

Question B:

Should there be legal restrictions on the ability of persons who claim, without sufficient justification, to hold IP rights that have been infringed to bring, or to threaten to bring, legal proceedings based on such claims against their competitors or others?

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1. Introduction – Scope of Legal Protection

Hungary is a member of the EU and a party to all major international treaties and conventions on intellectual property law such as the Berne Convention, the Paris Convention for the Protection of Industrial Property, the Patent Cooperation Treaty, the European Patent Convention 2000 (EPC 2000), the Madrid Agreement Concerning the International Registration of Marks, the Protocol of 1989 Relating to the Madrid Agreement Concerning the International Registration of Marks, the Trademark Law Treaty, and the TRIPs Agreement.¹

As an EU member state, Hungary has implemented all EU Directives concerning intellectual property rights, and all relevant EU Regulations are directly applicable in Hungary.

IP is regulated through acts of Parliament in Hungary. All major IP rights have a separate act covering them. The major acts are the Act No. LXXVI on Copyright ("**Copyright Act**"), the Act No. XXXIII of 1995 on the Protection of Inventions by Patents ("**Patent Act**") and the Act No. XI of 1997 on the Protection of Trademarks and Geographical Indicators ("**Trademark Act**"). Not only substantive legal provisions but also procedural provisions are included in these acts.

All the acts provide that the right holder has an exclusive right to use and exploit the intellectual property. In case of copyright and trademarks, the acts provide for an exemplificative list of infringing acts while, in the case of patents, the list is exhaustive².

Under the Copyright Act the infringing acts are in particular the reproduction (Sections 18 and 19), the distribution (Section 23), the public performance (Sections 24 and 25), the communication to the public by broadcasting or in any other manner (Sections 26 and 27), the retransmission of the broadcast work to the public with the involvement of an organisation other than the original one (Section 28), the adaptation (Section 29) and the exhibition (Section 69) of the work if done without the authorization of the copyright holder.

Under the Patent Act, on the basis of the exclusive right of exploitation, the patentee is entitled to prevent any person not having his consent (i) from making, using, putting on the market or offering for sale a product which is the subject matter of the invention, or stocking or importing the product for such purposes; (ii) from using a process which is the subject matter of the invention or, where such other person knows, or it is obvious from the circumstances, that the process cannot be used without the consent of the patentee, from offering the process for use; and (iii) from making, using, putting on the market, offering for sale, or stocking or importing for such purposes a product obtained directly via a process which is the subject matter of the invention.

¹ For a complete list of the treaties see the website of the Hungarian Intellectual Property Office for copyright: <https://www.sztnh.gov.hu/en/legal-sources/copyright>, for patents: <https://www.sztnh.gov.hu/en/legal-sources/patents> and for trademarks: <https://www.sztnh.gov.hu/en/legal-sources/trademarks>. For all other types of intellectual property rights: <https://www.sztnh.gov.hu/en/legal-sources-of-intellectual-property>.

² See Hungarian Supreme Court decision Kúria Pfv. 20.866/2013/4.

"Section 19 of the Patent Act is not exemplificative; it definitively specifies those commercial exploitations that qualify as infringement in the lack of the right holder's authorization."

Under the Trademark Act the infringing acts are in particular as follows: (i) affixing the mark to the goods or their packaging; (ii) putting the goods on the market or offering them for sale, or stocking them for those purposes, under that mark; (iii) supplying or offering services under that mark; (iv) importing or exporting the goods under the mark; (v) using the mark on business papers and in advertising; (vi) using the mark as a trade or company name or part of a trade or company name; and (vii) using the mark in comparative advertising in a manner that is contrary to the provisions of the act on the prohibition of unfair market practices and of the restriction of competition.

This scope of the protection of trademarks is in accordance with the Trademark Directive.³ According to the European Court of Justice (ECJ) the Trademark Directive provides full harmonization regarding Article 5 which determines the scope of the exclusive right conferred by the protection.⁴

Who may bring an action for infringement

When the exclusive rights are infringed the question arises who may bring action to protect those rights.

In case of copyright it is generally the author who may commence actions. However, in certain cases the exclusive and even the non-exclusive licensees may bring actions against copyright infringement. Regarding this question the Copyright Act differentiates between the author's moral rights and economic rights. In case of moral rights infringement the licensee may also bring action if the author specifically authorized them to do so in the license agreement.⁵ In case of the infringement of economic rights the Act further differentiates between exclusive and non-exclusive licensees. The exclusive licensee may even bring action in the absence of any specific stipulation in the license agreement on its own behalf if he/she invited the author to take the necessary measures to cease the infringement and the author fails to do so within thirty days from such invitation. The non-exclusive licensee may bring action if the license agreement specifically provides for this. Further, the collecting societies may bring actions for copyright infringement in the case of the rights administered by them.

