

Amalgamation of Egyptian Patent Law with TRIPS Agreement

By
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In 1995 the Egyptian parliament voted for TRIPS agreement, in the light of this agreement it was important to amend the Egyptian patent law (132/1949) to accommodate with the agreement.

The main characteristics of the new patent law may be summarized as follows:

1. Patent examination and realization of the absolute novelty of the invention, industrial application and its inventive step are prerequisites for granting the patent (art. 1).
2. A new category of inventions of moderately inventive step but having industrial benefits, i.e. utility models (Gebraucht-muster), was covered by (art. 5 and art. 30), its protection for 7 years only (art. 31).
3. Patent term is 20 years and not 16 years as before (art. 10).
4. The protected exclusive right of the inventor does not include experimentation for scientific research purposes (art. 11/1).
5. Patent protection covers not only the product but also the method of preparation (art. 11).
6. Each patent should cover only one invention (art. 13).
7. Inventors concerning biological or botanical materials are patentable, also new micro-organisms (art. 14).
8. Before examining drugs, chemical and pharmaceutical patents, the Ministry of Health should send its approval (art. 19).
9. To keep the drug prices within the financial level of the public, a fund was established to nullify the high increase in prices (art. 20).
10. Compulsory licensing is regarded an important tool in technology transfer. Generally, the reasons for compulsory licensing are those of the non-working, insufficient working or interdependence of patents and, finally, the public interest in the working of patented inventions dealing with energy, food or medicine (art. 25, art. 26 and art. 27).
11. Administrative courts are the place of competence for patent disputes (art. 29).

In practice, the fundamental importance of the patent law to inventors, and to the public at large, is to protect against the usurpation of novel and inventive concepts, either in Egypt or outside Egypt for Egyptian inventors or non Egyptian inventors. The law has little regard to the mental process by which the invention was actuated, whether the discovery be by accident or by long and laborious thought. The merit of a patent is to be determined, not by its standing in dialectics, but by its actual impact upon the art. to which it belongs.

ATRIP CONGRESS October 7, 2002 at New Delhi, India

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SMALL AND MEDIUM ENTERPRISES AND IPR (from Finnish Standpoint included in Country Reports on Recent Legislative and Judicial Trends)

In Finland the activity of applying patents for high technology (especially information technology) in relation to the population of the country is highest in the world. Big enterprises, i.e. enterprises having 250 employees or more,¹ have generally speaking more patent applications and granted patents than SMEs. The total amount of SMEs is however more than 90 per cent of all Finnish enterprises. Generally speaking a SME owns no patents or not more than one or a few patents. As far as the other IPRs are concerned, the situation can in general be described in the same way.

Typically SMEs are enterprises which either are in their initial stage or are never capable to grow to the category of a big enterprise. The reasons for such a stagnation vary in each individual case. Factors of a more general type (personal incapability of the enterpriser, financial difficulties, market situation, handicaps like excessive taxation and social expenses including the over-reaching bureaucratic control of SMEs on the part of public authorities) are often connected with more specific factors which result from characteristics of the IPRs which are part of the property of the enterprise in question. Owing to such hindrances the IPRs can be used only insufficiently for the purpose of economic growth of that enterprise.

There are many factors which affect negatively to the possibilities of SMEs to exploit a particular IPR. Generally speaking the dependence of a SME on only one or a few IPRs makes the enterprise more vulnerable in the economic competition which that enterprise faces especially on the part of big enterprises. Most SMEs do not possess large patent portfolios etc. which can be used e.g. as a change to pay acquisition costs of important IPRs owned by other enterprises.

Often a patent or another IPR brings about special advantages like savings in production costs, competitive prices or/and opening of new geographical markets.² However, owing to their vulnerability many SMEs cannot exploit these kinds of economic values of IPRs in the same scale as big enterprises. SMEs often lack financial possibilities to defend their patents and other IPRs or to take insurance against litigation costs. In general the personnel of SMEs is not either trained for handling disputes connected with patents and other IPRs and the time and energy devoted to such kinds of disputes about enforcement of IPRs is taken away from use of the inventive capacity and ingenuity which are the special characteristics of

¹ About the definition of a SME see W. Kingston in Creative Ideas for Intellectual Property. The ATRIP papers 2000-2001 (ed. by Dessemontet and R. Gani), Publication CEDIDAC 46, Lausanne 2002, 378.

² See M. Tuominen, Teollisoikeudet vakuutena (IPRs as guarantees), Vantaa 2001, p. 95.

SMEs.³ Often persons employed by SMEs do not have sufficient knowledge and insight in basic principles of e.g. contract law, necessary contractual precautions and negotiation tactics, when they negotiate with the representatives of especially big enterprises about the utilization of IPRs.

