For a considerable length of time, it seems, *bilateral channels* offer more favourable possibilities of increasing the efficiency of the protection.<sup>549</sup>

Regarding the forms of protection for the indications of sources or appellations of origin, it can be stated that the codification of a termed special protection has been undertaken by only a few legal systems. Even if the prospect of an increase in this number does exist, it is to be anticipated that in the long term, too, the protection can typically be ensured in an *indirect* way, e.g. by the instruments of trademark law or the law of competition. The international minimum norms of the latter are laid down in the Madrid Agreement by prescribing the ban on the false indication of source and origin.

## 4. The chances of law-unification in the field of competition law

172. *Prima facie*, the field of competition law holds out the slightest hope for success with respect to law-unification endeavours. This legal area consists of extremely *heterogeneous* categories. Different concepts, approaches, and methods prevail, which are difficult to govern by unified principles. Vörös's convincing arguments prove well the controversial nature of the concept on 'unified law of competition'.<sup>550</sup> Antitrust law, the law of the control of competitions (cartel law)

<sup>549</sup> Cf. Bognár, M. (6).

<sup>550</sup> Cf. Vörös (1).



is difficult to bring under equal terms with the mass of traditional norms targeted to fix fair rules of the game among competitors who are essentially identical in position and potential strength, and to ban unfair competition. In the last analysis, their unification in principle and theory can be brought about, as is indeed successfully attempted by Vörös, in his category termed 'the law of market behaviour'. However, the degree of abstraction of this category holds out to a lesser extent the promise of reflecting the transposition of substantive law into such concrete rules that can be effectively meet the demand of the unification of law.

Special difficulty arises due to the *many-hued nature* of the area of the rules of competition law and because of the latter's state of being scattered in various legal branches. Besides, an extremely strong movement is taking place in this legal field, which is closely linked to the economic-political changes in a given country. The norms of competition law express in the most direct way the intervention of the State and represent one of the foremost legal weapons of this intervention.

For a comprehensive law-unification, there are vistas open to certain *partial areas* at most. Presumably, the principles and rules, few in number, which are fixed in the PC, are the achievable results in law-unification that can according to conceivable perspectives be optimally expected. Further possibilities are offered by the universally increasing *consumer-protection approach*. The endeavours of the latter can lead to the formulation of some such generally acceptable principles or rules that are suitable for effective inclusion in the law of competition.

In certain *regional* communities, the possibility of unifying the law of competition can be anticipated, too. One of the most consistently established areas of the Common Market norm system is aimed at the regulation of competition.<sup>551</sup>

## 5. Law-unification or law-harmonization?

### (a) The methods of law-unification; its advantages and difficulties

173. Law-unification is not a purpose in itself, not a sort of mental sport in the lawyer's line, although participating in work of such kind undoubtedly means a kind of successful mental enjoyment. The aim of law-unification is to promote with its particular instruments and methods, the *establishment of an arena* in which the participants of international co-operation feel well and can pursue the realization of their own purposes according to more or less identical rules of the game; they can endeavour to serve their own interests, in principle, in a manner not or only slightly strained by the countries' boundaries.

The highest-level method of law-unification is undoubtedly the bringing about of identical *legal norms* in respect of form and content alike. This can take place either in such a way that the international agreement is transformed by some national legal norm, or that—without such a preceding action, formally independently—identical legal rules are enacted in the national legal systems. It may also

<sup>551</sup> In detail, cf. *Mádl* (1).



be that the international legal norm enters into force without any national legal transformation, directly.

The formal law-unifications—along with their undoubted advantages—are not free from certain stumbling blocks either. Attention will be called here only to two circumstances.

One of the facts is that—following from the abstract character of legal norms—even the textually identical, unified norms provide opportunity for different interpretations, and, accordingly, for the unfolding of a not fully identical application in practice. If given legal systems, on the issue of e.g. the criteria of patentability, accept the principle of non-obviousness, it is by no means certain that all offices for examination will uniformly perform their qualifying activity related to the non-obviousness of the filed invention. Or, as has been seen, the confusability of trademarks—depending upon the model of a given country's general consumer—can receive different evaluations even on the basis of identical norms. Cases of experience indicate *divergence in practice* built on textually identical legal rules.<sup>552</sup>

In the case of formal law-unification, the problem of attaining conformance so that the norm at issue will adjust itself to a given legal system is not easily resolvable. The *inner logic of the legal system*, its traditional concepts, the link stemming from the structure of a legal branch, the differences of the underlying mother-law branches, also lead to distortion and reduction in the degree of efficiency in achieving the aim targeted by law-unification.<sup>553</sup> It is important, namely, whether a legal system categorizes a given legal institution as belonging to its branch of civil law, or that of administrative law, of economics, labour law, etc. The administrative-financial environment can sensitively influence, in practice, the realization of essentially identical civil law regulations which are based on substantive law. So the criteria of licence contracts which are very near in content to one another come to realization differently in a legal system where the establishment of international relations is not or is only to a slight extent restricted from that to be experienced where State control of foreign trading powerfully prevails. So in the course of realization in practice, identical legal rules not infrequently lead to different consequences. Examples of contrary cases can of course be found, too. In analyzing e.g. the Western legal material on 'consumer protection', we can state that legal 'arms' of frequently identical aims and content are placed by the ex-socialist legal systems into the arsenal bearing the denomination 'quality protection'.<sup>554</sup>

174. While not underestimating therefore the possibilities of direct law-unification (the area of industrial property is in general more suitable for this than the average), we must utilize in a complex approach the method of *functional law-unification*, which of course requires more shaded and complicated work in its application. In the course of this, in the interests of the common aim, that is to say, in order

<sup>552</sup> Such experiences can be inferred from the practice of e.g. the Benelux trademark, cf. *Braun*, op. cit.