In case of patents it is generally the patent owner who may bring actions. A licensee may bring action if the license agreement authorizes him/her to do so. Moreover, registered licensees may bring action if they invited the patent owner to take the necessary measures to cease the infringement and the patent owner fails to do so within thirty days from the invitation. Finally, in case of compulsory licenses the licensee may also bring action without further limitations.⁶

In case of trademarks it is generally the trade mark owner who may bring actions. The licensee may bring action for trademark infringement in his/her own name only if the trademark owner consents thereto or if the licensing agreement authorised him/her to do so. Similarly to the other IP rights, the exclusive licensee may bring actions in his/her own name and without the consent of the owner against the infringer if the owner of the trademark, after the licensee's formal notice, does not initiate infringement proceedings within thirty days.⁷

2. Restrictions and remedies under IP laws

Restrictions on the exclusive rights are different with respect to the different IP rights, while the remedies are fundamentally the same for all IP rights under Hungarian law. Therefore, we will first discuss below the restrictions with respect to each right separately and then the remedies which apply to all IP rights.

Regarding each IP right there are limitations to the exclusive right in the public interest.

2.1 Restrictions under Copyright law

³ Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trademarks.

⁴ See paragraphs 25 and 29 of the judgment of the ECJ in the Silhouette case under No. C-355/96; paragraph 39 of the judgment in the joined cases of Zino Davidoff and Levi Strauss & Co. under case No. C-414/99 and C-416/99.

⁵ In case of films the Copyright Act states that the producer may bring action for the infringement of moral rights [sec. 65 (4)].

⁶ See sec. 33 (4) of the Patent Act.

⁷ See sec. 29 (5) of the Trademark Act.

In copyright law the object of protection is already enhancing competition and limiting the monopoly.⁸ Copyright protects content which is of original and individual nature. This means that the content itself without any form and the idea behind the form are not protected and, therefore, it is allowed to make use of the same content in different forms. The Copyright Act explicitly states that ideas, principles, theories, procedures, operating methods and mathematical operations do not enjoy copyright protection.⁹ In the case of the new types of work the existence of which came about with the development of digital technology, such as computer programs and electronic databases, both the EU and the Hungarian legislator introduced further limitations to copyright which aim to ensure the system of checks and balances. For example, it is not possible to prohibit the reproduction of a computer program for a lawful user of that program, and it is even allowed to decompile the source code of the program for the user's own use. In addition, the ever growing uses which are considered as cases of free use by the legislator also serve the interest of the public.

The general restriction on copyright is its territoriality, i.e. that the protection conferred by the Copyright Act extends only to the territory of Hungary. Foreign copyright laws are enforceable before Hungarian courts due to the principle of national treatment (for right holders of Berne Convention/TRIPs member states) and due to the non-discrimination provision of Articles 18 and 20 TFEU. A further restriction is that the protection is limited in time. The term of protection is 70 years for authors' rights and 50 years for neighbouring rights. The term of protection of the sui generis right applicable to databases amounts to 15 years (renewable in case of extension or arrangement of the database).

The specific restrictions are the cases of free use provided for by the Copyright Act. There is a free private reproduction right for the benefit of natural persons for private purposes as well as for the benefit of libraries, archives, museums and accredited schools (LAMS institutions). The free private reproduction is compensated for by the blank carrier and the reprography remunerations managed by collecting societies. All cases of free use are also subject to the general three step test that mirrors the similar provision of the TRIPs¹⁰ and the InfoSoc Directive.¹¹

2.2 Restrictions under Patent law

First, the very essence of patent protection is - similarly to copyright protection - already a restriction which also enhances competition. The fact that patent protection is granted only if the owner of the invention discloses its invention makes it possible for competitors and the general public to acquire detailed knowledge about the subject of the patent.

Similarly to copyright, there are numerous restrictions on patent protection as well.

The general restrictions of the Patent Act are that (i) protection is contingent on registration by the Hungarian Intellectual Property Office; (ii) the patent protection extends only to the territory of Hungary; and (iii) the term of protection is 20 years from the date of application. Similarly to copyright where the holders challenge the term of protection and try to prolong it from time to time, this happens with patents as well. In case of pharmaceutical products the manufacturer of new active part ingredients may extend the term of protection with up to 5 years with the so called supplementary protection certificate.¹² Another special provision concerning pharmaceutical products which, however, has the effect of prolonging the exclusive right of the patentee, is the so called data exclusivity.¹³ Accordingly the "dossier" of the originator pharmaceutical manufacturer used in the marketing authorisation procedure will be considered as trade secret for a period of time after the patent has expired. The purpose of this confidentiality protection is to prevent the generic manufacturer from referring to the originator's

⁸ On the „inner barriers” of IP rights see Gábor Faludi: A szerzői jog és az iparjogvédelem belső korlátai (The inner barriers of copyright and industrial property rights) in *Jogtudományi Közlöny*, 2006., 280-291.

