PRIVATE LAW CODIFICATION FROM THE PERSPECTIVE OF THE INTELLECTUAL PROPERTY

ISTVÁN GÁL

Universtiy of Szeged Faculty of Agriculture, Hódmezővásárhely, Hungary

Abstract: *The social and economic changes, which occurred following the codification of the Civil Code and the major modifications thereof, and the legal concepts, which were induced by such changes, justified the codification of a new and unified civil code in any case. Along with the codification of the new civil code, the question of the method of integrating the intellectual property rights in civil law has arisen.*

Beyond presenting the major codificational difficulties in the field of intellectual properties, the purpose of my study is to demonstrate the changes in regulation following the date of publication of the new Civil Code Proposal concerning the research agreement, which is about the generation of certain intellectual work, and the license agreement, which provides the frame of the use thereof, as well as to give the detailed and comparative presentation of the dogmatic standpoints in connection with such changes.

Key words: *civil law codification, intellectual property rights, industrial property rights protection, research contract, licence contract*

INTRODUCTION

The intellectual property law with its "ambivalent" nature has always caused significant dilemma for the theoretical and practical experts involved in the codification. Its reasons derive from the intangible aspect of this field of law that is suggested by its name, furthermore from the fact that this area of law bears both personal and property rights features. As in the past, in the present as well, everybody prefers the physical, tangible things, while the field of the intellectual property includes "products" of mind and these products do not manifest in a specific result in all cases. Taking into consideration that this legal area can be considered as one of the most dynamically developing segment of the civil law, it is important what regulatory environment will be established by the codification.

The current Civil Code (hereinafter CC), creating the background for the private property and market economy (Vékás L., 2008) based on free enterprise in accordance with the principles laid down by the Constitution (At the time of publishing "The principle matters of the Expert Proposal for the new Civil Code" the Act XX of 1949 (Constitution) was in force), is the "product" of an era which characteristics are far from the realization of the principles mentioned. Eminent representatives of the Hungarian legal science (Ferenc Madl, Attila Harmathy, Lajos Vekas academics and others) had already indicated the need of thorough reassessment, even re-codification of the CC shortly after regime change. (Szalma J., 2008) Urgency and necessity of the codification were noted, but no substantial steps were taken to achieve it until the Government Resolution No. 1050/1998. (IV. 24.), rather so-called legislation outside the code came to the fore (Szalma J., 2008).

The Government Decision No. 1050/1998. (IV. 24.) on the codification of civil law put an end to this regulatory approach untenable in the long term and a rather difficult process began which was ended by the draft CC basing on the proposal of Chief Commission for Codification. The draft CC was published by the Ministry of Public Administration and Justice in February 2012. After two-month long public consultation on the draft, the government accepted it almost without changes and it was submitted to the

Parliament as the Bill No. T/7971 (Új Ptk. Javaslat). This Bill was enacted as the Act V of 2013 on Civil Code (hereinafter new CC).

The new CC introduced significant changes in connection with the intellectual property, given the fact that – apart from referral to special laws – regulating this field of law left out of the new private law code, even though according to the reasoning of the bill "individual rights arising in intellectual property relationship (and majority of sanctions of their violation) are private nature" (Új Ptk. Javaslat). Given that there is no solid position in connection with judging this field of law, the new CC did not want to determine this unsolved question.

This study does not aim at detailed description of certain phases of civil law codification; it only focuses on its aspects that are relating to the intellectual property rights. Furthermore, this study aims to present what kind of changes are in regulating the research and license agreement after new CC taking into account their close relationship with formation and exploitation of the intellectual property. Present study seeks to take a position whether there has been positive change compared to the previous provisions, taking into consideration the role of these institutions in the economic life.

MATERIALS AND METHODS

In the study, the conclusions are based on the examination of the primary literature dealing with this subject, analytical studies and monographs published in the Hungarian legal doctrine in this field of law, as well as on analyzing empirical data obtained from the judicature. In describing each legal institution, the possible interpretations of law makers' intention were taken into account as well.

