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THE TERM INTELLECTUAL PROPERTY IN THE LEGISLATION OF THE CZECH REPUBLIC AND IN THE SPECIALIZED LITERATURE

Abstract: The paper maps Czech legislation with regard to the term. intellectual property. All the Czech Republic laws that deal with the intellectual property term are reviewed here, not only from the perspective of the general definition of this term, but also with a special focus on specific forms of intellectual property. Some ambiguous or not so specific definitions, as well as the term intellectual property, are explained using specialized literature. The aim of the paper is to summarize individual definitions and to evaluate the state of Czech legislation with regard to intellectual property. The paper's conclusion is dedicated to individual recommendations and insufficiencies in relation to definitions of intellectual property in Czech legislation.

Keywords: intellectual property, law, Czech legislation.

1. Introduction

The term intellectual property and its more detailed definition emerged in our country during the nineteenth century. Until then this term was only used in oral form without any detailed specification or definition. With regard to Europe, the Czech language mentioned the term intellectual property for the very first time in 1944 in the Official Bulletin No. L 1 where its definition was translated from the European document titled an Agreement on the European Economic Area and Report No. 28 on Intellectual Property.

In the Czech and the former Czechoslovak legislation, this term appeared for the first time at the end of the forties, taken from international contracts. The most important international contracts and agreements on intellectual property cover the London Agreement on German Patents issued in 1946 and published in a collection of laws. The international contracts and agreements mainly dealt with issues related to industrial rights and the protection of investments.

The boom came after 1989 with the issue of acts stipulating the specific principles of intellectual property protection. These acts especially cover the Act on Inventions, Industrial Designs and Rationalization Proposals, Utility Models Act and Trademarks Act [1].

The paper is therefore aimed at the more recent situation after 1989. The older acts are only valid in cases where no amendment has been issued so far. In the first part of the paper the most important laws are characterized that deal comprehensively with the term intellectual property. The second part of the paper refers to other laws that deal only marginally with intellectual property.

The conclusion brings the final assessment of the current situation with regard to Czech legislation focused on intellectual property, a summary of the disadvantages and also some recommendations for the improvement of Czech laws in this regard.

2. Important legislation defining the term intellectual property

The first part of the paper is aimed at the crucial laws containing the definition of intellectual property, or at least the definition of related terms. In particular it deals with the Commercial Code and Civic Code. It further deals with laws defining the individual forms of intellectual property protection, Act on Accountancy and the Czech Accounting Standards that view intellectual property from the perspective of accountancy.

2.1. Civic Code

One of the basic cornerstones of Czech legislation is the Civic Code issued in 1964. Intellectual property is mentioned in Chapter Nine – Definition of Several Terms where the following definition can be found in the “Things and Rights” part, under Section 118:

“Things and rights

Section 118

(1) Things and, if their nature admits so, rights or other property values can be subject to civil legal relationships.

(2) Also flats and non-residential premises may be subject to civil legal relationships” [2].

The term intellectual property is hidden under the term other property values. This term may be explained using vocational literature from several points of view.

According to Doc. JUDr. Petr Vojčík, CSc. other property values include both the intangible assets as a result of a human intellect, including the author’s crafts, inventions, utility designs and models, industrial designs and patents as well as intangible assets associated with the use of other intangible assets, such as trademarks, trade names etc.

A similar explanation is presented by Prof. JUDr. Jiří Švestka, DrSc., who also included into the other property values category manufacturing, technical and technological knowledge, as well as intangible assets resulting from a human personality (author’s crafts).

A slightly different definition (compared to those mentioned above) of other property values was presented by Ing. Karel Čada, who also included “trade secrets” into this category of assets.

Another angle of view is shown by Ing. Pavel Steiman who, despite including all the above mentioned categories, points to the fact that these “other property values” represent an open group, especially because of the permanent advance in technology. This should be rather viewed as an infinite group of terms that has been constantly growing hand in hand with the progress of technologies.

