PERSPECTIVE

The Path to Realisation of an International (World-Wide) Patent

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The 19th and 20th centuries are known as the era of the origin, development and global acknowledgement of intellectual property law as one of the important concepts of law. In these centuries "intellectual property" became a legal term acceptable in both international and domestic legal practice. The concept of intellectual property became so important that a special international body – the World Intellectual Property Organisation (WIPO) was created for the implementation of targeted policy and promotion of creative activities in this field, in addition to providing assistance to developing countries. This organisation is the most profitable and economically stable body among the other UN bodies.

Intellectual property law is applicable to any type of expression of ideas and thoughts originating from artistic or literary work that has been integrated into economic circulation. Namely, whether in a property relationship or destined for such, any work (copyright law), technical ideas originating as a result of cognitive and technical work, such as inventions (industrial property, namely patent law), as well as the outcomes of performance and industrially creative work, necessary for the use of these subjects in an economically profitable manner, such as performance, audio and visual recordings, broadcast works, trade and service marks, geographical indications, brand names and other commercial indications.[1] Attribution of these subjects to intellectual property law enforces their separation (privatisation), insofar as all legal systems acknowledge this field of law as a constituent part of public law[2]. It should be mentioned that intellectual property rules have been created and are developing in a similar fashion to those of real property law, but with one peculiarity – it is characteristic for its subjects to provide for numerous restrictions, and the origin of new grounds for these restrictions is an inevitable process due to the continued scientific, economic, cultural, and social, advancement of mankind.[3]

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[1] For the purposes of this article we shall not touch upon the other subjects of intellectual property.

[2] The Law of socialist countries treated this issue in a different manner.

[3] The results of the developments of the 20th century produced not only the school of supporters of maximum restrictions of intellectual property rights among legal scholars, by also the tendency to doubt the existence of the concept of intellectual property itself. Modern scientists base their opinions on the assumption that any data (information) necessary for the unimpeded satisfaction of cultural needs of a human being, free dissemination of ideas, and in general for the acquisition and deepening of knowledge,must be publicly available. In this light, the subjects of intellectual property law are called "public goods". For more detailed information regarding these issues see: *Makeen Foud Makee*n, Copyright in a Global Information Society,

With respect to the restrictions of intellectual property rights, it can be said, that the most noteworthy is the limitation on the exercise of these rights to the territory of a particular country. In addition, this stipulation on the exercise of these rights was provided from the very outset and it gave rise to a special treatment of certain private property which differed from real propriety law. Such a stipulation is a certain artificial deficiency which has become particularly pressing in the era of globalisation and intensification of international economic and commercial relations. The search for the solution to this problem led to the necessity of making fundamental and global multilateral international agreements. Agreements, made until now reflect the peculiarities of individual concepts of intellectual property. Consequently, in some cases the territorial limitation on application of intellectual property rights has been avoided, while in others this goal has not been achieved.[4] Such a situation creates disharmony and unreasonably separates concepts of intellectual property from one another, a state of affairs that would appear absolutely incorrect, particularly with respect to those subjects that are produced as a result of similar creative work. This would include works and inventions the creation of which is related to artistic-literary and technical work. Consequently, the only difference between the subjects created is that in one case the work aims at the satisfaction of cultural and social needs of a human being, while in the other case it is directed towards the economic and technical development of an individual, and satisfaction of his material needs.

For the purposes of this article patents shall be used as the basis and example for our deliberations.

As in other fields of intellectual property, the existence of patent law is conditioned by the development of industrial and trade-economic relations. The rules of patent law were created artificially. Since medieval times, each sovereign has tried to create the most beneficial system to encourage and protect the interests of manufacturers and entrepreneurs, a fact which used to put into economic circulation new and original technical innovations, from the creative point of view, and which were useful for the country. Initially these persons were granted privileges in terms of monopolies. It is apparent, that a sovereign of those times was not able to grant such a privilege that would have

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The Scope of Copyright Protection under International, US, UK, and French Law, 2000; *Koepsell* The Ontology of Cyberspace, Law, Philosophy, and the Future of Intellectual Property, 2000; *Halbert* , Intellectual Property in the Information Age, The politics of expanding ownership rights, 1999.

[4] The main reason is the different regime for the acquisition of rights. When it is not necessary to follow a certain special legal procedure for the acquisition of a right (work, performance, commercial indications) – the problem is settled, but whenever it is necessary to undergo certain administrative procedures for the acquisition of a right (invention) – the problem still remains unresolved.

extended beyond the boundaries of the country governed by him. Further development has been aimed at the reinforcement of invertors' rights through rules of positive law. As was the case with medieval privileges, the first patent laws used to protect inventors' rights only within a particular country. The first laws provided only for rights *in rem* and logically the positive rules of patent law that were created were similar to those of real property. But from the very outset these rules failed to embody one of the main principles specific to a corporeal thing: "A right follows a thing". This situation was also caused by the fact that certain countries provided for the protection of technical creations, while others did not. Furthermore, each country adopted a patent law independently from other countries. In addition, there were no well-known and commonly acknowledged, theoretically substantiated general principles which could have served as the basis for substantive patent law, and which now make the process of international harmonisation of patent law rules more efficient. Many measures have been undertaken so far under the aegis of WIPO, and which were accomplished by the adoption of new international acts. The outcome of the first stage was the Patent Law Treaty (PLT) that regulates various aspects of harmonisation of the provisions related to formal requirements. Currently work on the adoption of the Substantive Patent Law Treaty (SPLT) is underway.