<sup>553</sup> Cf. *Eörsi* (1), esp. pp. 196 et seq.

<sup>554</sup> Cf. *Lontai* (5).



that essentially identical conditions of operation, protection, and position can be ensured for the co-operating partners and other interested participants, the application of different methods, which are nevertheless of identical efficiency, is desirable. (The functional approach is an adequate modern method of comparative law, too.<sup>555</sup> This is not accidental, since the activities of comparative law constitute the theoretical basis preparation for occasionally the driving force of the endeavours for, and law-unification, and the results achieved in unification—harmonization feedback no less fruitfully in effect to the methodology of law-unification.) Let us clarify this by means of a few examples.

The expansion of the circle of product varieties worthy of protection is desirable, and, within this, e.g. also a more efficient legal protection of the developmental activities and results related to new *plant varieties*. This can be constructed by administrative methods or by a civil law approach. Within the latter, according to codification experience, a patent can be taken into consideration (either in its conventional form, or in that of the so-called plant patent, special patent), resp. the certificate of variety protection which is regulated as a separate institution. Considering that the two institutions are almost identical in content with respect to the criteria of protectability, to the legal structure of protection, and time of protection alike, it can be stated that in the last analysis, we are dealing here with two such forms of protection that formally are different but ensure fully-valued convertibility. This equivalence is also recognized by the UPOV.

The protection of *discoveries* is in certain countries solved by the introduction of special legal institutions: these set up presumptions regarding the discoverer, resp. the priority, on the one hand, and grant substantive rights to the discoverer for moral and material-type allotments. Hungarian law, with the assistance of copyright law, is apt to partially guarantee these preferences. It does not however provide substantive rights to material benefits; here the provision is held out in prospect only in a strongly mediated way, by the possibility of granting various State prizes, and by placing the case in the decision-maker's discretion. However, in case of a possible international agreement directed toward the protection of discoveries—naturally, depending on the content of the agreement—Hungary can with great probability meet the international obligation to be undertaken, even on the basis of the present regulation.

The consumer's right to be informed on the *origin of goods* is appropriately ensured also by the norms of trademark law, but a possibly more efficient protection of the interests attaching to that can also be guaranteed—without making the former superfluous—by administrative means, namely by obligatorily prescribing the indication of data on the goods and by official supervision of the latter.

175. As is clear from what has been said above, the unification of law which is desirable in the course of co-operation for industrial property, does not always require or make direct unification possible. So *in many cases* functional unification, virtually, the *law-approximation* or harmonization is the *desirable method*, which—precisely because of its conformity to the particularities of a given legal system and as a consequence of its more organic infiltration into that system—can guarantee a greater efficiency in practice.

It is hardly fortunate to set a value hierarchy of principle between law-unification taken in the strict sense of the word (direct unification) and harmonization. There are viewpoints according to which harmonization is nothing but 'a miscarried law-unification',<sup>556</sup> that is to say, where we do not succeed

<sup>555</sup> Cf. Eörsi (1), pp. 283 et seq.

<sup>556</sup> So, Réczai, op. cit.



in creating unified common norms, *faute de mieux*, let us harmonize the norms. This is a summary and simplified thesis. In my judgement, the two tendencies offer equal variants of an approach toward identical aims. The common aim is to achieve that on the basis of identical state of facts, and possibly with as wide a scope as possible, we can anticipate identical legal consequences, that is to say, to achieve the *Savigny*-type harmony of decisions (explained in connection with international private law, but it can be generalized and is by no means a wornout concept).<sup>557</sup> The characteristics of the given legal area will decide which of the methods serves the desired aim better: whether it is the formal or the functional method. Obviously, to answer this question, a considerate analysis is required by paying great attention to the inner coherence of the given system(s), occasionally even to metajuristic factors. It can even be said that the two—theoretically competing—methods are variants of equal rank of the category of law unification taken in a wider, more modern sense of the term.

176. *Private international law and the unification of the law.* — In areas where the unification or harmonization of substantive law has not had its turn, 'the harmony of decision' can be far-reaching and conventionally served by the rules of private international law. The latter is international in its nature, and is—as it were—the 'antechamber' of law-unification; it is apt and competent to fulfil its harmonizing function for the foreseeable future. This role can only be strengthened by the theoretical concepts which by debating the 'maimed' character of the norms of private international law, see the norm formula of the connecting rule as being in unity with the foreign legal rule invoked in this way.<sup>558</sup> Accordingly, even the collisional concept taken in the modern sense is far-reachingly apt to serve the unification of law. The same refers all the more so to the concept—considering an increasingly broader camp as of its own, although it richly provokes theoretical debates relating to legal systems—that does not narrow down the area of private international law to collision norms, but includes also the increasingly broadening legal area of 'international economic relations' to this category.<sup>559</sup>

With respect of the harmonizing and 'gap-filling' role of private international law, we can only agree with *Vékás's* concept; accordingly, "in formulating the collision norms, all the countries should accept and realize such general criteria as in given cases are apt to be applied internationally, that is to say, to be adopted by some international convention as well . . .".<sup>560</sup>

Although there are several international agreements in force—and transposed also into Hungarian law—(cf. esp. Chapter II) serving the direct unification of law, yet, the application of connecting rules of private international law has not infrequently had its turn (e.g. the law to be applied in relation to licence contracts, etc.).<sup>561</sup> The Hungarian Code of Private International Law, Law-Decree No. 13 of 1979, reflects in general satisfactorily the solutions accepted internationally; it is a modern regulation which adds to the useful depository of legal instruments available for the protection of industrial property.