Codification difficulties in field of intellectual property law

In inserting the intellectual property law into the new CC, doctrinal problems start with naming this legal field. New legal science positions (Boytha Gy., 2000, Ficsor M. Z., 2001, Bacher V., 2000) appearing during the codification process are consistent that the "intellectual property" is not suitable to serve as a name for the whole field of law. Its reason is that the "property" can be applied with certainty only in copyright. From institutions being outside of the copyright law and covered by the whole field of law, the trademarks, geographical indications, know-how, as well as neighboring rights – having regard to the fact that creative activity is rarely associated with them – can not be considered works (Ficsor M. Z., 2001). "However, they are intellectual products if they are direct, non-tangible results of intellectual work" (Boytha Gy., 2000).

Taking into account the positions appearing in the legal literature, this field of law would integrated in the new CC under the heading of "Rights related to the intellectual products" by György Boytha, and "intellectual ownership" by Vilmos Bacher and Mihaly Ficsor.

The naming problem entails the question of placing this field of law in the new CC and several dogmatic debates are formulating in connection with this issue (As regards the name of this field of law, see Görög M., 2012.) The current CC contains the rules of the intellectual property in the Part of "Persons," under the Heading of "The moral and the intellectual property rights".

The intellectual property law "as an odd one" of the civil law is about halfway between personal rights and ownership related to things (Szladits K., 1937). Thus, creator has moral and property rights in connection with the intellectual work (Kaprinay E., 2012). Recognition of this dual identity is no longer at issue in the legal literature; however, the different positions are not consistent as to which of these two segments are more dominant. Thus, it is a question where regulating this field of law happens, among personal rights or property rights.

The civil law, in principle, is based on protecting the ownership related to things possessed physically and the incorporeal field of intellectual property was integrated into this system (Boytha Gy., 2000). Taking into consideration the current jurisprudential positions, György Boytha and Gabor Faludi, emphasizing the features of personal rights, would place this field of law in the Part of Persons, but Boytha would put in a separate chapter under the heading of "Rights related to the intellectual products" mentioned previously. In contrast, Vilmos Bacher and Mihaly Ficsor, highlighting the relationship with the ownership - in a separate chapter, under the heading of "intellectual ownership" - would place this field of law in the part of the ownership.

The new CC, breaking with the majority of the aforementioned jurisprudential positions, did not integrate the rules of the intellectual property, and stipulated its own provisions as background norms related to the special laws. In my opinion, although not entirely, but the position declared by the general reasoning of the Proposal can be agreed according to which laws protecting the intellectual property include mixed – substantive, procedural and administrative – norms from branch of law perspective that – despite the differences of their character – are in close relationship, thus dividing them would be unfortunate.

The foreign codes do not attempt to integrate a wider range of the provisions on the intellectual property, and apart from the Italian and Soviet Codification in year of 1942; there is no attempt for this type of regulation (Ficsor M. Z., 2001).

Furthermore, as an argument against the integration can be mentioned that these areas of civil law "permanently cause newer and newer tasks for the legislature because of the rapid technological development and - taking into account the highly cross-border nature - the need for continuous harmonization" (Kaprinay E., 2012).

The agreement creating the intellectual property, changes in regulating the research agreement

It is not an inconsiderable fact that a significant proportion of the protectable intellectual works is made within the framework of a specific subtype of the business contract, namely the research agreement. So, it is worth examining how the regulation of this agreement happened in the new CC.

Under the rules of the current CC the research agreement – depending on the parties – it is not always a performance contract differently from the other special subtypes of the business contract, and in addition to the business elements the research agreement has such features which the contract of services belonging to the diligence contract also bears.

In accordance with the provisions of the law (Ptk.) the court declared the following in its one of decisions on this legal institution in year of 2002. in connection with the

research agreement for its business element the rules of business contract, for its assignment elements the provisions of contract for services must be must be applied (BH, 2002).

The new CC states: "Under the research agreement the researcher is obliged to produce result during the research work, the customer is obliged to take over it and pay a fee."

The new CC, by amending the term of the agreement, placed the research agreement, in principle, in the group of the performance contracts similar to the other subtypes of the business contract, but left to the parties the possibility that the award can be paid in case of failing the result.

Besides the fundamental nature of the agreement, the new legislation changes the rules of the legally protectable result developed during the research with regard to the entitled person. In accordance with the previous provisions the protection depended on whether the customer stipulated or not the right of disposition related to the intellectual property. If so, then costumer may freely dispose with the work, otherwise the researcher has the right of disposition.