Moreover, the possibilities of SMEs to enforce their IPRs depend on the characteristics of the legal system in each country. In most countries, including European countries, patents are granted according to the so-called first to file -system. This system (as well as the so-called first to invent -system in the United States patent law) can be assumed to be more favourable for big enterprises than for SMEs. This depends on the fact that big enterprises have more financial resources than SMEs to dispute about some basic legal problems, like about the question who is the inventor (in Europe) or who is the true and first inventor (in USA).

Generally speaking the Finnish IPR system meets well the international standards. Protection is given besides for inventions, industrial designs, trademarks, (copyright-protected) works and other kinds of IPRs qualified as exclusive rights also for trade secrets and secret technical know-how which often is more valuable than a patent to which the exploitation of know-how may be linked.

When the relation of a SME to IPR is studied, it may be asserted that the study should be concentrated in the same time to the exclusive rights (patents etc.) as well as to the trade secrets and the secret know-how of the enterprise in question. The IPRs of the last-mentioned type are protected only in certain relations especially mentioned in the article 4 of the Finnish Unfair Trade Practices Act and in the chapter 30 articles 4-6 of the Finnish Penal Code.

According to the present provisions of these laws the duty of an employee to abstain from misusing the employer's trade secrets is, in principle, limited to the period of validity of the employment contract. The mobility of manpower and freedom of competition are the basic ideas behind the said main rule. In addition, the freedom of competition includes the right to engage key personnel directly from a competitor. From legal point of view that kind of activity may however turn out to be problematic, if the main goal of the activity is to acquire the possession of the secret know-how of the competitor which in the same time often is his trade secret.⁴

Generally speaking big enterprises have better financial resources to offer key employees of SMEs better salary and other advantages than their present employers can afford to pay. Therefore SMEs often are under threat of loss of the secret know-how necessary for the best utilization of their patents, utility models and other IPRs via the engagement of their key personnel to the service of a big competitor. Such losses tend to lessen the interest of SMEs in innovative activities, from which socioeconomic losses may result.

³ See Kingston, op. cit., pp. 386-392.

⁴ See M. Castrén, Liikesalaisuuksien oikeussuojasta yhteistointasuhteissa ja niiden jälkeen (The protection of trade secrets in cooperative relations and thereafter), Vammala 1973, pp. 111-112, 131-133 and M. Castrén in Creative Ideas for Intellectual Property, Lausanne 2002, p. 585.

We shall keep in mind that SMEs often are more innovative than their bigger competitors. Those often confine themselves to exploit their old products and methods without developing better and more competitive substitutes.

According to a recent government proposal just debated by Parliament the duty of an employee to abstain from using or divulging the employer's trade secrets would, as far as the responsibility according to chapter 30 article 5 of the Penal Code is concerned, be extended to last until two years have elapsed since the termination of the employment contract.⁵ In addition, according to the chapter 3, article 4 of the existing Finnish Employment Contract Act the new employer or another third party is liable for the damages accrued to the former employer from the divulgation of a trade secret to the third party, if he knew or should have known that the divulgation made by the employee was unlawful.

The said government proposal will in the near future presumably be turned into legislation. It is interesting to see if the protection of employers' trade secrets and secret know-how will be improved so that the said right of the former employer to recover damages, besides from the former employee, as well from the new employer, will be extended to make the new employer liable (together with the former employer) for damages accrued to the former employer from a divulgation of a secret, which the former employee has committed during the said period of two years.

The answer to the posed question depends partly on the interpretation of the said article of the Employment Contract Act. In addition, the liability of the new employer using former employer's trade secrets under the said circumstances can, according to my opinion, be based on the existing general clause in the article 1 of the Unfair Trade Practices Act. According to the said article in general all unfair practices in business life are prohibited.

As has been told, SMEs are especially vulnerable, as far as their trade secrets and secret know-how are in question. The described law reform might improve SMEs' position in that respect.

Like enterprises in general SMEs may demand especially their key persons to sign contracts not to compete with their former employer during a fixed time. Such a restraint may not normally exceed a period of six months. Owing to this reason and to the other conditions required by the law for the validity of a contract not to compete (chapter 3 article 5 of the Employment Contract Act) such contracts do not in general help much SMEs to protect their trade secrets and secret know-how.

I hope that the foregoing presentation has been helpful to clarify that when the question about SMEs and IPR is studied, an overall reaching examination covering all relevant economic and legal aspects related to IPRs qualified as exclusive rights as well as other valuable business assets (especially secret know-how protectable as a trade secret) may be valuable in order to give a picture as complete as possible about how SMEs manage to handle their IPRs and to make a profit from them.

⁵ See about Chapter 30, Article 5 of the Criminal Code in Government Proposal 2002:53.