⁹ Sec. 1. (6) of the Copyright Act.

¹⁰ Article 13 TRIPs: Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

¹¹ Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

¹² See Regulation (EC) No 469/2009 of 6 May 2009 concerning the supplementary protection certificate for medicinal products.

¹³ This has its origin in article 39 (3) of the TRIPs Agreement.

documentation. Although this data exclusivity is not regulated in patent law but in pharmaceutical law,¹⁴ it has an indirect effect on the term of protection of certain patents.

A specific restriction of patent law is the right of prior use in case of parallel inventions. According to the right of prior use any person who, in good faith, has begun to make or use the subject matter of the invention or had made serious preparations for that purpose in Hungary before the date of priority is entitled to use the invention.

Another specific restriction is the right of continued use according to which any person who, in the period between a declaration of lapse of patent protection and the restoration thereof has started to make or use the subject matter of the invention or has made serious preparations for that purpose in Hungary has the right to further use it.

The Bolar or research exemption is also a specific limitation of the exclusive rights in patents. According to this exception, the patentee's exclusive exploitation right does not extend to any experimental act in connection with the subject matter of the invention, including any experiments and tests necessary to receive a marketing authorization for a product which incorporates the invention. Because of the Bolar exemption, a competitor's product can receive a marketing authorization by the time the product patent has expired, and, therefore, at the time of expiry a cheaper competitor's (usually generic) product can appear on the market. There was uncertainty whether the Bolar exemption extends only to the necessary actions to prepare a marketing authorization or whether it can also include the submission of the marketing authorization request or even the authorization itself. In Hungary it has been clarified by the courts¹⁵ that the Bolar exemption extends to the application for a marketing authorization.

Finally, a specific restriction under patent law is the system of compulsory licenses. Compulsory licenses may be granted due to lack of exploitation or in case of dependent patents.

- *The lack of exploitation*: If within four years from the date of filing of the patent application or within three years from the grant of the patent, whichever period expires last, the patentee has not exploited the invention in Hungary to satisfy the domestic demand or if the patentee has not undertaken serious preparations or has not granted a license for such purpose, a compulsory license must be granted to the applicant for the license, unless the patentee justifies the lack of exploitation.
- *Dependent patents*: If the patented invention cannot be exploited without infringing another patent ("the dominant patent"), a compulsory license must be granted, on request and to the extent necessary for the exploitation of the dominant patent, to the holder of the dependent patent, provided that the invention claimed in the dependent patent involves an important technical advance of considerable economic significance in relation to the invention claimed in the dominant patent.

2.3 Restrictions under Trademark law

The general restrictions of the Trademark Act are similar of those to the Patent Act, which means that trademark protection is also dependent on registration by the Hungarian Intellectual Property Office, the trademark protection extends also only to the territory of Hungary, and there is also a restriction on the term of protection which is 10 years from the date of application with the possibility to renewal for further terms of 10 years.

Specific restrictions in the Trademark Act are the limitations of trademark protection, such as the use of own name or address; the use of a mark relating to a characteristic of the goods or service; the indication of the purpose of the goods or service, in particular in the case of accessories or spare parts; the exhaustion of trademark protection; acquiescence; and the failure to use the trademark for consecutive 5 years.

2.4 Exhaustion of Rights

The exhaustion of rights applies to the right of distribution in copyright law and to trademark protections with respect to the European Economic Area. The case law of the ECJ on the right of exhaustion is applicable in Hungary as well.

¹⁴ Directive 2004/27/EC on the Community code relating to medicinal products for human use and in Hungary sec. 16/A of the Health Ministry Regulation nr. 52/2005.

¹⁵ Fővárosi Bíróság P. 26.566/2005/25. Fővárosi Ítéltábla Pf. 20.895/2006/8.

The exhaustion of IP rights has been developed by the ECJ to resolve the collision between the territoriality of the IP rights and the free movement of goods. The principle of exhaustion is known in copyright law¹⁶ and in trademark law¹⁷ (in the absence of EU wide harmonisation the patent law, it has not been introduced to patent law yet). As a consequence the right holder may not use its exclusive right to hinder the free movement of goods within the EEA and to divide the internal market along national borders.