Under the new legislation, if the result generated during the research can be protected legally, the researcher is obliged to transfer the valuable rights to the customer. If the transfer is excluded by the law, the researcher is obliged to transfer the most extensive exploitation permission related to the result (Új Ptk.). Contrary to the previous regulations, if the results developed during the research can be legally protected, the customer is entitled to it irrespective of the will of the parties, in all cases.

The changes mentioned previously make clear that the research agreement provides researchers to produce legally protectable results (Új Ptk. Javaslat), furthermore, it is harmonized with the other subtypes of the business contract and as a result of these two conditions, regulating this agreement becomes clearer.

Exploitation of the intellectual property – regulatory questions of the license agreement

Doctrinal debates generated in connection with the codification of the intellectual property have had influence on the license agreement which is the one of the cardinal contracts in this field of law. While the research agreement creates the intellectual property, license agreement is the legal tool of the exploitation the existing intellectual work.

This study does not aim at detailed description of the characteristics of the license agreement; it only focuses on the regulatory issues raised during the codification process.

Rules of the agreement had remained outside from the private law code and authors of the new CC did not consider integrating this agreement into the code justifiable. The Hungarian Patent Office (hereinafter HPO) declared by its remark in connection with the draft of the new CC - sharply in response to the regulatory concept established by Gábor Faludi (Faludi G., 2008) – why it does not consider justified to integrate the exploitation contract having features of copyright and the license agreement having features of industrial property under a common name. Furthermore, it stipulated why it does not think justifiable to place a part of the rules of the agreement in the private law code.

According to the HPO's view, "neither theoretical nor practical considerations do not justify to introduce new type of contracts as "license agreement " by the future CC and particularly it is not appropriate that this new type of contracts applies to such a wide range and so heterogeneous group of the contracts" (Ficsor M. Z., 2007). Arguments not in favor included the codification principles, such as violation of the methodological homogeneity and uniform terminology, lack of related jurisdictional issues, and differences of social and economic conditions affected by the copyright and industrial property rights that are hindering the uniform regulating (Ficsor M. Z., 2007).

Currently, the regulation of the license agreement is quite fragmented: its basics are included by the III Chapter of the Patent Act (Szbt.), IV Chapter of Trademark Act (Védjegy tv.), furthermore by the acts on legal protection of designs (Formaterv. tv.), on legal protection of utility models (Haszn. tv.**)** and on legal protection of topographies of microelectronic semiconductor products (Mikro. tv.).

So its basics are established by different laws of the industrial property laws, while the Civil Code serves as background law, in each case.

Faludi's concept attempted to make this fragmented regulation clear which, by a two-tier regulation, aimed at placing the general rules of the license agreement in the part of each contracts in the new CC, while the provisions related to the specific subtypes were wanted to post in separate acts.

In my point of view, the real value and progress of Faludi's definition and regulatory concept is involving in a system the exploitation of all rights dogmatically belonging to the license agreement. In my opinion, such widespread regulation of license agreement is dogmatically supported, and – in view of the fact that the agreement already has the typical contractual elements which are the basis of separate contracts – by Faludi's two-level regulation, it is justified to place its general rules into new CC.

CONCLUSIONS

Examining the codification difficulties emerging in the field of intellectual property law – naming this field of law, issue of its systematic placement, duality arising from personal and property character, heterogeneous nature covering many types of the works – highlighted the very complex nature of this field of law. It can be concluded that clear resolution in connection with judging this field of law cannot be given because of the constantly competing aspects of personal and property rights. The Proposal for new CC placed this field in the Part of Persons, but the related provision, without specific rules, only includes reference for some specific pieces of legislation.

In the Proposal for new CC research agreement became performance contract, in principle, and costumer has the right to dispose over the result legally protected in all cases. With these amendments, the Proposal created doctrinal consistency between the research agreement and other subtypes of business contract, furthermore made the regulation of this institution clear.

Which the license agreement is considered, we can draw the conclusion that the theoretical and practical life elaborated it such a way that it bears the typical contractual elements justifying its evaluation as a separate type of contracts and it has a general essential core that characterizes all subtypes of this agreement which can be found in the

new CC. Nevertheless, the authors' of the new CC did not integrate this contract in the private law code.

Summarizing the above mentioned we can say that the Proposal for the new CC means a solution attempting to safety but it gives rise to dogmatic debates by not integrating the rules on the copyright, industrial property and on the license agreement, furthermore by applying not a radical, but important reform of the research agreement.

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