Journal of legal and social studies

Issn: 2507-7333

Eissn: 2676-1742

The specificity of the patent for invention in the different legal systems

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Date of send: 15 / 02 / 2021	date of acceptance: 15 / 03 /2021	Date of Publication: 01/06/2021

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Abstract:
The study of this subject falls within the framework of intellectual property law, in this regard it aims at the legal determination of the specific characteristics relating to the patent of invention as well as certain related rights and which are also legally protected, in order to manage to distinguish the particularity of the patent for invention compared to other similar rights. This is how we ask about the particularism that distinguishes the patent for invention in intellectual property law? In this sense a multidisciplinary methodology was carried out, and which includes historical, descriptive, comparative approaches as well as the method of analysis throughout our subject which is articulated on two main ideas in particular the diversity of determination of the patent of invention and the different qualifications of the rights related to the invention patent, to finally deduce its originality compared to other similar rights.

Keywords:Intellectual property; patent for invention; related rights, TRIPS.

Résumé:

L'étude du présent sujet s'inscrit dans le cadre du droit de la propriété intellectuelle, à cet égard elle vise la détermination juridiques des caractères spécifiques relatifs au brevet d'invention ainsi que certains droits connexes et qui sont aussi légalement protégés, afin d'arriver à distinguer le particularisme du brevet d'invention par rapport à d'autres droits similaires. C'est ainsi qu'on se demande sur le particularisme qui distingue le brevet d'invention en matière de droit de la propriété intellectuelle ? En ce sens une méthodologie multidisciplinaire a été effectuée, et qui comprend les approches : historique, descriptive, comparative ainsi que la méthode d'analyse tout au long de notre sujet qui s'articule sur deux idées principales notamment la diversité de détermination du brevet d'invention et les différentes qualifications des droits connexes au brevet d'invention, pour enfin déduire son originalité par rapport aux autres droits pareils.

Mots clés : Propriété intellectuelle; brevet d'invention;droits connexes, ADPIC.

"Today, real wealth is not concrete,

It is abstract. It is not material, it is immaterial"[1]

Introduction

Since all time, man has always sought to protect his own property, so he has sought through several means to counter anything that is likely to harm his own interests and property.

However, today and unlike in ancient times, human concern is no longer content only with classic tangible goods, but is spreading to also contain intangible goods, especially those relating to intellectual property.

In addition, intellectual property rights are therefore property rights like any other. They allow the creator or owner or holder of a patent or a trademark or a work protected by copyright, to profit from his work.

Moreover, this is where the patent constitutes a private right granted on an invention. This title gives to its holder the right to decide the possibility of use of this invention by a third party.

In return, the patent holder discloses to the public the technical information relating to the invention in the published patent document.

Prior to the advent of patents, secrecy made it possible to obtain a monopoly for the unique individuals who had the keys to the invention. However, Pythagoras prevented his disciples from revealing their secrets, going so far as to have the pupil who had betrayed his silence put to death[2].

It was therefore only much later that the "first patent", enunciated by *the parte venetiana*, adopted by the Venice Senate in 1474, appeared. This law was the first legislation regulating the granting of privileges for creations in the technical field[3]. Thus, the law of March 19, 1474 raised the main support for the current patent.

Thus, patents have an incentive function, as they offer individuals recognition for their creativity, as well as the possibility of material reward for their marketable inventions.

They thus encourage innovation which improves the quality of human life.

Thus the present subject is of considerable interest insofar as it seeks to determine the specific characteristics linked to the patent for invention as well as the related rights which revolve around this institution in the different legal systems and this in order to determine the appropriate legal status of this branch, particularly under industrial property law.

In this sense, it is appropriate that we wonder about the particularism that distinguishes the patent for invention in intellectual property law?

For this, this study absolutely requires the development of a multidisciplinary approach and will take into consideration the historical, descriptive and comparative approach of the various comparative rights in the matter, as well as the method of analysis, depending on the stages of our subject in order to identify the points that seem to us to be decisive in the development of this subject.