2.2. Commercial Code

The Commercial Code is aimed at trade secrets, as the specific subject of intellectual property. This term is however marginal and not every vocational literature acknowledges trade secrets as the subject of intellectual property. The second reference to intellectual property describes the particular uses by third parties (license agreements to industrial property).

“Trade Secrets

§ 17

One of the rights appertaining to an enterprise involves trade secrets (also referred to as “business secrets”). Trade secrets include commercial, manufacturing and technological facts relating to the enterprise which have actual or potential material or nonmaterial value, are not commonly available in the business circles in question, and are to be kept confidential at the discretion of the entrepreneur, who ensures that his enterprise’s secrets are protected in a suitable manner.

§ 18

An entrepreneur operating an enterprise to which the provisions on trade secrets apply has an exclusive right to dispose of such secrets, including the right to grant permission to someone else to use a particular trade secret and to determine the conditions of such use.

§ 19

The right to maintain a trade secret lasts as long as the facts referred to in section 17 above apply.

§ 20

An entrepreneur has the right to legal protection against violation or jeopardizing of his trade secrets, as in the case of unfair competition” [3].

A trade secret is described in the Commercial Code quite precisely, and section 17 contains a detailed specification of this term. Other sections contain possibilities of trade secret’s use and the protection of intellectual property in cases of infringement of the related rights.

“Industrial Property License Contract

§ 508

Fundamental Provisions

(1) Under an industrial property license contract, the “licensor” authorizes the “licensee” to exercise (intangible) industrial property rights (hereafter “the rights”) only to an agreed extent and within agreed territory, and the licensee undertakes to make determined payments or to provide other material values (payment in kind) in return.

(2) The contract must be in writing.

§ 509

(1) If a particular Act so stipulates, the exercise of the rights granted on the basis of a contract requires an entry in the respective register of such rights.

(2) If the duration of the rights is dependent upon the exercise of them, the licensee is bound to exercise the rights.

§ 510

The licensor is bound to uphold the rights for the duration of the contract if their nature so requires.

§ 511

(1) The licensor may continue to exercise the rights which are the object of the contract, and may also grant them to other persons.

(2) The licensee may not allow other persons to exercise the rights.

§ 512

Following the conclusion of the contract, the licensor is bound, without undue delay, to make available to the licensee all the documentation and information required for the exercise of the rights under the contract.

§ 513

The licensee must keep confidential both the documentation and the information which have been made available to him under the contract with respect to third persons, unless it follows from the contract or the nature of the documentation and information that the licensor is not interested in keeping such information confidential. Those who take part in the business activities of the licensee and are bound to keep the information confidential shall not be considered as third persons. After termination of the contract, the licensee must return to the licensor all the documentation made available to him and keep the relevant information in confidence, until such information becomes generally known.

§ 514

(1) If the licensee is restricted in the exercise of his rights by other persons, or if he ascertains that other persons are violating these rights, he must report this to the licensor without undue delay.

(2) The licensor shall, without undue delay, take all necessary legal steps to protect the exercise of the rights by the licensee. When the licensor takes such steps, the licensee is bound to cooperate with him to the necessary extent.

§ 515

If the contract is not concluded for a definite period, it may be terminated by notice. Unless the contract sets a different period of notice, the given notice takes effect one year from the end of the month in which it is delivered to the other party” [3].

Division VI of the Commercial Code deals with the potential use of the subject of intellectual property by third parties. The rights and obligations associated with the use of intellectual property are in particular stipulated in sections 508 through 515. Section 508 contains the three basic obligations related to the use of intellectual property, whereas the subsequent provisions cover the remaining obligations associated with the conclusion of the license contract for the subject of the intellectual property. This part of the act does not provide a detailed definition of intellectual property, but deals with the potential use of intellectual property for business purposes.

2.3. Acts defining specific forms of intellectual property protection

These are the Act on Inventions, Industrial Designs and Rationalization Proposals, Act on Utility Designs and Act on Trademarks. Each individual act deals with a specific form of protection of the intellectual property. They cover the most detailed definition of intellectual property subjects. However it should be noted that the acts contain a listing of individual subjects of intellectual property instead of some general definition of the term itself.