The ECJ further broadens the scope of exhaustion of copyright in the online environment such as when the exhaustion was extended by the ECJ to the user licence of a computer program.¹⁸

2.5 Remedies

The remedies provided for by all IP acts are in line with the Enforcement Directive.¹⁹ The civil law remedies are (i) to demand that the fact of infringement be declared by the court; (ii) to demand that the infringer cease the infringement or any acts directly threatening therewith and that he/she be prohibited from further infringement; (iii) to demand that the infringer give information on the identity of persons involved in the production and distribution of the infringing goods or the provision of infringing services and of the business contacts established for their distribution; (iv) to demand satisfaction from the infringer by way of a declaration or other appropriate means and, if necessary, that the declaration be made public by or at the expense of the infringer; (v) to demand the surrender of the enrichment obtained through the infringement; (vi) to demand the seizure, transfer to a specific person, recall or definitive removal from the channels of commerce, or destruction, of the infringing products and packaging, as well as of the means and materials exclusively or primarily used for infringement; and (vii) to claim damages under the rules of civil liability.

Remedies which may be available to the recipient of unjustified claims are, in the absence of specific legislation, the claims/defences which generally may be used as such.

One such claim is that the information requested by the plaintiff constitutes business secret. This would not hinder the litigation, it may only prevent the person making that unjustified claim from accessing business secrets.

Another claim is that the defendant may request the decision to be published at the end of the litigation. Further, the defendant may also claim damages for the loss suffered by the unjustified claims. In cases where the plaintiff applied for a preliminary injunction which had been granted by the court, the court may oblige the right holder to provide appropriate security, which serves as a deposit to satisfy compensation claims to recover losses suffered by the opposing party where it is subsequently found that there has been no infringement. Under the new rules of the Code of Civil Procedure,²⁰ effective from 1 January 2018, the defendant automatically receives the security, without starting an action for compensation and without evidencing the actual amount of the loss. If the amount of loss is higher than the security, it is possible to demand compensation for losses not covered by the security. On the other hand, if the amount of loss is lower than the amount of the security, the difference may not be demanded by the patentee.

We note that the recent judgment of the EUCJ in case C-688/17 might change this practice. The EUCJ ruled that in case of a wrongly issued preliminary injunction the defendant is not entitled to any compensation if he/she has not acted as may generally be expected in order to avoid or mitigate his/her loss. In the case at hand the generic manufacturer launched its pharmaceutical product without first starting invalidation action against the patent which was potentially infringed by its products. The Court held that this failure to clear the way may deprive the defendant of the grant of any compensation for the unjustified preliminary injunction. This decision may shift the balance previously established in favour of the rightholders as it may deter third parties from entering the market with competing products.

¹⁶ Sec. 23 (5) of Copyright Act: “If the copy of the work has been put into circulation by the rightholder or by another person expressly authorised therefor by the rightholder through sale or the assignment of ownership in any other manner within the European Economic Area, the right of distribution – with the exception of the right of rental, lending and importation – shall further on be exhausted with regard to the copy of the work thus put into circulation.”

¹⁷ Sec. 16 (1) Trademark Act: “Trade mark protection shall not entitle the holder to prohibit the use of the trade mark in relation to goods which have been placed on the market in the European Economic Area by him or with his expressed consent.”

¹⁸ C-128/11 UsedSoft decision.

¹⁹ Directive 2004/48/EC on the enforcement of intellectual property rights.

²⁰ Act Nr. 130 of 2016.

The remedies mentioned above are available to all defendants no matter whether they are the primary infringers or intermediaries in the supply chain.

3. Restrictions and Remedies under Competition Law

The Act LVII of 1996 on the prohibition of unfair and restrictive market practices (the "Competition Act") contains provisions in respect of the following cases: general clause on the prohibition of unfair market practices; defamation; prohibition of calls to boycott; passing-off (prohibition on the manufacture, sale or advertisement, without the consent of the competitor, a product with such characteristic appearance, packaging, designation or name, or using such name, designation or designation of origin by which the competitor or its product is generally recognized); ensuring fairness of tenders.

On the one hand, there is a close relationship between competition law and IP law; for example, when we think of trademark infringement and passing-off. In case of passing-off²¹ competition law complements IP laws. Under Hungarian law "unfair competition law" and "IP law" are in the relationship of general versus specific rules, in which case the specific law designed to protect registered marks should be applied (Hungarian law does not protect unregistered marks under the umbrella of trademark law). Therefore, competition law claims are secondary to claims based on intellectual property rights and, accordingly, the remedies available under IP right protection are primarily applied.²²

From a competition law perspective the territorial exclusivity, the abuse of dominant position, the prohibition of call to boycott and the passing-off are relevant with respect to IP rights. These regulations supplement all the inner barriers of IP rights mentioned under sec. 2 above which of course are also relevant from a competition point of view, as they also limit the exclusive right of the IP holder providing him/her monopoly over his/her intellectual property.

Most collisions between competition law and IP rights occur in the field of copyright. This is due to the fact that that new, functional industrial works such as software and databases have been introduced to copyright law.²³

Hungarian competition law as well as IP laws are in line with EU legislation. Therefore, when examining this question, we may also turn to EU case law. Below, we present through some of the most important CJEU cases how competition law rules apply the exercise of intellectual property, especially copyright constitutes the market conduct.