## **(b) The main principles of law unification, and the harmonization of laws**

177. The unification of the law can thus take place in various areas, with different methods, on different levels and with varying intensity. It is in general a necessarily occurring requirement of international co-operation. Let us now try to outline what the principles on which it is desirable to build in formulating the policies to be followed with respect to law unification or harmonization. Three main principles are considered essential: preference to universality; guaranteeing the unity of domestic law; the principle of voluntariness and gradualness with respect to unification.

<sup>557</sup> In detail, cf. *Vékás* (4).

<sup>558</sup> Cf. *Vékás* (4).

<sup>559</sup> Comprehensively, *Mádl-Vékás*, op. cit.; *Vékás* (4); *Eörsi* (3); *Mádl* (2).

<sup>560</sup> *Vékás* (4).

<sup>561</sup> Cf. *Bobrovsky* (2); *Mádl-Vékás*, op. cit.



178. *Preference to universality.* — The advantages stemming from the existence and expansion of international co-operation dictate that in the field of industrial property, *universal-type unification* or harmonization should primarily be urged. The protection of the unity achieved so far, and its possible further development is *desirable*. Naturally, in the course of this activity no disregard of the realization of *essential national interests*—perceived in a good sense and on a long-term basis—can be accepted, but in the interest of the advantages held out by internationality, a high degree of *willingness to compromise* must be offered. This makes a flexible assessment necessary, which takes into consideration the various demands on the part of developing countries which reflect their real interests. However, this should not be done at the expense of the essential principles of the results achieved so far suffering radical modification.

The advantage of harmonization which serve regional co-operation and closer integration should also be taken advantage of, but care must be taken so that *regional co-operation for the unification of industrial property should not cause a conflict with the interests attaching to universality*, and e.g. that the regional harmonization must continue to conform to the PC.

Modern regional regulation is built on real demands; in principle it does not hurt the interests attached to universal-type unification. Still, the possibility of danger arises that regional regulation “beyond a certain quantity supersedes the possibility of universal regulation... if the world becomes as it were ‘saturated’ with regional regulations, will it not lead to a state that these countries will become devoid of interest, in the acceptance of the universal regulation...”<sup>562</sup> The economic literature also emphasizes to the harmful consequences of a possible ‘regional autarchy’.<sup>563</sup>

179. *Ensuring unity of domestic law.* — The product of either universal- or regional-level law-unification must not become an alien body within the legal system concerned. Such a state can be maintained for a short, transitional period at most. Unification of patent law in the Common Market countries or West-European countries especially offers a good example. The Munich Agreement has led to the—often significant—transformation of domestic patent law of the participating countries.

The harmonization of the law on an international level thus exerts a—direct or indirect—*effect on domestic legal systems*. However, the demand for conformity of the domestic transformation and its appropriate inclusion into the concrete legal system must also be taken into consideration here.<sup>564</sup> This requires the modification of domestic law not only with respect to the closely concerned legal institution, but radiates into areas of other connecting norms (e.g. legal rules of foreign trade, finance, etc.).

180. *The principle of voluntariness and gradualness.* — In the field of law-unification and law-approximation, cogency must be restricted to the necessary degree; along with the fixing of certain essential rules, it is desirable to *increase the*

<sup>562</sup> Réczei, op. cit.

<sup>563</sup> Cf. esp. Bognár, J. (1); KERÉKGYÁRTÓ, GY.: A KGST szerepe a megváltozott világ gazdasági környezetben (The role of the COMECON in the changed world economic environment), KSz 1981/10.

<sup>564</sup> Cf. Eörsi (1), pp. 358 et seq.



proportion of regulations which also offer dispositive, possibly convertible variants including recommendations. Again, reference can be made here to the possibility of choosing between patent or variety protection.

*Law-unification is a long-term endeavour.* The fact that in certain areas, no universal-type unification can realistically be anticipated within a foreseeable time (several examples of this were produced in the preceding subsections), does not exempt a given country from carrying out the *introductory activities* that can be expected in such cases, with an eye toward long-term harmonization. The various tendencies must be accompanied by due attention and possibly should be reflected in the domestic law, thereby establishing the conditions for subsequent and successful law-unification. According to experience, the experiments realized in smaller circles and *regional* frameworks constitute good preparation for law-unification on a universal level.

The endeavours to unify laws on a gradual, short or long-term basis make the conscious banking of the experiences and their assessment, theoretical analysis well as, possibly, the initiatives serving the harmonization of laws, desirable. Meetings and organizations like the AIPPI—of non-governmental character—which assemble the specialists of science and practice can serve as good fora for these endeavours.