The adoption of the Substantive Patent Law Treaty will allow for common regulation of the essence of patent rights throughout the entire world. Consequently, it will become possible to avoid territorial restriction of the scope of application of patent rights. Similar to the title to a corporeal thing, it will become possible to apply the above mentioned principle with respect to patent property (special) rights, which may now sound as if "a right follows an invention". This situation allows for the realization of the idea of a "world-wide patent", a goal which has been the dream of every inventor and his legal successor.

It might be asserted that the theoretical and practical preconditions for the implementation of this idea already exist.[5] The current situation is as follows. Under the international provisions of patent law, the Bern Convention for the Protection of Literary and Artistic Works (Bern Convention), rights related to a work are automatically protected in all the member countries of the Convention, states that constitute an absolute majority of the well-known countries of the world. According to this Convention, a special copyright attaches to a work. Insofar as the rights of persons engaged in creative work (authors, inventors) are of the same ontological and legal nature, there are no essential problems

[5] Currently legal scholars put forward the issue of protection of not only technical ideas, but also the issue of the creation of a global register of any ideas, and consequently, for the development of a respective legal regime. In this respect, one would like to refer to the recently published article: *Livingston*, World-wide idea registration in a global idea bank is a sine qua non to protect present intellectual property ideas for posterity, The Journal of World Intellectual Property, Law, Economics, Politics, vol.8, No.4, 499-517.

preventing acknowledgement of patent rights without territorial restrictions. Furthermore, rigorous efforts have been undertaken to settle this matter, a development that is required by globalisation processes concerning international trade. The settlement of this issue is headed by the World Trade Organisation (WTO) and WIPO. The Agreement on Trade Related Aspects pf Intellectual Property Rights (TRIPS) was adopted within the framework of the WTO, which obliges the WTO member states to provide for uniform regulation of trade related rights, including intellectual property rights and of course, patent rights, which are inseparable from commerce. By virtue of this Agreement, all member states are obliged to incorporate the acknowledged principles of patent law in their domestic legislation. The holders of these rights must be confident that their rights will follow the subjects of trade from country to country. This situation brings us to the question of the exterritorial application of intellectual property rights. In this light, everything seems to be settled with respect to copyrights, as mentioned above, by virtue of the Bern Convention.

The Paris Convention, adopted in the filed of industrial property law, which among other issues covers the subjects of patent law, fails to settle this problem. It does not embody the principle of automatic application of rights on the territories of the member states. In my opinion, the primary reason for this is that particular administrative procedures are required for the acquisition of rights over these subjects and that these administrative procedures are discharged according to domestic laws and procedures. They cannot be ignored as there must be an officially registered patent including a description and‘or formula of the invention. These procedures vary from country to country, as in certain countries they are simplified with only formal requirements needing to be verified, while in other states subjects are inspected on their merits, a fact that often complicates and makes expensive patent expertise. The reason for this is easily understandable as this type of expertise includes the research of information and assessment of criteria relating to the novelty and industrial applicability of the invention. In order to promote simplification of the acquisition of rights, the Patent Cooperation Treaty made under aegis of Paris Convention provides for a procedure that envisages an international phase. However, under the same Convention it is necessary to undergo some domestic procedures as well following completion of the international phase.

Certain regional agreements have been made with a view toward expansion of the territorial scope of application of patent rights. Some of these agreements extend the application of these rights to the territory of their member countries. One of such agreements is the Eurasia Patent Convention, the parties to which are former the Soviet states except for the Baltic States, Georgia, Ukraine and Uzbekistan. Application of a similar regional patent is provided for in African countries, where two regional agreements, made by English-speaking and French-speaking countries have been concluded (these are the Agreements on the *Organization Africaine de la Propriete Industrielle* and on the African Regional Industrial Property Organization). The Euro-

pean Community has not yet realised the idea of a common European patent that is provided for by a draft agreement.[6]

From among the subjects of industrial property a somewhat better situation is notable with respect to trade (service) marks, appellations of origin, and industrial models. The problem has been settled through international registration that becomes valid on the territory of each country, unless a country refuses its application, a situation that occurs when the right over a similar subject already exists on the territory of the country concerned, or when the subject is not compatible with the rules of public order and ethics in any of the countries concerned. Despite this stipulation concerning domestic procedure, the issue may be considered as settled with respect to these subjects of industrial property.[7]

The above analysis enables us to come to the conclusion that only patent rights would appear to be "oppressed" as compared with the other intellectual-property rights, although there are no irreconcilable legal obstacles for their exterritorial application. In my opinion there are the following ways of overcoming this problem:

1. Introduction of a provision into the Paris Convention, under which patent rights will become applicable on the territories of member states, provided special international procedures are observed. If the holders of these rights have no desire to follow these procedures, they should have the possibility to acquire patent rights through domestic procedures that would be applicable only on the territory of the country concerned. This will lead to the development of a two-fold regime for the application of patent rights – "exterritorial application" on the basis of an international (world-wide) patent[8] issued through international registration, and application limited to the territory of an individual country on the basis of a national patent.