Each of these acts defines the term intellectual property either through conditions for recognition or via a listing of subjects not covered by this category. Also there are some conditions for the protection of intellectual property. Annexes to the acts contain fees and charges that must be covered during the period of intellectual property protection. The acts also deal with the extinction or cancellation of intellectual property protection [4; 5; 6].

2.4. Act on Accountancy and Czech accounting standards

Another important act that deals with the issues associated with intellectual property is the Act on Accountancy and also Czech accounting standards. The Czech accounting system classifies intellectual property as intangible assets, whereas the general definition can be found in section 6 – Intangible Assets. A precise definition of intellectual property is contained in paragraph 3 of the same section.

“§ 6 – Intangible assets

(1) The line “B.I. Intangible assets” especially covers establishment costs, intangible results of research and development, software, valuable rights and goodwill with a useful life exceeding one year, at an amount determined by the accounting unit, except for goodwill, and under conditions determined by the applicable legislation, especially subject to the principle of relevancy as well as a true and fair representation of assets. It also covers emission permits and preferential limits. The usable life shall mean the period during that the assets are usable for current or maintainable for future activities. The assets may be further used as a basis or a part of improved or other procedures and solutions including the period of verification of intangible results.

(3) According to par. 1

b) intangible results of research and development and software are such assets that were either developed internally (by own activities) for trading purposes or acquired from third parties,

c) valuable rights are especially items of industrial and similar property, results of human intellect or the rights pursuant to special regulations⁵⁾ subject to conditions pursuant to letter b)” [7].

The above mentioned section deals with the definition of long-term intangible assets. It also includes into the intangible assets group intangible results of research and development, software and valuable rights, as subjects of intellectual property. Paragraph 3 then contains quite an important precondition applicable to Czech accountancy – that the subject of intellectual property (as well as other intangible assets, which is however irrelevant for the proper definition of intellectual property) may be only recognized in the accounting books of the company, if developed internally for trading purposes. Should the intellectual property not be intended for future trading, it cannot be posted to the accounting books. The second precondition for posting says that the subject of intellectual property must be acquired from a third person (e.g. by purchase).

3. Other legislation defining the intellectual property

The second part of the paper is dedicated to Czech laws that also mention intellectual property, but only marginally.

3.1. Labor Code

The Labor Code also deals with the term intellectual property only marginally. What we can find here is the definition of the non-competition agreement (clause) protecting especially legal entities from the misuse of know-how and trade secrets by their competitors. In this case the non-competition clause protects the employer from misuse of know-how by former employees.

“NON-COMPETITION AGREEMENT (CLAUSE)

§ 310

(1) In the case of the conclusion of an agreement (a clause) under which an employee undertakes (promises), after the termination of his employment for a certain period but for no longer than one year, to refrain from performance of gainful activity which would be identical with his employer’s business activity or which would be of a competitive nature to the employer’s business activity, the employer must concurrently undertake in the agreement (clause) to provide adequate monetary compensation to the employee, and this monetary compensation must be at least in the amount of the employee’s average monthly earnings for each month when the said obligation (undertaking, promise) is fulfilled. This monetary

compensation shall be payable backward on a monthly basis unless the parties have agreed otherwise” [8].

The Labor Code further defines the detailed conditions that must be fulfilled by employees. There are also some compensation conditions for the employees (the employer shall provide the adequate monetary compensation to the employee).

3.2. Consumer Protection Act

In the first part of the act, under section 2, the particular definitions of intellectual property are mentioned in the case of the potential infringement (violation) of related rights.

“Section 2

r) products or goods violating some intellectual property rights means:

1. fake products or goods, including their packaging, which without the consent of the trademark holder bear a designation which is the same as or can be mistaken for a trademark, violate the rights of a trademark holder pursuant to a special law¹, all objects bearing such a designation (signs, logos, labels, stickers, brochures, user’s manuals, warranty documentation, etc.), even in cases when they are supplied separately, and separate packaging which bears such a designation,

2. prohibited imitations, i.e. products or goods which are copies or comprise copies made without the consent of the holder of copyrights or related rights or without the consent of the holder of industrial model rights, provided that the production of such an imitation violates such rights in accordance with special laws²,

3. products or goods which violate the rights of holders of a patent³ or a utility model⁴ or the rights of holders of supplementary protection certificate for pharmaceuticals and vegetation-protection substances in accordance with a special law,

4. products or goods violating the rights of a person, availing the protection of registered designation of origin or geographic description⁵” [9].