## Conclusions and Suggestions in the Field of Hungarian Law

### 1. Hungarian regulation of industrial property

181. *Characterization of the recodification of the industrial property.* — After the Second World War, resp. the establishment of the socialist socio-economic system, a codification took place which, primarily from the viewpoint of the legal superstructure, bore greater importance, usually comprising whole legal branches. In the law-maker's judgement, industrial property, and in general the legal area of intellectual property, did not belong to the category of the most urgent tasks of codification. Even though there were concepts and suggestions formulated and drafts elaborated, a comprehensive new regulation of this legal area had its turn only in 1969. Until this time, relatively old norms were in force which—with slight modifications—had served for several generations.<sup>565</sup>

Although according to well-founded opinions, recodification could have taken place and would have been necessary even earlier, the choice of time depending also on eventualities—was accompanied by several advantages. Let us emphasize only two points here. In 1968, the introduction of the comprehensive reform of the economic mechanism took place, while in 1967 the Stockholm revision of the PC had its turn. This made it possible for the new regulation to be based on the newest results of the system of *international* protection of industrial property, and on its observable *tendencies*, on the one hand, and could successfully contribute to the establishment of a *mechanism-conforming* regulation on the other. Naturally, it relied to a large extent on the accumulated court practice experiences and on principles formulated in the legal literature.<sup>566</sup>

The most important land-marks of the *recodification* carried out in 1969–1984 are as follows. (In 1968, the general conditions of research contracts were issued by Decree No. 1/1968/I.11/OMFB, but this issuance already belonged to the recodification 'wave' at issue.)<sup>567</sup> In 1969, the patent law (Act II, 1969), and the

<sup>565</sup> For the pre-history of codification, cf. *Lontai* (3); (16).

<sup>566</sup> It is especially *Világhy's* (2) position of principle and theory that is reflected in the codification.

<sup>567</sup> In the course of the reform in 1977 of the Hungarian Civil Code, Decree No. 1/1968 OMFB was annulled; the provisions relating to research contracts received their place partly in the Civil Code, partly in Decree No. 7/1978/II.1/ Council of Ministers on economic organs' delivery and work contracts. Basically, this meant merely structural-technical changes of legal rules; as regards the contract conditions no radical modifications have been instituted. Cf. to this, *Lontai* (8).



trademark law (Act IX, 1969) were born (and, in the same year the basic code of the other legal area of intellectual property, namely, Act III, 1969, on copyright, was issued). The innovation law was recodified in 1974 (Decree No. 38/1974/X.30/MT); in 1978, the 'doyen' of the legal area, namely, Decree No. 107709/1907. KM which had not been the most up-to-date decree even at the time of its codification, was replaced by the law on the protection of industrial design (Law-Decree No. 28/1978). As has already been indicated, Hungarian patent law was modified, and innovation law recodified in 1983.<sup>568</sup> Reference must also be made to the modification of the Hungarian Civil Code in 1977, an important provision of which—beyond others related to industrial property—is the declaration of the protection of know-how, which has already been referred to above. The recodification of the area of industrial property ended with Act IV of 1984 on the prohibition of unfair economic activity.<sup>569</sup>

The outstanding characteristics of the Act can be summarized as follows:

— It offers a kind of codification which reflects modern, international tendencies (justified also by Hungary's export-orientation).

— It is in harmony with the concepts and long-term endeavours of Hungary's economic management system, as well as with the conditions of a modern market economy.

— It luckily amalgamates the characteristic—internationally and historically developed—trends of regulation by competition law, aimed at the prohibition of unfair competition activities; the inhibition of the abuse of market superiority; the protection of the consumer's interests. It oversteps the traditionally narrow model of competition relationships and endeavours to realize fairness in general market behaviour.

— It establishes the organizational-procedural methods to realize the regulation.<sup>570</sup>

Very recently two important acts have been promulgated, Act XXXVIII of 1991 on the utility models and Act XXXIX of 1991 on the protection of integrated circuits (in harmony with the Washington Treaty of 1989).

The modernization of the Hungarian industrial property system has been on the codification agenda from 1987. Hungary's obligations assumed by the association agreement concluded with the European Union as well as the results of the Uruguay Round of the GATT, but mainly the bilateral agreement on intellectual property between Hungary and the USA (signed at 24 September 1993) accelerated the codification process. Act XLIX of 1994 (entering into force from 1st July 1994) on industrial property and copyright has amended the whole field of intellectual property. As regards industrial property, the most important modification is the introduction of product patent for chemical, pharmaceutical and food products, with some transitional provisions.

182. The recodification of Hungary's industrial property contains several principles which reflect the characteristics of the Hungarian social system, and at the same time recognize several international tendencies (analyzed in detail in Chapter

<sup>568</sup> To the newer regulation in 1979, cf. *Bobrovsky* (7).

<sup>569</sup> Cf. *Vörös* (2); (3); *Lontai* (16).

<sup>570</sup> To the concepts on codification relating to further development, see *Vörös* (4). Completed by Act LXXXVI of 1990.



IV). In what follows below, a few of the *main features* prevailing in the field of industrial property (and even in the whole legal area related to intellectual property) will be surveyed.

(a) The scope of protectable products, resp. interests, has expanded. So, e.g. new plant and animal varieties are protectable; besides the technical solutions, those of an organizational type may also qualify as innovations.

(b) The character of protection consistently reflects the civil-law approach, and brings about rights with absolute structure and exclusivity.

(c) Similarly, the system of proprietary rights, and those relating to the creator's person, has also been established consistently and in detail. This is set forth in the innovation decree, too.

(d) As a counter-point to the personal and proprietary rights, a detailed regulation expresses the social purpose of the protection, by including restrictions which serve the public interest. The patentee's incentive to utilization is the possibility for compulsory licence. Failure to utilize a trademark can lead to the lapse of the protection.

(e) The entitlements related to solutions which can be applied in the employment (labour) relationship are the subject of detailed and modern regulations, as regards remuneration and the secondary right of disposal as well.

(f) The legislature codified the dynamics of the legal relationship by stating the most important criteria with respect to the usual contracts (research contract, licence contract) applied in the field of industrial property, thereby underscoring again the significance of the civil law approach.