3.1 Territorial Exclusivity

As regards intellectual property exploitation agreements, the transfer of the exclusive right by the right holder in one Member State to a single licensee is not sufficient to establish the anti-competitive character of this agreement. Conversely, where the agreement is aimed at dividing the EU market along national borders, it must be considered as an agreement which has the objective to restrict competition within the meaning of Article 101 (1) TFEU.

In the Football Association Premier League case,²⁴ some pubs in the United Kingdom were using foreign decoder cards made available by Greek broadcasting organizations to subscribers in Greece to gain access to the broadcast of English football matches. These pubs bought the decoder card at a lower price than what Sky, the UK broadcasting rights holder, required. The right holder has granted broadcasting organizations exclusive rights

²¹ Pursuant to Section 6 of the Competition Act, "it shall be prohibited to manufacture, distribute or advertise goods and services (hereinafter together: goods) without the consent of competitor with such typical outside appearance, packaging or labelling (including designation of origin), or to use a name, mark or designation, by which a competitor or its goods are usually recognised." In legal practice, this is called "infringement of the characteristic appearance", or "slavish imitation" (although the scope of Section 6 is broader). This provision is the Hungarian passing-off rule.

²² See Gusztáv Bacher: Unfair Competition - Country report on Hungary, in Henning-Bodewig (ed): International Handbook on Unfair Competition, Verlag C.H.Beck, 2013 (co-published by Hart Publishing and Nomos), 2013.

²³ See Peter Gyertyánfy: Kell-e még szélesebb szerzői jog? (Do we need an even broader copyright?) in Magyar Tudomány 2/20003., 226-230.

²⁴ C-403 és C-429 joint cases Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08).

in the territory of each Member State, and in order to protect the territorial exclusivity and prevent the public from receiving broadcasts outside the Member State concerned, the right holder have imposed an obligation on the broadcasting organization to encode the satellite signal and prohibit the making available of decoding cards to persons wishing to watch their programs outside the Member State to which they have been granted authorization. The rightholder tried to take action against English pubs, but the CJEU found that EU law precludes a licensing system for the broadcasting of English football matches which grants broadcasting organizations territorial exclusivity in each Member State and which prohibits television viewers from using a decoder card in other Member States.

The anticompetitive nature of territorial exclusivity was also examined in the context of cooperation between collecting societies. Collecting societies are authorized to manage copyrights either under the express authorization of the authors or under the authority of the collecting society that manages the same type of rights in another country. In 1936, the International Association of Authors and Composers' Associations (CISAC) drafted a model contract for reciprocal representation agreements between its members. This model contract serves as an optional model for reciprocal representation agreements between its members for the purpose of transferring licenses for the public performance of musical works. Each collecting society undertakes, on a reciprocal basis, to transfer the rights to the works of its repertoire to the other collecting societies for use in their respective territories. Through its network of reciprocal representation agreements, each collecting society can offer a worldwide music portfolio to commercial users, but only for its own use. The European Commission considered it anticompetitive that, in reciprocal representation agreements, each organization restricts the right to grant licenses for the works of its repertoire in the territory of the other collecting society. However, the General Court annulled the Commission's decision because the practice of the collecting societies was not the result of a concerted practice with the object of restricting competition, but of the need to effectively combat the unauthorized use of music.²⁵

3.2 Copyright Exclusivity as a Condition of Dominance

An essential feature of intellectual property rights is that the rightholder is granted an exclusive right to use its intellectual property. Laws providing exclusivity are opposed to competition law which to ensure the openness of markets and act against monopolies. Thus, a conflict between the two legal regulations and their principles seems inevitable. The difficult question of modern competition policy is to determine when, if at all, the exercise of intellectual property rights is considered to be so detrimental to consumer welfare that competition law has to interfere with the situation created by intellectual property law. The question therefore arises as to whether Article 102 TFEU may oblige the rightholder to grant a license to a third party (compulsory license). The CJEU has made it clear that the right to an exclusive right is not in itself open to challenge under Article 102.²⁶ Article 102 may only apply in the event of improper (abusive) exercise of the right. According to the case law of the CJEU, the success of an application for a compulsory license requires some additional element with respect to the intellectual property, such as access to the necessary tools for entry to the market in case of essential facilities (use of infrastructure).