However, in the existence of several criteria which distinguish the elements necessary for a creation of mind to qualify as a patent for invention from one legal system to another, it therefore seems appropriate to grant a distinctive focus relating to the diversity of determination of the patent for invention (Chapter I), but the presence of other similar rights requires special consideration with regard to the different qualifications of rights related to the patent for invention (Chapter II).

Chapter I: Diversity of determination of the patent for invention

Any new invention is considered to be a creation of mind which grants its owner a private right which manifests itself in the granting of a legally protected invention patent; therefore it is advisable to first mention the notion patentability (Section 1), before seeking this determination of the patent for invention in the different legal systems compared (Section 2).

Sec 1: The notion of patentability

Any new idea, the manifestation or development of which may become useful to society, belongs primarily to the person who conceived it, in this respect, we distinguish the patent for invention (Sub-section 1), as well as the recognition of a monopoly of exploitation of this creation of mind requires territorial protection (Subsection 2).

Sub-section 1: The patent for invention

Any invention may be the subject of an industrial property title issued by the public industrial property services which confers on its owner or his successors an exclusive right of exploitation.

In addition, the concept of patentability includes a certain peculiarity compared to other intellectual rights; this specificity is manifested by the consecration of this concept differently in the existing legal systems.

In addition, the patent is a title which is based on a creation of the mind[4], this concept not specified by the legislator who did not want to abstain from the benefit of the patent of fields unknown at the time, is currently considered as covering any technical solution[5].

In addition, the possibly patentable invention will be noted as an asset without an owner until the date of the application. Thus, when it is filed, it will give rise, if it is qualified as a patentable invention, to the delivery of a title conferring a monopoly on its holder.

Thus, the notion of patentability constitutes a legal measure granting protection over an invention. The preservation of research results seems almost a requirement for its existence at the moment that technological development could not be accepted without a legal means of protection which all States are concerned with putting in place a legal regime for the preservation of techniques inventions.

However, this title is issued by the public authorities, in Morocco the Moroccan Office for Industrial and Commercial Property (OMPIC), giving an invention a temporary operating monopoly, which in all countries is twenty years from the filing of the application, to the one who reveals it, and provides a sufficient description and claims this monopoly.

Thus, the state tends to please the interests of the inventor, who is granted a privilege of exploitation on his invention for twenty years.

Sub-section 2: Territorial patent protection

Therefore, it is easy to see that the granting of such a title assigns a decision that only the public authorities of a State see the right of approval. The recognition of an operating monopoly in one State cannot arise from an action arising from the administrations of another.

This initially led to a rigid territoriality of invention patents, the consequence of which was to order the inventor to file as many applications in the countries where he wishes to acquire protection.

These procedures are governed by the national law of each state and do not necessarily end with the grant of a patent.

The importunities of this territoriality have been weakened through international instruments.

In addition to the Paris Convention of 1883, to which 160 countries have now adhered, the objective of which is to facilitate the nationals of each of the States to obtain and protect industrial property, it is also important to cite the Treaty of Patent Cooperation (PCT) concluded in Washington in 1970, which is an attempt to simplify patent filing procedures while leaving full the sovereignty of the States which are free of their decision in accordance with their internal law[6].

Thus, the patent right is therefore a property right relating to adequate technical knowledge by the patentee and the appropriation is accomplished by taking the patent. Only the patent technique grants the inventor an exclusive right to his invention. Otherwise, the patent is part of the know-how which is incapable of serving as the basis for a private right[7].

However, the rules which specify the patent owner in the case of an invention completed by more than one person, one separately from the other, are distinct.

In the United States, the first-to-invent system continues to prevail until now. Under this system, the right to a patent rests with the first inventor, that is, the person who establishes that he pioneered the conception of the invention and its practical application.

This is a more secure solution for inventors who, although they have not claimed a patent for their inventions, can commercialize them.

On the other hand, Morocco and other countries of Europe, establish in the matter the system of the first-to-file, according to which the right is conferred on the person who entrusts the patent application first; in principle, this technique promotes legal order and the rapid public disclosure of inventions, on which, in a certain provision, technical growth is based.

Section 2: The patent for invention in comparative legal systems

From one legal system to another, different criteria can be distinguished which are not always unanimous in determining the patent for invention, which is why particular attention will be devoted to studying the European patent for invention (Sub- section 1), before also studying Common Law patent law.