(g) It is of significance of a guarantee that the question of deciding in any legal dispute concerned with essential issues of a given legal relationship (the existence of protection, infringement, rights of person, employment character, remuneration, etc.) belongs in the competency of the courts, or if it does not belong there, the supervision by courts of the decision made by the given state-administrative body is possible.

(h) Very essential principles, relating to the whole legal area of intellectual property, namely, to the so-called borderline problems as well, are laid down in the article added of the year 1977 to the Hungarian Civil Code, e.g. the gapless protection (Paras (1) and (3) of §86), and the possibility of parallel, cumulative protection (Para (1) of §87).

Summarizing, it can be stated that in the field of industrial property, Hungary has a *comprehensive* and *modern* codification at its disposal. This does not of course mean that further developments, certain modifications, or additional codifications are not necessary.

183. *Connection with the international system of industrial property.* — Hungary is traditionally and necessarily a conscious and active participant, and occasionally an initiator in the development of international relations falling in the arena of industrial property. As has been indicated in Chapter II, Hungary is a member country of the *PC*, on the basis of the newest, Stockholm, text; and is participant in most of the 17 *subsidiary agreements* (in some way, i.e. either as a member, or at least as a signatory). Let us add that the prescriptions of the Strasbourg



agreement (patent classification) are applied in the Hungarian practice, although Hungary is not a formal member.

The modernity and standard of Hungary's system of protection for industrial property are in general also admitted abroad, and the country's expertise in industrial property enjoys appropriate respect in the fields of both universal and regional co-operation, resp. in the activities of the AIPPI and similar organizations.<sup>571</sup>

## 2. The Hungarian approach towards the international industrial property endeavours

184. *Characteristic features of Hungary's situation.* — Here it should be emphasized that owing to the conscious aims of Hungary's economic development as well as to its potential, *international relations* and *co-operation* acquire outstanding significance.<sup>572</sup> The technical development relies to a large extent to results achieved in other countries, and a considerable proportion of this can be obtained from the developed capitalist countries.<sup>573</sup> The import of *East-West relations* is reflected in the data of licence turnover,<sup>574</sup> and is also reflected by the statistics on patents, according to which more than half of patent applications are from foreign countries and within this, the majority originates from western countries.<sup>575</sup>

This relationship is not unidirectional. Traditionally competitive Hungarian sectors (the pharmaceutical industry, telecommunication techniques) apply for patent registration in great numbers in the West.<sup>576</sup> In a word, the economic connections of Hungary underscore the importance of intensive participation in international industrial property co-operation.

This recognition is also reflected in the activities of Hungarian social organizations in the service of industrial property. The Hungarian Sections of the AIPPI and MIE have organized eight occasions successful international conferences since 1969. These usually put well-selected, timely issues on the agenda, as shown by the rate of participation.<sup>577</sup>

185. *Principles of the Hungarian industrial property policy.* — The principles qualified in Chapter V (cf. Points 175–178) as those which are generally to be

<sup>571</sup> About this, *Á. Bogsch* (MIE Közleményei, 30) at the event of his election as an honourable member, spoke with appreciation, in the Jubilee Assembly of MIE.

<sup>572</sup> Cf. *Fahvégi*, op. cit.; *Bognár, J.* (4).

<sup>573</sup> Cf. *Izik* (Mrs.), op. cit.

<sup>574</sup> Cf. *Mádl*, op. cit.

<sup>575</sup> So, of the patent filings in 1989, more than 60% were applications from foreign countries, and cca 80% of the latter from capitalist countries. Cf. SZK 1990/3.

<sup>576</sup> It is worth remarking that some 30% of the filing which were made abroad in 1989 were according to PCT.

<sup>577</sup> Some 170 representatives of 30 foreign countries took part in the 1982 MIE–AIPPI Conference on economic efficiency and industrial property rights protection. Cf. LONTAI, E.: Economic efficiency and protection of industrial property (International Conference, Budapest, September 13–17, 1982), *AJ* 1983/1–2.



observed, and must also be considered directive from the viewpoint of the policy related to Hungarian industrial property. Accordingly, in the course of participating in international co-operation and the elaboration of the rules to be applied in the industrial property, the principles of unification on a *universal* level are considered by Hungary as of *basic* importance—while keeping in mind Hungary's particular (national economic and enterprise) interests. Similarly, in the course of elaborating a closer regional co-operation, which is also considered essential, we urge solutions which are in harmony with the universal connections, to complement and enrich the latter. Hungary follows with increasing attention the progress of West-European integration and endeavours to establish conditions of joining it or at least a close co-operation with it.

It must be emphasized that it is not only Hungary's present situation and a consideration of her interests that are the guiding principles in the assessment of law-unification endeavours, but in the course of fulfilling all the above-mentioned aims, the prospects and targets of *long-term development* must also be kept in view.

These possibilities and the principles built on them determine our viewpoint with respect to the assessment of tendencies in universal and regional co-operation, and to the formation of our domestic legislation.

### 3. Evaluation of the universal law-unification

186. *The expedient viewpoint in connection with the PC revision.* — It is our position that—without an alteration of the essence of traditionally developed principles—the justifiable demands of *developing countries* must be supported, in a way and to such an extent of course as is made possible by the natural characteristics of the given institution for the protection of industrial property.