2. The granting of an international patent on the basis of an international application that would be filed with the patent agency of the country of origin, where the formal expertise would be conducted and where the application would be granted, the date of the filing of which would also be considered as the date of filing the international application.

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[6] There is the European Patent Convention that sets forth uniform expertise procedure for all its member states, and which concludes with a decision on the granting of a patent. But a single patent is not granted, as mandatory domestic procedures must also be complied with, thus making it necessary to register the invention formula in every country following the submission of the translation thereof into a national language and payment of certain fee. Otherwise the patent granted by the European Patent Agency will not be valid on the territory of the country concerned.

[7] Certain observations on the perfection of the right acquired thought its international registration could be made with respect to its application, a topic that lies outside the scope of this article, thus we shall not go into details in this regards.

[8] I have given preference to the term "international patent" as the term "international application" already exists and is provided for by the Patent Co-operation Agreement. For an exterritorial patent other terms such as "worldwide patent" might be considered acceptable.

2.1 Initially an international application could be made in the appropriate national language, but would then be translated into one of the official languages of the Patent Cooperation Treaty, e.g. into English;[9]

2.2 An application subjected to the expertise of formal requirements would be transferred to an international body, whose role could be played by the International Bureau envisaged by the Patent Cooperation Treaty;

2.3 The Bureau would enter the received applications into an international register that would then be published (if the application was initially filed in the national language, both the national and translated applications could be published simultaneously);

2.4 Following its publication, an international patent would be granted for a term of 20 year, as it is practicable for the time being.[10]

Such a system of issuing patents would be efficient and cheap. The fact that no expertise on merits has been performed would not invalidate the status of an international patent. This opinion is supported by the swift and efficient development of modern information technologies. There is little doubt that increased use of computers and other information technologies will continue unabated in the future. Consequently applicants for patent rights will be no less informed concerning technological innovations than any patent agency, while the inventor himself will be able to assess the criteria together with specialists having relevant patent knowledge none the worse than that of a patent agency expert.[11] One of the most important tasks of a patent agency will be the public dissemination of information. Thus, the granting of a patent without verification requirement through administrative procedure with requirements of novelty or innovation will neither diminish the status of an international patent, nor make it make it easily revocable. The future patent-holder will personally ensure the maintenance of his rights (i.e. he will assess its compliance with relevant criteria, based on the available information), and thus will not take the risk of obtaining an easily revocable patent, insofar as such a patent will provide nothing but an economic loss. Furthermore, if a future patent-holder gives preference to official assessment of criteria, then he will be able to apply the option provided for by the Patent Cooperation Treaty and request that preliminary expertise on the merits based on an international information search. Both methods of assessment should be optional.

3. An international patent should also be granted on the basis of a national patent through the introduction of a regime similar to that for newly filed patents, unless the period of validity of the latter has expired.

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[9] Based on current practice, the English language might become the sole official language of an international patent.

[10] One would not support the idea of increasing the period of validity of a patent.

[11] The idea that the role of national patent agencies may reduced to a certain reasonable extent already exists, and it was made with respect to the patent office of such a powerful country as the United States of America. See: *Ono*, In Search of Positive Developments in International Intellectual Property Policy, Intellectual Property Litigation System Reform in Japan, The Journal of World Intellectual Property, Law, Economics, Politics, vol.8, No.4, 459-497.

4. A granted international patent will be legally valid, unless it is appealed against by an interested party. If the court acknowledges that it does not comply with set requirements (unified criteria), the international patent will be withdrawn.[12]

An appeal may be heard by:
– A court of any country;
– The courts of countries, provided for by agreement of the parties;
– A specially set up international patent court, which would be comprised of the representatives of contracting parties

Along with making an amendment to the Paris Convention, the implementation of the above discussed idea of an international patent would require the making of a new agreement that will include the positive features of the Patent Cooperation Treaty, Madrid Agreement Concerning the International Registration of Marks and related protocols, the Hague Agreement Concerning the International Deposit of Industrial Designs and its Geneva Protocol, the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, PLT, TRIPS, SPLT, as well as other international acts, among them the European Directives and Regulations.

Of course, it is impossible to cover all practical and theoretical issues related to the creation of a new system of international patents. One would be ready to participate in the discussion, if there is such and to examine their various practical aspects.

[12] However, it is possible to provide for the withdrawal of the patent on the territory of the country concerned (according to interested parties).