3.2.1 The Magill Case²⁷ - Applying the Essential Facility Doctrine to Copyright

The television program schedule is protected by copyright under English and Irish law. Mr Magill wanted to publish a weekly newsletter from television companies' broadcast in the United Kingdom and Ireland. Previously, there was no publication available that featured all three TV channels' programs in a week's advance. Broadcasters when relying on intellectual property laws have abusively denied the provision of essential information due to the following circumstances. First, the refusal concerned the provision of a product - a weekly television program - which was essential for the pursuit of the activity in question (the publication of a comprehensive weekly television program). Second, the refusal prevented the emergence of a new product, the comprehensive weekly television program, which was not produced by the television companies in question and which had potential consumer demand. Thus, this constituted an abuse under Article 82 TEC (now Article 102 TFEU). Third, the refusal was not objectively justified. Finally, by their conduct, the television companies have

²⁵ T-442/08 CISAC v Commission. See Eszter Kabai– Gábor Faludi: Egy lényegtelené vált CISAC-ügy margójára (To the margin of the irrelevant CISAC case), in Iparjogvédelmi és Szerzői Jogi Szemle 9. (119.) February 2014.71-104.

²⁶ C-238/87 Volvo case.

²⁷ C-241/91. P. and C-242/91. P. joint cases Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities.

reserved to themselves a secondary market, the weekly television program market, excluding any competition in that market. There is no doubt that the fact that television programs were protected by copyright law in the UK and Ireland played a role in the decision, whereas in most Member States the legal systems would not have afforded intellectual property rights to the same television program.

3.2.2 Microsoft Case - Abuse of a Dominant Position in the Operating System Market for Computers

One of the best-known cases in this field of law is the Microsoft case²⁸. The Commission found that Microsoft had a dominant position in the PC operating systems market and the work group server operating systems market. By relying on copyright and industrial right protection, Microsoft did not disclose the source code of the interface between the operating system and the user program, which allows work group server connectivity. The Commission stated that Microsoft had abused its dominant position by refusing to disclose to its competitors interoperability information that would have enabled them to develop new products that could compete with Microsoft's products.²⁹ The ECJ shared the Commission's interpretation, finding that the operating system was indispensable, and by refusing access to interoperability information, Microsoft completely excluded competition in the secondary market. Microsoft's foreclosure has led to increased customer detention for Microsoft workgroup servers and prevented competitors from developing non-Windows operating systems.³⁰

3.2.3 Conclusion

It is generally agreed in legal literature that the issue of compulsory licensing should be settled primarily by intellectual property law and not by competition law.³¹ Beyond its internal limitations, the external, primarily antitrust, restriction of copyright has been gaining ground ever since the scope of protection has been extended to functional, "industrial" works and performances (software, non-proprietary databases). Restrictions of intellectual property rights under competition law to the abuse of a dominant position can only take place under specific conditions in the case of functional "industrial" works if it can be demonstrated that the object of protection is an indispensable asset. Pursuant to case law, a specific circumstance may be deemed to exist where the refusal relates to a product or service which is indispensable for the conduct of a business in a neighbouring / secondary market and the refusal excludes all effective competition in that neighbouring market or prevents the appearance of a new product for which there is potential consumer demand.

3.3 Prohibition of Boycott - Design Protection

Under the Hungarian Competition Act it is prohibited to call for a boycott, that is, to make unfair appeals to other persons with the intention to disrupt existing economic relationships with third parties or to prevent the creation of such relationships.³² In the case at hand,³³ the defendant wrote letters to the customer of the plaintiff claiming that the customers should no longer buy the plaintiff's products because they would expose themselves to design infringement claims. Rather, they should buy the defendant's product which is not under design protection. The court found that such threat of possible IP infringement violated the prohibition of calls on boycott.

3.4 Spare Parts - Restrictions under Design law

Another measure which serves competition while restricting IP rights is the restriction of the subject matter of design protection which was first introduced by the European legislator in connection with components intended to replace parts of complex products which are themselves protected by design right.

In accordance with this, the Hungarian Design Act³⁴ provides that design protection does not entitle the holder to prohibit a third party from the use of the design of a component part exploited for the purpose of the repair of a complex product to the extent necessary for restoring its original appearance, provided that such use is

²⁸ T-201/04 Microsoft v Commission.

²⁹ Another element of the proceeding was the abuse of a dominant position by tying Microsoft's operating system and Windows Media Player.

³⁰ Richard Whish: *Versenyjog (Competition law)*, HVG, 2010, 789.

³¹ Richard Whish: *Versenyjog (Competition law)*, HVG, 2010, 785.

³² Sec. 5 of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices.

³³ BDT2018.3796.

³⁴ Act XLVIII of 2001 on the Legal Protection of Designs.

compatible with the requirements of fair trade practice and the design necessarily conforms to the original appearance of the complex product.

There has been a long debate in the EU on whether certain spare parts should be excluded from design right protection. The general principle that spare parts are eligible for design right protection is restricted to some extent by the statutory exceptions for ‘must fit’ and ‘must match’ designs.

Spare parts that are not visible during normal use or parts which are solely dictated by technical function are in any event excluded from EU design protection³⁵.