So, we cannot consider the introduction of preferential treatment with a general character as right. The *maintaining of the principle of national treatment*—in our opinion—serves the widening of international co-operation more advantageously, and anyway—a fairly large part of the recommended preference is hardly suitable for an essential improvement of the position of developing countries. More appropriately, it can be agreed if the rapid development of the infrastructure (information base; supply of proficients) in the field of the developing countries' industrial property is established—either by means of bilateral agreements or internationally concentrated efforts. In certain areas, the establishment of *preferential treatment*, or particular regulation possible is acceptable—as a compromise—but only with a *transitional character*, to include it in the PC system of norms, or in a separate agreement.

In principle, it can be approved if in respect to the protected solutions (first of all the inventions) the *liability of utilization is strengthened*, and the sanctions securing this are made stricter. It is questionable whether the principle of the *restriction of importation* is well founded, that is to say, a formulation of its relevance in general and in principle from the viewpoint of utilization is needed. Presumably, our national economic interests—in many cases—are contrary to the



acceptance of such positions. Here again, in the interests of saving the unity of universality a certain kind of compromise can be imagined, namely the exceptional authorization of individual countries to a stricter domestic regulation in this direction, possibly also with a transitional character. It is very doubtful whether it is indeed the regulation in the area of industrial property that is assignable to restrict the abuses, manifested in this field, on the one hand, and the experiences of certain developing countries regarding their more radical codification testify to the falling back to a great extent of foreign filings, that is to say, to the narrowing of international co-operation, on the other. This nevertheless is hardly a desirable consequence.

The Hungarian position is constant and unambiguous in respect to the *colonial clause*. In principle, the endeavour is also honourable which is directed towards the introduction of the *principle of majority*. It should be noted, however, that even if the majority principle is laid down according to the sense, consent is to be achieved in practice, since it is voluntary compliance only that can guarantee the effective realization of the agreement.

The endeavours directed towards an *increased protection of geographical indications* are in full harmony with our national interests. These—either within the PC framework, or, which is presumably the road that can be taken, on the level of special subsidiary agreements—must be supported, still, with the restriction that in this respect the providing of preferences is less justifiable. The ensuring of increased protection must be on a universal level.<sup>578</sup>

It is useful to emphasize that although it is not an issue belonging in the sphere of law-unification, the *activities* and initiatives of the international organization for the protection of industrial property (*WIPO*) as are directed—primarily, but not exclusively, in the interest of developing countries—towards perfecting the organizational and informative background of activities deployed in the area of industrial property, and towards the strengthening of professional training, which should be pronounced right and should be supported.

187. *The position to be followed in respect of other universal agreements.* — As has been indicated, we are members to the overwhelming majority of the so-called subsidiary agreements, on the basis of the texts signed in connection with the latest revisions (some of them have not yet entered into force).

As it seems, the questions of details related to the particular protection of geographical indications are excluded from the PC framework; and the expectation is that either a certain kind of reform of the *Lisbon Agreement* will come along or a new agreement replacing it can be anticipated. Hungarian interests provide a basis for the view that we should actively participate in the perfection of the agreement or its recodification, and that we should do even more so to further the expansion of the circle of participants and in the intensive exploitation of its possibilities.

With regard to the endeavours to improve the system of international trademark protection, we consider first of all the further development of the—well-performing

<sup>578</sup> Bognár, M. (4).



—Madrid Agreement as desirable, including here the exploitation of the possibility offered by the Protocol of 1989.

Hungary is also a supporter to a broad extent of the concepts on a universal agreement directed towards the unification of the substantive law of patent. The effective Hungarian law is already in harmony with a majority of the solutions planned to be unified.

The frameworks and legal conditions of international co-operation for the protection of industrial property provide favourable possibilities. We may say that the legislator has done its share in this respect. It thus depends primarily on the economic organizations and enterprises how successfully exploit the possibilities. (There are of course also things to be done on the macrolevel, participation in international relations implies such conditions of interests and incentives as are to be established, resp. improved by economic-financial regulation.) We refer here especially to the possibilities provided by the PCT, EPU and UPOV, the exploitation of which should be encouraged to a greater degree.

#### 4. Tasks in regional co-operation

188. As a consequence of the recent 'change of social-political system', it has become clear—and not without precedence—that Hungary is Europe-oriented. Accordingly, the basic endeavour in the field of industrial property has become to adjust first of all to West-European, resp. the Common Market system. This is served by the industrial property conceptions of codification—in part, still in the process of elaboration—certain aspects of which have already been analyzed earlier.<sup>579</sup>

#### 5. Suggestions de lege ferenda

189. The point of departure here should be to point out that there is a large number of tasks to be accomplished by Hungarian legislation, in the interests of establishing a system of *legal criteria for the market economy*.

Important steps have already been made for the establishment of legal instruments. Reference can be made here to the modernization of the company law, to the law of restructuring the economy, to the law of going to bust to the legal rules on the protection of foreign investments, or on the liberalization of foreign trade laws. Virtually, the modification in 1977 of the Civil Code and also the reform of the company law can be included in this trend. These legal norms—even though according to the well-founded criticism their further improvement is indeed desirable—serve by all means the strengthening of the unfolding of the model for market economy.

There are a number of further areas the regulation of which appears in the programme of the codification work. The comprehensive *reform of the Civil Code* is worthy of emphasis among them; the scientific preparation for the carrying out of this work is already in progress. In part, also to this area belongs the formulation of the legislative tasks which are timely in the legal area of intellectual property, more closely in the system of industrial property.<sup>580</sup>

<sup>579</sup> Cf. *Beier* (7); similarly, the materials of the Budapest Symposium (Note 253) and that of Munich (9–10 July, 1992) "Der Schutz des geistigen Eigentums in Mittel- und Osteuropa" *GRUR Int.* 1992/12.