The Consumer Protection Act also covers some specific infringements of intellectual property rights, for instance the violation of trademark rights, the violation of industrial design rights as well as the rights to the registered designation of origin or geographic description. It also covers provisions on the potential violation of rights to technical solutions (patents and utility models). Besides the Act on Inventions, Industrial Designs and Rationalization Proposals and the Trademark Act, this definition is one of the most concrete definitions of intellectual property in Czech legislation.

¹ Act on Trademarks, No. 137/1995 Coll., as amended.

² Act on Literary, Scientific, and Artistic Works (Copyright Act), No. 35/1965 Coll., as amended.

³ Act No. 527/1990 Coll., as amended.

⁴ Act on Utility Models, No. 478/1992 Coll., as amended by Act No. 116/2000 Coll.

⁵ Act No. 452/2001 Coll. On the Protection of Origin Designation and Geographic Description Amending the Consumer Protection Act.

3.3. Income Tax Act

The income tax act deals with the term intellectual property only marginally, in connection with the income tax the physical person or legal entity must pay to the state budget.

“Section 7

Incomes from undertaking and other self-employment profit-making activities

(2) The incomes from other self-employment profit-making activities, unless covered under Section 6, are

a) incomes from the use or provision of rights to industrial or other intellectual property, copyrights including related rights⁹⁾, including incomes from the issue, reproduction and distribution of literal and other works at own expense,

§ 10

Other incomes

1) Other incomes increasing the company assets, except for incomes pursuant to Sections 6 through 9, especially

d) incomes from inherited rights to industrial or other intellectual property, including copyrights and related rights,...” [10].

In both cases it is not the definition of the intellectual property (specific subjects of intellectual property are listed), but rather the definition of the mandatory payment of income tax from the sale or provision of intellectual rights to third parties. Section 10 (Other incomes) deals with the inherited rights to intellectual property.

3.4. Act on Valuation of Property

As is obvious from the title, this act does not relate to the definition of intellectual property, but deals with the possibility of valuation of the subject of intellectual property for trading purposes.

“PROPERTY RIGHTS

Section 17

Valuation of Property Rights Arising from Industrial Property, Trademarks, Right to Indication, Know-How, and Certain Property Rights Related to Copyright and Rights of Database Compilers

1. Property rights related to industrial property rights¹⁶⁾, trademarks and right to designation¹⁷⁾, or rights arising from their use, and know-how, property rights related to copyright, except for the rights of performing artists, and property rights of a compiler of a database shall be valued using the yield method, and namely as the sum of discounted future annual net yields arising from the use of these rights as at the day of valuation. The manner of discounting shall be stipulated in a Decree.

2. Annual net yields arising from such use shall be ascertained:

a) from contracts on the use of a certain right (e.g. license agreements) valid at the day of valuation;

b) according to the actual situation of the last calendar year of use within the five-year period preceding the year of valuation, if not ascertained pursuant to letter a).

3. Years of use:

a) shall be ascertained from contracts, but only for the maximum period determined in letters b), c) or d);

b) shall be five years for industrial property rights and know-how, and ten years for rights pertaining to trademarks and designations, if the number of the years cannot be ascertained as stated in letter a);

c) shall be the number of years remaining to termination of the fifty-year period of such right duration in the case of copyright and related right, if the number of the years cannot be ascertained as stated in letter a);

d) shall be the number of years remaining to the termination of the fifteen-year period of such right's duration in the case of rights of a database compiler, if the number of the years cannot be ascertained as stated in letter a).

4. Where the right cannot be valued pursuant to subsections 1 to 3 for whatever reason, e.g. because it was not used, or where the price ascertained pursuant to subsections 1 to 3 is disproportionately higher or lower than the fair market price, the right shall be valued according to the fair market price.