Sub-section 1: The European patent for invention

This title was established by the European Patent Convention, concluded in Munich in 1973 and revised in 2000[8]. This provides for the grant of a European patent for one or more Contracting States.

Thus, this classic international convention between European states with a wider geographic scope than the European Union, aims to establish a single procedure for the granting of patents under identical conditions, under the aegis of EPO. However, the European patent is not a unitary title since, once granted, it turns out to be a bundle of national patents in the states designated by the applicant. These effects are then managed by the various national laws. As a result, this system did not therefore create a unified patent regime[9].

Likewise, it should be noted that this title has an effect only if it is issued according to the procedure organized by the CEB, ensures its holder uniform protection in all participating member states that have ratified the agreement and produces identical effects in all these states.

European patent applications are lodged with the European patent office or the central industrial property services of a Contracting State.

The application on whether or not to grant a European patent falls within the competence of the European Patent Office (EPO).

In addition, art 64 Para 1 states that: the patent granted to its holder from the date on which the mention of its grant is published in the European Patent Bulletin, and in each of the Contracting States for which it was granted. It is for this reason that the inventor enjoys the same rights as would be conferred on him by a national patent granted in that State.

Thus, it appears that an invention must first present "an invention", which eliminates discoveries as well as scientific theories and mathematical methods or aesthetic creations, the latter must be capable of industrial application, likewise it must be new[10], which requires checking that it is not included in the state of

the art, and be inventive, and finally it must not interfere with public order and good morals[11].

Once granted the European patent, validated in a contracting state of the convention is transformed into a national patent and, as such, is subject to the rules of that state.

We will retain that this is not really a European patent, but one or more national patents obtained through a European procedure.

Sub-section 2: Patent law in Common Law

A considerable peculiarity characterizes the patent in Common Law in particular in American law, from the moment when any creation or industrial invention is likely to be patented, even if it belongs to other intellectual rights.

Thus, we will cite as an example the designs that are protected in Europe, not only by copyright, but also by means of private industrial property law, the object of which is to grant to the holder the registration of an exclusive right for 25 years.[12]

In the United States, the design is preserved through so-called "design patent" whose glorious example is possibly the shape of the COCACOLA bottle patented in 1915, obtaining these patents is subject to preliminary examination and requires novelty, originality and ornamental character of the design.

By virtue of the latter condition the courts exclude the granting of patents to designs of objects which have been determined by their function.

Furthermore, the patent in question covers only the non-functional aspects of the creation. This right lasts only 14 years from the granting of the patent[13].

However, it is understood that the patent for invention is not the only way to acquire a private right, other titles granted nevertheless by the public authorities lead to obtaining an exclusive right called rights related to the patent of invention.

Chapter II: The different qualifications of the rights related to the patent for invention.

The existence of several legal mechanisms relating to the protection of the patent for invention in the different legal systems compared does not prevent it from being the only creation which grants its guardians exclusive exploitation from then on that there are also legally protected rights also known as neighboring rights to the patent for invention (Section 1), however, the patent right is sometimes described as coexisting with other specific creations (Section 2).

Section 1: Rights related to the patent for invention

There are two types of creations which give access to rights related to the patent for invention, in this sense it is about utility certificates (Sub-section 1), as well as plant varieties (Sub-section 2).

Sub-section 1: Utility certificates

If the invention patent remains the most masterful means for the legal preservation of inventions, there is another alternative: the utility certificate.

Thus, the utility certificate is "a small patent", accompanying weaker inventions that do not require the full extent of patent protection.

However, to be certifiable an invention must meet the same patent requirements[14].

In addition, the complexity of the procedures to obtain a patent and the costs they entail have led some legal systems to provide for the protection of inventions by means of a simpler and faster administrative procedure, although for a shorter duration. This is the fundamental objective of utility certificates (sometimes called utility models) admitted by French law, German law and Portuguese law, thus, it should be noted that utility certificates are not granted in Moroccan law.