<sup>580</sup> A majority of the members of the codification committee established under the leadership of the deputy justice minister are university professors, and researchers.



190. *The protection of technical products.* — In relation to the general criteria of patentability, strong consideration must be given to the introduction of *non-obviousness* as an evaluating criterion. Along with maintaining the criterion of *absolute novelty*, it is desirable to milden the strictness of this criterion by means of certain exceptions. Harmonization with the strengthening international trends would make it expedient, namely, that in the cases of illegal publications the entitled would receive certain allowance (e.g. for six months) for the filing. Similarly, it is deemed worthy of consideration that in the cases of the inventors' own prior publications, such periods of grace allowance with respect to the time of filing, should be introduced which is otherwise even necessary in the case of joining the harmonization agreement. In this case it is evidently desirable that the 'intermittent', well-meaning users' essential interests will not be hurt by the involvement.

In connection with the defining of the circle of protectable (patentable) products, the cases of *exclusion* should be considerably *reduced*. (This again is a criterion of joining the harmonization agreement mentioned above.) Accordingly, in the opinion of the majority of professionals, the introduction of *product protection* seemed to be expedient. This of course must be preceded by a careful thorough-going economic analysis, it seemed however that the long-term developmental interests of the sectors concerned and the tangible trends of development of the international property alike strengthen the arguments which are in favour of the introduction of product protection. (In given cases it can be expedient to institute a longer grace period, possibly some other restrictions made in the interests of the public, e.g. a shorter period of protection or fixing the possibility of compulsory licence on a larger scale, etc.)<sup>581</sup> A similar position seemed to be justifiable in relation to the patentability of *pharmaceutical products* and *foodstuffs*. Utilization to a satisfactory extent could possibly be guaranteed again by means of restrictions in the interests of the public, alongside of the administrative means which are anyhow available or adjustable. It would be also expedient to recognize the patentability of the *micro-organism stocks*.<sup>582</sup> As has been referred to above, Act XLIX of 1994 decided in favour of introduction of product patent system.

As has already been indicated, *software* is granted protection by the copyright law, also in Hungarian law. It would be desirable—in connection with the reform of copyright law<sup>583</sup>—to formulate some software-specific provisions related to further part issues. Furthermore, it also needs consideration whether would it not be expedient to make the consequences also in the field of patent codification unambiguous, namely, to lay down expressly in the patent law that software as such is excluded from patentability.

Several criticizing remarks have been made in connection with the effective regulation which was passed in 1989 on employee's inventions and on innovations.<sup>584</sup> In my judgement, the regulation is basically progressive; the possible

<sup>581</sup> See, Bobrovsky (6).

<sup>582</sup> See, Adler-Posteiner (Mrs.) op. cit.

<sup>583</sup> To this, virtually no modification of the effective Hungarian patent law would be necessary, since it does not contain a pronounced exclusion clause; only the current practice should be corrected.

<sup>584</sup> See to this, Gyertyánfy, op. cit.



negative consequences of the criticized solutions are to be entered more to the account of the inventors' state of being at the mercy of certain circumstances than to the legal regulation. The present codification is suitable for making it for the court practice possible to work out the principles which can appropriately harmonize the interests of the inventors and of the employers.<sup>585</sup>

In the course of the reform of the Civil Code the elaboration of rules for the type of licence contract would be desirable; the latter should be built on the model of more detailed and up-to-date contracts; it would be a kind of typical contract (thus, containing also know-how elements) alongside of, or in place of, the rules narrowly restricted at present to the patent licence.<sup>586</sup>

191. *Commodity marks.* — In the field of trademark law, the express regulation of the institution of the *certification mark* can be recommended for consideration; furthermore the stricter sanctioning of the compulsory utilization of trademark, namely, the requirement of the *actual utilization* of an appropriate volume in place of the formal, maintaining type (advertisement) utilization.

<sup>585</sup> See, Bobrowsky (7).

<sup>586</sup> See, Vörös (4).



# Abbreviations

|             |                                                                                                                    |
|-------------|--------------------------------------------------------------------------------------------------------------------|
| Acta Szeged | — Acta Universitatis Szegediensis de Attila József Nominatae, Acta Juridica et Politica                            |
| AJ          | — Acta Juridica Academiae Scientiarum Hungaricae                                                                   |
| AIPPI       | — Association Internationale pour la Protection de la Propriété Industrielle                                       |
| ALAI        | — Association Littéraire et Artistique Internationale                                                              |
| ATRIP       | — International Association for the Advancement of Teaching and Research in Intellectual Property                  |
| ÁJ          | — Állam- és Jogtudomány (Science of State and Law)                                                                 |
| BH          | — Bíróági Határozatok (Court Decisions)                                                                            |
| BIRPI       | — Bureaux Internationaux Réunis pour la Protection de la Propriété Industrielle                                    |
| BMETI       | — Budapesti Műszaki Egyetem Továbbképző Intézete (Institute of Further Education of Budapest Technical University) |
| CEIPI       | — Centre d'Études Internationales de la Propriété Industrielle                                                     |
| ECOSOC      | — Economic and Social Council                                                                                      |
| EIPR        | — European Intellectual Property Review                                                                            |
| EGK         | — Európai Gazdasági Közösség (European Economic Community)                                                         |
| ELTE Acta   | — Acta Facultatis Politico-Juridicae Universitatis Scientiarum Budapestiensis de Rolando Eötvös Nominatae          |
| EPÜ         | — Europäischer Patentübereinkommen                                                                                 |
| FAO         | — Food and Agriculture Organization                                                                                |
| FOT         | — Fogyasztók Országos Tanácsa (Consumers' National Council)                                                        |
| G           | — Gazdaság (Economy)                                                                                               |
| GATT        | — General Agreement on Tariffs and Trade                                                                           |
| GJ          | — Gazdaság- és Jogtudomány (Economics and Jurisprudence)                                                           |
| GRUR        | — Gewerblicher Rechtsschutz und Urheberrecht                                                                       |
| GRUR Int.   | — Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil                                                 |
| ICIREPAT    | — Committee for International Co-operation in Information Retrieval among Patent Offices                           |
| IFIA        | — International Federation of Inventors' Associations                                                              |
| IIC         | — International Review of Industrial Property and Copyright Law                                                    |
| ILO         | — International Labour Organization                                                                                |
| Ind. Prop.  | — Industrial Property                                                                                              |
| INPADOC     | — International Patent Documentation Center                                                                        |
| IPC         | — International Patent Classification                                                                              |
| ISO         | — International Standardization Organization                                                                       |
| JK          | — Jogtudományi Közlöny (Jurisprudential Gazette)                                                                   |
| KJK         | — Közgazdasági és Jogi Könyvkiadó (Publishers of Economics and Law)                                                |
| KSZ         | — Közgazdasági Szemle (Economics Review)                                                                           |



