

**Question Q228**

**National Group:** Hungary  
**Title:** **Prior User Rights**  
**Reporter:** Dr. Marcell KERESZTY  
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**Questions**

**I. Analysis of current law and case law**

Groups are invited to answer the following questions under their national laws:

1. Is there a provision in your national patent law that makes an exception to the exclusive right of a patent holder for parties who have used the invention before the filing/priority date of the patent (“prior user rights”)?

Yes (Art. 21(1)-(3) of the Hungarian Patent Act (HUPA)).

2. How frequently are prior user rights used in your country? Is there empirical data on how often prior user rights are asserted as a defense in negotiations or court proceedings?

Prior user rights are used very rarely in Hungary. Only five court decisions were published in the last five decades in which such rights were asserted as a defense, and similarly, negotiations touch this question very rarely.

3. To what degree must someone claiming a prior user right have developed the embodiment which is asserted as having been used prior to the filing/priority date of the patent? Is it sufficient to have conceived of the embodiment, or must it have been reduced to practice or commercialized?

A condition of right of prior use is that manufacturing or using of the subject matter of the invention has begun or serious preparations for that effect have been made (Art. 21(1) HUPA).

4. Does it make a difference in your country if
  - the prior use occurred before the priority date; or
  - it occurred after the priority date, but before the filing date?

Yes, only prior use before the priority date qualifies as a limitation of the exclusive right (Art. 21(1) HUPA).

5. Is there a territorial limitation with regard to the scope of prior user rights in your

country? In other words, if a party has used the patented invention before the filing/priority date in a foreign country, can it then claim a prior user right in your country?

There is a territorial limitation with regard to the scope of prior user rights in Hungary; such rights can be claimed only on the basis of domestic activities (Art. 21(1) HUPA).

6. Is there a provision that excludes prior user rights for those who have derived their knowledge of the invention from the patent holder and/or the inventor?

Yes. Only activities in good faith can be a basis for prior user rights, and a prior user shall be considered a bona fide user only until it is proved that the prior use was based on the inventive activity that led to the patented product (Art. 21(1)-(2) HUPA).

7. Is it necessary that the prior user has acted in good faith to be granted a prior user right?

Yes, good faith is one of the conditions of prior user rights (Art. 21(1) HUPA).

8. Is there a material limitation with regard to prior user rights in your country? More specifically, if someone has used an embodiment of a patented invention before the filing/priority date of the patent, can he then claim a prior user right to anything covered by the patent? In particular, is the owner of a prior user right entitled to alter/change the embodiment of the patented invention used before the filing/priority date of the patent to other embodiments that would also fall within the patent's scope of protection or is he strictly limited to the concrete use enacted or prepared before the patent's application or priority date? In the event that changes/alterations are permitted by your national law, to what degree?

Published case law is silent on this issue. It follows from the wording of Art. 21(3) HUPA that a limit of the prior user rights is the extent of the activities present on the priority date (or that of the activities resulting from serious preparations present on the priority date). Accordingly, it seems that there is no material limitation in the sense of the question and the owner of a prior user right is entitled to changes/alterations of the subject embodiment/use.

9. Does a prior user right in your country require the continued use (or the necessary preparations of the use) of the invention claimed by the patent at the moment in which the objection of the prior user right is asserted or is it sufficient if the invention claimed by the patent has been used before the priority/filing date of the patent but has been abandoned at a later stage?

Prior user rights in Hungary require the use (or the necessary preparations of the use) on the priority date. Apart from this, no continued use is required.

10. Is a prior user right transferable and/or licensable in your country? If yes, under what circumstances?

The right of prior use may only be transferred together with an entitled economic organization or with that part of the economic organization in which such making, using or preparation has taken place (Art. 21(3) HUPA). No licensing of a prior user right is possible.

11. Does your national law provide any exceptions or special provisions with regard to a prior user right owned by a company within a corporate group? In particular, can a prior user right be transferred or licensed to another group company?