In addition, these titles can protect inventions which, like patents, are new involve an inventive step and are susceptible of industrial application, the degree of inventive step (and therefore the level of technological progress).

According to German law, it may include a simple "inventive step" instead of the inventive step required for the grant of a patent; or according to Portuguese law, a practical or technical advantage for the manufacture or use of the product.

The duration of the utility certificate is set for a shorter period than the patent 10 years for German law, and 6 years for French law[15].

Thus, only the simplified procedure differentiates these two titles.

In return, the utility certificate can be granted without any prior substantial examination of the invention.

The law only requires an analysis of the formal conventions it specifies. However, these titles are not harmonized internationally even in Europe[16].

Furthermore, utility models are not accepted by other legal systems, notably the United States and the United Kingdom.

However, the importance of these industrial titles in these latter states has been questioned; by signaling fears as to their effect on the inventive step, since they escape all appropriate examination.

Thus, the Common Law systems devote certain prevention with regard to the protection of free competition, which is possibly called into question by the acquiescence of private rights in industrial goods.

The idea of obtaining a private right is not limited only for industrial inventions, but it extends also to include plant varieties.

Sub-section 2: Plant variety

The creation and discovery of new varieties of plants is of considerable social importance today.

In addition, plant varieties are based on a particular raw material: nature. Thus, Law 9/94 on plant varieties[17] established careful protection for the work of seed selectors. However, the farmer is attached to the issue of a title devoted to certain plant varieties created or discovered.

Furthermore, narrowly excluded from patentability in the civil law system, and authorized in Common Law.

The significance of this phenomenon is also expressed in the contemporary discussion around genetically modified organisms, which includes transgenic plants.

Many questions are raised about other products of human genius that affect each other in the same way as regards plant varieties. Since these varieties are generally capable of self-reproduction, the distribution of any quantity, albeit

small, of reproductive material of a new plant variety can make it quickly achievable, without undoubted expense to all concerned[18].

Moreover, the fact that we are dealing here with a living species nevertheless raises reservations to such a variety, it is also at the origin of the eviction of the patentability of plant varieties.

This eviction stems, therefore, from the fact that these new varieties are frequently the consequence of a simple discovery - that is to say the revelation of a law of nature rather than of a true invention - these reservations are reflected in art 27 of the TRIPS Convention.

This is what gave rise to the Convention for the Protection of New Varieties of Plants, concluded in Paris in 1961, and last revised in 1991, the member states of which formed among themselves the international union for the protection of vegetable varieties.

According to this international instrument, each Contracting State undertakes to grant and protect the "breeder's right" to plant varieties which are new, distinct, uniform and stable.

This right includes in particular, the exclusive rights of production, reproduction, sale, exploitation, import and possession, for one of these purposes, of the material of reproduction or multiplication of the protected variety[19].

Notwithstanding its proximity to the patent, which has led some authors to characterize it as a neighboring right, the conditions for granting the plant variety breeder's right are defined with a certain degree of autonomy from the conditions for industrial application.

Thus, the variety is deemed to be "new" if, on the date of filing the application for the plant breeder's right, the reproductive or vegetative propagation material or a harvest product of the variety has not yet been marketed by the breeder or with a consent - a criterion of commercial novelty is therefore enshrined in the place of the reference of the state of the art accepted in the patent regime-; "Distinct", if it is clearly different from any other variety the existence of which on the filing date of the application is well known; "Homogeneous" if it is sufficiently uniform in its relevant characteristics, subject to foreseeable variation having regard to the peculiarities of its sexual reproduction or vegetative propagation; "Stable", if its relevant characteristics remain unchanged as a result of its successive reproductions or multiplications[20].

In Morocco and like European legal systems, the granting of patents on plant varieties remains prohibited, unlike the United States where federal legislation not only allows the granting of a sui generis right over them , but also patents for "plant patents" plants.

In addition, the convention left the definition of the right holder to national systems.

The duration of the right itself is not uniform, because the convention has only fixed a minimum duration in this regard, which according to the text resulting from the 1991 revision, is from 20 to 25 years, according to the nature of protected plant species. This is the period determined by French, American and Moroccan law.