|             |                                                                                                                                                                   |
|-------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| LPÜ         | — Luxemburger Patentübereinkunft                                                                                                                                  |
| MIE         | — Magyar Iparjogvédelmi Egyesület (Hungarian Association for Protection of Industrial Property)                                                                   |
| MJ          | — Magyar Jog (Hungarian Law)                                                                                                                                      |
| MT          | — Magyar Tudomány (Hungarian Science)                                                                                                                             |
| N           | — der Neuerer                                                                                                                                                     |
| NSZO        | — Nemzetközi Szabadalmi Osztályozás (International Patent Classification)                                                                                         |
| OAPI        | — Organisation Africaine de la Propriété Intellectuelle                                                                                                           |
| OECD        | — Organization for Economic Co-operation and Development                                                                                                          |
| OMPI        | — WIPO                                                                                                                                                            |
| OTH         | — Országos Találmányi Hivatal (National Invention Office)                                                                                                         |
| PC          | — Paris Convention                                                                                                                                                |
| PCT         | — Patent Co-operation Treaty                                                                                                                                      |
| Proceedings | — Proceedings of the Hungarian Group of AIPPI                                                                                                                     |
| Prop. ind.  | — Propriété industrielle                                                                                                                                          |
| Ptk         | — Polgári Törvénykönyv (Civil Code)                                                                                                                               |
| RIDA        | — Revue Internationale de Droit d'Auteur                                                                                                                          |
| St. u. R.   | — Staat und Recht                                                                                                                                                 |
| Szjt.       | — Szerzői jogi törvény (Copyright Act)                                                                                                                            |
| Szjt. Vr.   | — Decree 9/1969/XII.29/MM (Enacting decree of the Copyright Act; issued by the Minister of Culture)                                                               |
| SZK         | — Szabadalmi Közlöny és Védjegyértesítő (Patent Gazette and Trade-Mark Courier)                                                                                   |
| Szt.        | — Szabadalmi törvény (Patent law; Act II of 1969)                                                                                                                 |
| Szt. Vr.    | — Enacting clause of the Patent Act; Decree No. 4/1969/XII.28/OMFB-IM, jointly issued by the National Technical Development Committee and the Ministry of Justice |
| TPB         | — Tudományospolitikai Bizottság (Committee of Science Policy)                                                                                                     |
| TRT         | — Trademark Registration Treaty                                                                                                                                   |
| TSZ         | — Társadalmi Szemle (Society Review)                                                                                                                              |
| UL          | — Újítók Lapja (Innovators' Journal)                                                                                                                              |
| UNCITRAL    | — United Nations Commission for International Trade Law                                                                                                           |
| UNCTAD      | — United Nations Conference on Trade and Development                                                                                                              |
| UNESCO      | — UN Educational, Scientific and Cultural Organization                                                                                                            |
| UNIDO       | — United Nations Industrial Development Organization                                                                                                              |
| UPOV        | — Union pour la Protection des Obtentions Végétales                                                                                                               |
| VI          | — Voprosy Izobretatelstva                                                                                                                                         |
| Vt.         | — Védjegy törvény (Trademark Act)                                                                                                                                 |
| Vt. Vr.     | — 2/1970/VII.1/OMFB-IM (Enforcing Decree of the Trademark Act issued by the National Technical Development Committee and the Ministry of Justice)                 |
| WHO         | — World Health Organization                                                                                                                                       |
| WIPO        | — World Intellectual Property Organization                                                                                                                        |



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The starting point of the monograph is based on the fact that the institutional and norm system of industrial property plays an important role on the promotion of innovative and creative activity. The development of the necessary international co-operation in this field makes the unification—or, at least, approximation, harmonization—of the relevant legislation unavoidable. The book gives a survey and evaluation on the legal framework of the international co-operation in industrial property, the Paris Convention, the attached special agreements, the World Intellectual Property Organization. The author analyzes in detail the specific interests characteristic of this field (those of creators, enterprises, consumers, competitors, etc.) and the legal means reflecting the said interests. On a large comparative basis he surveys the modern trends of development (centrifugal and centripetal tendencies) and formulates some conclusions concerning the chances of law-unification, respectively, law-harmonization as well as some recommendations on the further development of the international co-operation and that of the Hungarian legislation.





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