Further, must fit parts do not enjoy design protection: a design cannot enjoy protection if it comprises features of the appearance of a product which must necessarily be reproduced in their exact form and dimensions in order to permit the product in which the design is incorporated or to which it is applied to be mechanically connected to or placed in, around or against (i.e. must fit with) another product so that either product may perform its function.

Must match parts, on the contrary, are spare parts whose shape and configuration depends on the shape and configuration of a complex product (which consists of various parts and is demountable, e.g. a car), yet, there does exist an alternative in design. So, while the ‘must fit’ clause is directed to specific parts (mostly mechanical parts) necessary for providing a connection with another product, ‘must match’ parts basically relate to spare parts that are used for the purpose of repair in order to restore a product to its original appearance.

The controversy within the EU arose around the ‘must match’ spare parts which nearly prevented the harmonization of the national design laws between the EU Member States. Under these circumstances, the EU decided that until a common understanding between the Member States could be reached for a transitional period, it would not be appropriate to confer any design protection for a design which constitutes a component of a complex product used for the repair of that complex product to restore its original appearance. This was codified in Article 110 CDR, the so-called ‘repair clause’.

In December 2017, the CJEU published its decision in the joined *Acacia* cases,³⁶ providing guidance on how to interpret the repair clause. The CJEU stated that the repair clause covers all spare parts without any form of limitations, regardless the shape. Further, the CJEU held that the repair exemption will not be available if the replacement part does not correspond, in terms of its colour or its dimensions, to the original part, or if the appearance of a complex product was changed since it was placed on the market. Further, manufacturers have a duty of diligence regarding compliance by downstream users which requires them to inform the latter that (i) the design is not theirs, and (ii) it is intended exclusively for the purpose of the repair of the complex product so as to restore its original appearance. In addition, they have to ensure, for example by way of contract, that they do not intend to use the component part other than for the repair of the complex product. Finally, they have to refrain from selling a component part where they know or ought reasonably to know that the part in question will not be used for the repair of the complex product.

The CJEU's decision provides some clarity as to infringement by manufacturers and traders of replacement parts. Nevertheless, it must be seen how national courts will apply the repair conditions and how easily they will be enforced.

In Hungary the Design Act³⁷ states in a way similar to the Community Design Regulation that design protection does not entitle the holder to prohibit a third party from using the design of a component part exploited for the purpose of the repair of a complex product to the extent necessary for restoring its original appearance, provided that such use is compatible with the requirements of fair trade practice and the design necessarily conforms to the original appearance of the complex product. We are not aware to date of any reported case law on this issue in Hungary.

3.4 Technology Transfer

³⁵ Articles 4(2) and 8(1) of the Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.

³⁶ Joined Cases C-397/16 and C-435/16.

³⁷ Act XLVIII of 2001 on the Legal Protection of Designs.

Above we showed the limitation of the existence or the scope of IP rights which are due to competition law considerations. Another limitation may be the also competition law driven limitations on the use and the exploitation of IP rights. These are the limitations to technology transfer, that is, to IP license agreements³⁸. Here, we outline only the main aspects of these safe harbour provisions. The EU Technology Transfer Block Exemption Regulation (TTBER)³⁹ applies to technology transfer agreements the purpose of which is to produce the contract product and the subject of which are technology rights. Under the TTBER technology rights are know-how, patents, utility models, design rights, topographies for semiconductor products, SPCs, plant breeder's certificates and software copyrights. Based on the TTBER the TFEU's prohibition of agreements that have as their object or effect the restriction, prevention or distortion of competition within the EU and which have an effect on trade between EU Member States [Article 101 (1)] does not apply to technology transfer agreements. This means that, as a general rule, under the TTBER technology transfer agreements are allowed (safe harbour), even if they divide the EU market or have other restrictive effects from a competition law point of view. The TTBER, however, defines certain exceptions to this general rule which have to be respected by IP (technology rights) right holders when entering into a license agreement in the EU. These exceptions are the market share thresholds, the so-called hardcore restrictions and the excluded restrictions.

3.4.1 Market Share Thresholds

The safe harbour under the TTBER is only available to parties who meet particular market share thresholds. If the parties are competitors, the combined market share of the parties must not exceed 20%. If the parties are not competitors, none of the parties may have a bigger market share than 30%.⁴⁰

3.4.2 Hardcore Restrictions

Hardcore restrictions are prohibited under the TTBER. Hardcore restrictions for agreements between competitors differ from those for agreements between non-competitors.