5. Property rights of an author and performing artists, being not a transferable right, shall not be valued.”

The act contains a detailed description of the potential methods for valuation of intellectual property using the yield method. This method is however only usable if the subjects of intellectual property are tradable and used for production purposes or the provision of services. Only then may the future annual net incomes be determined and used for the valuation, in other cases some different valuation method must be used.

Act on the Protection of Competition

Again in this case intellectual property is included only marginally. In this case the access to intellectual property by individual competitors is dealt with. The precondition of equal access is covered in Article 11.

“Article 11

(1) Abuse of dominant position to the detriment of other undertakings or consumers shall be prohibited. Abuse of dominant position shall consist particularly of:

f) refusal to grant other undertakings access for a reasonable reimbursement, to own transmission grids or similar distribution networks or other infrastructure facilities, which are owned or used on other legal grounds by the undertaking in dominant position, provided other undertakings are unable for legal or other reasons to operate in the same market as the dominant undertakings without being able to jointly use such facilities, and such dominant undertakings fail to prove that such joint use is unfeasible for operational or other reasons or that they cannot be reasonably requested to enable such use. The same also applies in due proportion to the refusal of access for a **reasonable reimbursement**, of other undertakings to **the**

use of intellectual property or access to networks owned or used on other legal grounds by the undertaking in a dominant position, provided such use is necessary for participating in competition in the same market as the dominant undertakings or in any other market.”

Also in this case the detailed definition of the subject of intellectual property is missing. This text is only dedicated to the issues associated with the subject of the Act on the Protection of Competition.

4. Conclusion

The essence of the paper was to review and document the presence of the term “intellectual property” in Czech legislation and the effort to find the borders of this term as well as to assess differences in the views by individual acts.

In my opinion there is no exact definition covered in the Czech legislation that would strictly specify the term intellectual property. In most cases the acts are not concrete and the proper explanation could be probably found in comments to the acts or vocational literature only. On the other hand we must admit that it is quite difficult to define the term intellectual property, especially because this area has been constantly developing, not only with regard to tangible, but especially to intangible assets, ideas and creative values.

The concrete definition can be found in Czech legislation only with regard to the definition of particular items covered by the term “intellectual property” (see the Act on Inventions, Industrial Designs and Rationalization Proposals, Act on Utility Models and Trademark Act). What is unfortunately completely missing is the listing of individual categories of intellectual property, and therefore it is impossible to determine what subjects are/are not included in the intellectual property category. A good example is trade secrets that certain experts include, and the others exclude from, the intellectual property category.

Another bottleneck of Czech legislation is the definition of the term “results of research and development.” In foreign countries the difference between the results of research and results of development is clearly defined. However Czech legislation does not include any comparison of these terms.

The conclusion is that – in my opinion – more attention should be given to the issues associated with intellectual property in Czech legislation, especially with regard to a more precise definition of the term intellectual property in general.

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POJĘCIE WŁASNOŚCI INTELEKTUALNEJ W CZESKICH PRZEPISACH PRAWA I W LITERATURZE FACHOWEJ

Streszczenie: Artykuł poświęcony jest analizie czeskich przepisów prawa odnoszących się do własności intelektualnej. Po kolei przedstawiono wszystkie ustawy Republiki Czeskiej zawierające pojęcie własności intelektualnej. Zaprezentowano nie tylko ogólne definicje własności intelektualnej, ale również te dotyczące konkretnej jej formy. W wielu przypadkach niejednoznaczne lub niezbyt konkretne definicje i pojęcie własności intelektualnej wyjaśniono przy wykorzystaniu literatury fachowej. Celem artykułu jest ogólne podsumowanie poszczególnych definicji oraz dokonanie oceny czeskich przepisów prawa odnoszących się do własności intelektualnej. W zakończeniu wskazano poszczególne zalecenia i niedobory w definicjach własności intelektualnej, jakie występują w czeskich przepisach prawa.

Słowa kluczowe: własność intelektualna, ustawa, czeskie ustawodawstwo.