On the other hand, in Germany these periods have been extended respectively from 25 to 30 years, thus, the term of protection in Portugal is still set from 15 to 20 years in accordance with the original wording of the convention.

Sometimes a patent right coexists with another industrial property right this concurrency of rights gives rise to new industrial property rights.

Section 2: The coexistence of a patent for invention and another right

The patent right is described as coexisting in two ways with another right in a specific creation. First, patent rights and plant varieties are likely to coexist on a genetically modified plant (Subsection 1). Second, patent protection of function can be achieved with copyright protection of form, which is combined on software. (Sub-section 2).

Sub-section 1: The genetically modified plant

This includes transgenic plants, biotechnological invention and plant variety. Established in Morocco by law 9/94, the plant variety rights are very close to patent law[21] to such an extent that it is permissible to determine it, like the right of performers vis-à-vis copyright, neighboring right to the right patents[22].

Moreover, the UPOV convention in its 1961 version is authorizing the choice of plant variety protection by patent law or by the creation of a "Sui generis" right.

However, the development of genetic engineering currently allows humans to modify one or more genes of a plant. A plant capable of being protected as a whole as a plant variety can incorporate a biotechnological invention protectable

under patent law, thus, a variety defined as "all plants with the same stable genetic characteristics, including for all successive generations"[23].

For its part, the biotechnological invention is "a gene or a portion of genes, which makes it possible to implement a process or to manufacture a product"[24]. It is made by a genetic manipulation which helps to include in the plant a new characteristic, for example, "a variety of grape variety protected by a certificate of obtaining can be genetically modified in order to preserve it more from winter weather conditions".

As a result, a patent and a plant variety right can therefore coexist on a genetically modified plant.

In addition, it is important to remember that plant varieties preserved by a certificate are excluded from the field of patentability at the time that the same creation cannot be protected by a patent and by a sui generis right. In addition, art 4 s2 of the 1998 directive provides that: "inventions relating to plants are patentable if the technical feasibility of the invention is not limited to a plant variety ...".

In this regard, the protected invention must not relate to a single variety in particular, which means that the two creations - plant variety and the biotechnological invention - remain distinct even if they can be characterized in the same plants[25].

The common patent rights and plant varieties give rise to a genetically modified plant, this coexistence can also include a patent right with a copyright ends in software.

Sub-section 2: The software

The States recognized the creators of software a copyright, this moreover without filing formalities, therefore without cost for a long protection which, in 1994, was ordered in France on an international standard of duration of protection of 50 years *post mortem auctoris*, duration extended in Europe to 60 years in application of the directive of October 29, 1993, similarly, the United States has governed in the same way by extending the duration from 14 years to 60 years[26].

This led the usual investors in this field to seek that the software is covered by a patent right so that it can be protected as soon as it is filed, in order to guarantee legal certainty to investors.

However, remember that the monopoly on a patent right lasts only 20 years instead of 60 years for copyright.

Moreover, the law defines software as a set of instructions which aims to perform functions by an information processing system.

Software is copyrightable as a work of language, provided it meets the condition of originality.

Thus, a patent which could relate to the functionalities of the software which creates: "an additional technical effect going beyond the normal physical prohibitions between the programs and the computer".

The case law of the Office has recently been assessed by moving the debate from the exclusion of patentability to the characterization of inventive step.

Conclusion

The study of this subject shows that the patent for invention is considered to be a creation of mind which enjoys legal protection that grants its holder exclusive exploitation rights and this, through territorial protection.

However, the determination of the patent for invention is not always unanimous in all legal systems, since each system is distinguished by its own specific determination criteria, in particular the European system and the Common Law system.

However, the existence of this legal arsenal dedicated to the patent for invention does not prevent the existence of other rights which are similar to it and which are also protected by law, in particular the two neighboring rights: the utility certificate and plant breeding.

It is also noted that the invention patent may in certain specific cases coexist with a protected right, in this sense it is the coexistence of the invention patent with genetically modified platforms and its coexistence with software.

Thus and after this study, we recommend that other more in-depth studies such as dissertations or theses in this matter should be carried out to clarify in an even more thorough way all that is relative with the patent of invention as a very specific branch of intellectual property.

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