There are no exceptions or special provisions with regard to corporate groups; the provisions in point 10 above are also applicable for such situations.

12. Are there any exceptions for any specific fields of technology or types of entity with regard to prior user rights in your country?

There are no exceptions for any specific fields of technology or types of entity with regard to prior user rights in Hungary.

13. The Groups are invited to explain any further requirements placed on prior user rights by their national law.

A special 'prior user right' is stipulated in Art. 84/K (6) HUPA for the case if not the entire scope of protection of a European patent is valid for Hungary due to a translation error in the Hungarian validation thereof. This special 'prior user right' can be acquired for embodiments falling within the scope of protection not covered by the erroneous translation. The critical date is the date of the official publication about the correction of the translation; apart from this, the answers in above points 3 to 12 are valid for this special 'prior user right' as well.

## **II. Policy considerations and proposals for improvements to your current system**

14. Should a prior user right exist in any legal system? If yes, what is the main legal justification for a prior user right?

Yes. The main legal justification for prior user rights is that patents should have no "retroactive effect", i.e. any activity practiced before the priority date should by no means become illegitimate due to a later patent filing. From an economic perspective, investments on the use of an invention should not be frustrated by later protective rights.

15. What is the perceived value of prior user rights in your country?

The perceived value of prior user rights is little in Hungary.

16. Are there certain aspects that should be altered or changed with regard to the existing implementation of the prior user right in your country? In particular, are there certain measures or ways that could lead to an improvement and/or strengthening of your current system?

There seems to be no reason for changes with regard to the existing implementation of the prior user right in Hungary.

## **III. Proposals for harmonization**

Groups are invited to put forward proposals for the adoption of harmonized rules in relation to prior user rights. More specifically, the Groups are invited to answer the following questions:

17. Is harmonization of “prior user rights” desirable?

Harmonization seems to be less crucial in the light of the territorial limitation and the ‘case by case’ character of such rights. On the other hand, harmonization is still desirable due to simplification of the global patent system.

18. What should be the standard definition of “use” in relation to prior user rights? Must the use be commercial?

The use must be commercial.

19. What should be the definition of “date” (or “critical date”) for prior user rights? (*i.e.* when must the invention have been used to establish a prior user right?)

The priority date should be the critical date.

20. Should a prior user right persist in the event that the use and/or preparation for use of the invention has already been abandoned at the time of the patent application/priority date or should the prior user right lapse upon the termination of the use and/or preparation of use?

A prior user right should not persist in the event that the use and/or preparation for use of the invention has already been abandoned at the time of the priority date. Apart from this, the prior user right should not lapse upon the termination of the use and/or preparation of use.

21. What should be the territorial scope of a prior user right? In particular, if a party has used the patented invention before the decisive date in a foreign country, should it then be entitled to claim a prior user right?

The prior user right should have a territorial scope. In particular, a foreign use or preparation should not be a basis of such rights.

22. Should there be a provision that excludes prior user rights for those who have derived their knowledge of the invention from the patent holder and/or the inventor? If yes, should it be necessary that the prior user has acted in good faith to be granted a prior user right?

There should be a provision that excludes prior user rights for those who have derived their knowledge of the invention from the patent holder or the inventor. It should be necessary that the prior user has acted in good faith to be granted a prior user right

23. Should there be material limitation with regard to prior use rights? In particular, if someone has used an embodiment of a patented invention before the filing/priority date of the patent, should he then be entitled to claim a prior user right to anything covered by the patent?

Apart from the extent of use at the priority date, there should be no material limitation with regard to prior user rights.

24. Should a prior user right be transferable and/ or licensable?

The right of prior use should only be transferable together with the entitled economic organization or with that part of the economic organization in which the use or preparation has taken place. Licensing of a prior user right should not be possible.

25. Should there be any exceptions for any specific fields of technology or types of entity with regard to prior user rights?

No.

26. The Groups are also invited to present all other suggestions which may appear in the context of the possible international harmonization of "prior user rights".

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