Between competitors it is prohibited to apply price fixing, to provide for limitations on production and sale, to allocate markets or customers and to restrict the licensee from exploiting his/her own technology or to restrict either party from engaging in research and development.⁴¹

Between non-competitors it is prohibited to apply price fixing; however, maximum prices or recommended prices are allowed. It is further prohibited to restrict the territory to which the licensee may passively sell and to restrict active or passive sale to end-users, if the licensee is a member of a selective distribution system operating at the retail level of supply.⁴²

3.4.3 Excluded Restrictions

Excluded restrictions are restrictions which are generally allowed but which must be individually assessed. These comprise the exclusive grant-back license and the non-challenge clause. The exclusive grant back means that the licensee is obliged to assign or license back exclusively its own improvements of the licensed technology. By the non-challenge clause the licensee is prohibited from challenging the validity of the licensor's IP rights or in case of non-exclusive licenses a clause which allows the licensor to terminate the agreement if the licensee challenges one of its IP rights.⁴³

If the safe harbour does not apply to a technology transfer agreement, individual assessment is needed under the relevant TFEU provision.⁴⁴

3.5 Remedies under Competition Law for the Recipient of any Unjustified Claim

³⁸ IP assignment agreements where part of the risk associated with the exploitation remains with the assignor are also considered technology transfer agreements under the TTBER.

³⁹ Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements.

⁴⁰ Article 3 TTBER.

⁴¹ See Article 4 1. of TTBER.

⁴² See Article 4 2. of TTBER.

⁴³ See Article 5 of TTBER.

⁴⁴ See also Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements (2014/C 89/03).

The remedies for the recipient of any unjustified claim are the same under competition law as the general remedies provided for by the Competition Act. The remedies in these cases are very similar to those in IP infringements. The civil law remedies are (i) to demand that the fact of infringement be declared by the court; (ii) to demand that the infringer cease the infringement or any acts directly threatening therewith and that the infringer be prohibited from further infringement; (iii) to demand that the infringer give information on the identity of persons involved in the production and distribution of the infringing goods or the provision of infringing services and of the business contacts established for their distribution; (iv) to demand satisfaction from the infringer by way of a declaration or other appropriate means and, if necessary, that the declaration be made public by or at the expense of the infringer; (v) to demand the seizure, transfer to a specific person, recall or definitive removal from the channels of commerce, or destruction, of the infringing products and packaging, as well as of the means and materials exclusively or primarily used for infringement; and (vi) to claim damages under the rules of civil liability.

4. Threat of Unjustified Claims - Abuse of IP Rights

As seen above the prohibition of call on boycott may serve as a limitation to unjustified IP claims. As shown above in point 3.3 the Hungarian courts established that an unjustified threat against IP rights the intention of which is to disrupt existing economic relationships with third parties or to prevent the creation of such relationships may constitute a violation of competition law.

Another area where abuse is possible is the criminal enforcement of IP rights. The TRIPs agreement made it necessary to introduce criminal sanctions for certain IP infringements such as counterfeiting and product piracy committed on a commercial scale.⁴⁵ The Hungarian legislator introduced criminal sanctions in case of IP infringements to a much broader extent, basically against all IP infringements. As a consequence, IP rightholders often file criminal complaints with the investigating authority, claiming IP infringement instead of enforcing the rights before civil courts. It is not only cheaper for the rightholder as the cost of the criminal proceedings is borne by the state and not the parties as in civil proceedings, but it is also often used as revenge in mere commercial disputes. As criminal law requires the perpetrator (infringer) to be a natural person, the criminal case will be opened against the CEO of the company involved in the infringement. As the procedure even at first instance typically lasts for years, it can easily constitute unjust harassment against a person. Frequently, software developers having a dispute about the copyright of the software bring criminal complaints against each other, or former employees bring complaints against their former employer (and thus its CEO) based on copyright infringement. It also happened that the owner of an auction house was convicted in a criminal procedure because he published a photo of the painting put on auction in its catalogue. Even one of the most renowned Hungarian contemporary painters was convicted for copyright infringement when he wrote a book about his teacher the most influential Hungarian avant-garde artist, Lajos Kassák, and the administrator of Kassák's copyright filed a criminal complaint against him. All these are examples for IP disputes which should never reach criminal courts.

5. Summary

Generally it seems that there is a fair balance between the exclusive rights of IP holders and the rights and interests of third parties. First of all, the inner barriers of IP rights serve as a limitation to the exclusive rights in the interest of the public and third parties. Then, there are other branches of law which further limit the exclusivity of the IP rights, mostly competition law, but in certain cases constitutional and general civil law as well.

IP rights may be misused if the intention to threaten with IP claims is to disrupt existing economic relationships with third parties or to prevent the creation of such relationships. In Hungary this may be sanctioned by the courts if it violates the prohibition of calls on boycott. Another example of misuse is when IP rightholders use criminal law for the enforcement of their IP rights. Against this the law is powerless, mainly because of the very formal nature of criminal law. This misuse could be eliminated by narrowing the scope of criminal sanctions for IP infringements.

⁴⁵ Article 61 of the TRIPs Agreement: "Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale."