

# **Enforcement of Intellectual Property Rights**

## **Teaching materials**

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## **Content**

### **I. JUDr Zdeněk Hraba**

**The role of courts and public prosecutor's offices in enforcement of the intellectual property rights, protection and tools against infringement of the copyrights and the industrial rights, application of the Directive of the European Parliament and of the Council on criminal measures for enforcement of the intellectual property rights, jurisdiction of courts, the Police, the Customs Administration and the Czech Commercial Inspection .....**5

### **II. Mgr. Vladimír Abraham**

**Crime in the area of infringement of the intellectual property rights.....42**

### **III. JUDr Zdeněk Hraba**

**Powers and competences of the State Agricultural and Food Inspection Authority (SZPI) in the area of enforcement of the intellectual property rights.....71**



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## **Content**

<b>1. Introduction.....</b>	<b>8</b>
<b>2. Hierarchy of Legal Responsibility .....</b>	<b>8</b>
<b>3. Role of Courts .....</b>	<b>9</b>
3.1 General .....	9
3.2 In Matters Resulting from Intellectual Property Rights.....	11
3.3 Subject-Matter and Territorial Jurisdiction of Courts .....	24
<b>4. Role of Public Prosecutor's Offices .....</b>	<b>27</b>
4.1 General .....	27
4.2 In Matters Resulting from Intellectual Property Rights.....	29
4.3 Subject-Matter and Territorial Jurisdiction of Public Prosecutor's Offices.....	30
<b>5. Jurisdiction of the Police.....</b>	<b>31</b>
<b>6. Jurisdiction of the Customs Administration and the Czech Commercial Inspection.....</b>	<b>34</b>
<b>7. Application of Directive of the European Parliament and of the Council on Criminal Measures for Enforcement of Intellectual Property Rights .....</b>	<b>38</b>

## **1. Introduction**

The objective of the work is to provide a clearer specification of competences and of the subject-matter and territorial jurisdiction of the ruling state bodies in enforcement of the intellectual property rights and in sanctioning unlawful conduct infringing the intellectual property rights.

The work is not focused on evaluation of the Czech legislation in force; however, it has to be observed that this legislation shows a significant unsystematic approach and legislatively technical imperfection, which has to affect the efficiency of such legislation.

## **2. Hierarchy of Legal Responsibility**

The Constitutional Court emphasized in its decision, file ref. I.ÚS 69/06 of 12 October 2006, that it understands the criminal law as the ultima ratio law, i.e. a law instruments of which should be and have to be used when and only when the use of other instruments of the legal order is out of question or obviously inefficient. At the same time, the criminal law and the criminal classification of a certain conduct has basically no room where it would be substituting the personal activity of individuals in respect of protection of their rights and legal interests in the area of the common relations based on the private law. Otherwise, people would not be enjoying equal rights in their mutual relations and the public authorities would be lacking respect for the equality of citizens, thus leading to the breach of Article 1 of the Charter and Article 1(1) of the Constitution.

In the opinion of the Constitutional Court, the nature of the criminal law as ultima ratio reflects particularly the proportionality principle which the established case law of the Constitutional Court regards as a mark of a democratic legal state (Article 1(1) of the Constitution, cf. e.g. the decision, file ref. IV. ÚS 227/05).

In other words, conducts infringing rights resulting from the civil law regulations have to be fought against particularly using the private law instruments, if these are insufficient, administrative sanctions should be applied and as the last instrument, the criminal law. The approach to the contrary, i.e. the use of the criminal-law procedure without the prior use of instruments of the other branches of law, would be inconsistent with the above indicated criminal repression subsidiarity principle which demands that the state apply the criminal law instruments moderately. When judging under the criminal law a conduct which is based on the civil law, the matter has to be primarily viewed from the point of view of the civil law and the fact has to be considered, whether the conditions are given for employment of the extreme instrument of repression – the criminal law (similarly, see the decision of the Constitutional Court, file ref. IV. ÚS 469/04).

Therefore, the criminal law cannot serve as an instrument substituting the protection of rights and legal interests of an individual in the area of relations based on the private law, where it depends particularly on the personal activity of individuals to guard their rights for which the judicial power should provide protection, within the meaning of

the vigilantes iura scripta sunt principle (cf. the decision, file ref. I. ÚS 4/04).

The Constitutional Court respects the fact that it is for the legislators to determine the criminal-law policy and to qualify a certain kind of conduct, as far as the formal nature is concerned, as a criminal act (similarly, see the published ruling of the Constitutional Court, file ref. Pl. ÚS 4/03). It is also aware of the fact that the criminal law is governed by the principle under which no criminal act may remain legally unpunished (*nullum crimen sine poena legali*), which expresses the concept of inevitability of a criminal sanction in case of commission of a criminal act. However, according to convictions of the Constitutional Court, the conditions of culpability of an act have to be interpreted in the light of the criminal law principles among which belongs also the above mentioned *ultima ratio* principle. It should be taken into account when judging both the formal and material aspects of a criminal act (decision of the Constitutional Court, file ref. IV. ÚS 469/04).

The competence of the individual bodies of the judiciary and the public administration in enforcement of the intellectual property rights has to be understood from the viewpoint of this succinctly and, it has to be said, bindingly formulated hierarchy of responsibility for infringement of the intellectual property rights (valid, however, also generally). The said hierarchy of responsibility from the civil or commercial responsibility via the administrative responsibility to the criminal responsibility, being the top of the responsibility pyramid *sui generis*, is in no way altered by the fact that the administrative law sanctions are many times severer and harsher than the criminal sanctions at the present time.

The thing is that the criminal sanctions maintain their most distinctive defamation nature among all types of the legal responsibility.

### **3. Role of Courts**

#### **3.1 General**

Pursuant to the provision of Section 2 of Act No. 6/2002 Coll., on courts and judges, as amended, courts

- a) hear and decide disputes and other matters falling within their competence according to the laws on civil proceedings,
- b) hear and decide criminal cases falling within their competence according to the laws on criminal proceedings,
- c) decide in other cases stipulated by law or an international treaty that has been approved by the Parliament, is binding for the Czech Republic and has been promulgated.

#### **Ad a)**

Pursuant to the provision of Section 2 of Act No. 99/1963 Coll., the Civil Procedure Code, as amended, courts hear and decide disputes and other legal matters in the civil proceedings and execute decisions that have not been complied with voluntarily; at the same time, they see that no rights or law-protected interests of natural persons and legal persons be infringed and that no rights be abused to the prejudice of these persons.

#### **Ad b)**

In accordance with the provision of Section 1 of Act No. 141/1961 Coll., the Rules of Criminal Procedure, as

amended, the courts are to proceed in such manner that criminal acts be duly detected and their perpetrators be rightfully punished according to law. At the same time, the proceedings have to act towards strengthening the rule of law, preventing criminal activity, towards education of citizens in spirit of rigorous observance of laws and the rules of coexistence of citizens and of the honourable discharge of duties to the state and society. The Rules of Criminal Procedure divide criminal proceedings into several stages in which the detection of criminal activity is assigned to various, mutually independent state bodies which have different powers while accomplishing the same objective. The criminal proceedings are divided into three basic phases, i.e. the preliminary proceedings with the police bodies and the public prosecutor having the main sphere of action, the proceedings before courts and the enforcement proceedings. The crucial stage is, no doubt, the decision-making by courts on the guilt and penalty, but courts have significant competences also in the preliminary proceedings. It is worth to specify these competences for the sake of clarity:

- approval of requesting information on classified matters (Section 8(4) of the Rules of Criminal Procedure)
- making decision on the request of an accused person to be granted the right to a gratuitous defence or a defence for a reduced remuneration
- appointment of the defence, cancellation of the appointment or release from the duties of the defence (Sections 37a, 39, 40 and 40a of the Rules of Criminal Procedure)
- making decision to the intent that the aggrieved persons may enforce their rights in the criminal proceedings only through joint representatives, or

choosing the particular representatives if the number of the selected representatives exceeds the limit prescribed by law (Section 44 of the Rules of Criminal Procedure)

- making decision to the intent that the injured person is entitled to legal assistance provided by a representative gratuitously or for a reduced remuneration and appointment of the representative for the injured person from the ranks of attorneys (Section 51a of the Rules of Criminal Procedure)
- decision-making on custody of the accused person (Sections 67, 68, 69(5), 72, 73 and 73a of the Rules of Criminal Procedure) including the decision on the detainee (Section 77 of the Rules of Criminal Procedure)
- issuance of a warrant of arrest (Section 69(1) of the Rules of Criminal Procedure)
- making decision on restrictions in respect of an accused person serving a term of imprisonment (Section 74a of the Rules of Criminal Procedure)
- search warrant (Section 83(1) of the Rules of Criminal Procedure)
- order to produce evidence in a flat or a dwelling (Section 85b of the Rules of Criminal Procedure)
- consent to open or exchange a consignment (Sections 87 and 87a of the Rules of Criminal Procedure)
- order to monitor the telecommunications activity (Section 88(1) of the Rules of Criminal Procedure)
- order to find out data about the telecommunications activity (Section 88a(1) of the Rules of Criminal Procedure)
- decision on monitoring of the accused person in a mental hospital (Section 116(2) of the Rules of Criminal Procedure)

- decision on complaints against decisions of the public prosecutors and/or police bodies concerning seizure of property, funds in accounts and securities, and on continuation of custody (Section 146a of the Rules of Criminal Procedure)
- decision on the use of operational means of searching in certain cases (Sections 158d(3) and 158e(4) of the Rules of Criminal Procedure)
- issuance of an international warrant of arrest (Section 376 of the Rules of Criminal Procedure)
- decision on custody of the accused person extradited from abroad (Section 377 of the Rules of Criminal Procedure)

In addition to the mentioned acts which represent decision-making activities, the judge performs other acts in the preliminary proceedings, where he/she does not make any formal decisions but guarantees by his/her personal participation the legitimacy of certain practices of the police bodies and subsequently the usability of evidence obtained in such manner in further proceedings. We are talking, in particular, about the necessary participation of a judge during examination or recognition if these acts are performed as urgent or unrepeatable prior to the commencement of the criminal prosecution (Section 158a of the Rules of Criminal Procedure).

With regard to the purpose of this treatise, the competences of the court in the enforcement proceedings stage are put aside. Naturally, this does not mean that this stage is not important in the fulfilment of the objectives of the criminal proceedings.

#### **Ad c)**

Pursuant to the provision of Section 4(1) of Act No. 150/2002 Coll., the Code of Administrative Justice, as amended, the

courts of administrative justice decide on actions against decisions made in the sphere of the public administration by an executive power body, a body of a territorial self-governing unit, as well as by a natural or legal person or another body if entrusted with decision-making about the rights and obligations of natural and legal persons in the sphere of the public administration, on protection against the inaction of an administrative body, on protection against unlawful interference by an administrative body and on competence actions.

### **3.2 In Matters Resulting from Intellectual Property Rights**

#### **3.2.1 Civil Court Proceedings**

The task of the courts in the civil proceedings is to decide on the rights, obligations and law-protected interests of natural and legal persons and the state. The private-law nature of the intellectual property is reflected in the fact that in all cases of infringement of the intellectual property rights, civil proceedings may be initiated upon the motion (action) made by the entitled, i.e. actively legitimated, person. Several fundamental rights may be sought through a civil action.

##### **3.2.1.1 Negatory Right**

It is a right to the prohibition of infringement of a right or to the order to refrain from certain economic or other activities. Should infringement of the rights occur, the entitled person may seek a judicial decision that the infringer refrain from acts by which the right is infringed or endangered (Section 4(1) of Act No. 221/2006 Coll.). The action may be successful providing that

infringement of the right persists, is threatening or will be repeated; e.g. upon finding out that production of goods which are counterfeits from the viewpoint of the intellectual property is being prepared.

If the infringer stopped infringing the intellectual property right in the course of the proceedings and repeated or renewed infringement of the right was not proved in the proceedings, the right to prohibition of infringement of the right cannot be, naturally, granted.

### **3.2.1.2 Right to Elimination of Consequences or Destruction of Goods**

Should infringement of the rights occur, the entitled person may seek a judicial decision that the infringer refrain from acts by which the right is infringed or endangered, and that the consequences of the endangerment or infringement be removed, in particularly by

- a) withdrawal from the market of the products whose manufacture or launch to the market or storage resulted in infringement or endangerment of the right,
- b) permanent removal or destruction of the goods whose manufacture or launch to the market or storage resulted in endangerment or infringement of the right,
- c) withdrawal, permanent removal or destruction of the materials, tools and equipment intended for or used, exclusively or largely, in activities infringing or endangering the right.

The court shall not order the destruction where infringement of the right may be removed in a different manner and the destruction would be inadequate to such infringement. Should the remedial measures aim at products,

materials, tools or equipment not owned by the infringer of the right, the court shall take into consideration the interests of the third parties, in particular consumers and persons acting *bona fide*. The removal of a label or a counterfeit trademark from the products before their launch to the market may be permitted only in extraordinary cases.

The entitled person may also seek a court decision on the said claims against any person whose means or services are used by the third persons for infringement of the rights.

Instead of the mentioned measures, the court may, upon the motion of the infringer of the rights, order the infringer to pay a pecuniary compensation to the entitled person, namely where the infringer neither knew nor was able to know, where these measures would cause him an inadequate injury and the pecuniary compensation to the entitled person seems to be sufficient. (Section 4 of Act No. 221/2006 Coll., on enforcement of the industrial property rights and on the amendment of the industrial property protection acts (Act on Enforcement of the Industrial Property Rights))

### **3.2.1.3 Right to Information**

The entitled person may require from a third party

- a) who possessed, with the intention of obtaining a direct or indirect economic or commercial advantage, goods infringing the right, or
- b) who used, with the intention of obtaining a direct or indirect economic or commercial advantage, services infringing the right, or
- c) who was found providing, with the intention of obtaining a direct or indirect economic or commercial advantage,

services used in activities infringing the right, or

d) who was indicated by a person referred to in subparagraphs a), b) or c) as being involved in the production, processing, storing or distribution of the goods or in the provision of the services, information about the origin and distribution channels of the infringing goods or services.

This claimable information includes:

a) first name and surname or business name or designation and place of the permanent residence or the registered office of the producer, processor, storer, distributor or other previous holder of the goods or services infringing the right,

b) information concerning the produced, processed, delivered, stored, accepted or ordered quantity and the price received for the respective goods or services.

If the said information is not provided voluntarily within the appropriate period of time, the entitled person may claim such information by lodging a motion with the court in the proceedings relating to infringement of the right. The court shall dismiss the action where it would bear no proportion to the importance of endangerment or infringement of the right (Section 3 of the Act No. 221/2006 Coll., on enforcement of the industrial property rights).

The right to information was introduced in the area of the industrial property by adoption of Act No. 116/2000 Coll. that implemented the provision of Section 47 of the TRIPS Agreement in the individual legal regulations concerning the industrial property protection. Although the right to information had already been embodied in the legal order, it is only the provision of Section 3 of the Act No. 221/2006 Coll., on enforcement of the industrial property rights, that provides in detail,

which information the person entitled to enforcement of the industrial property rights is eligible for. These rights which are intended to strengthen significantly the position of the industrial right owner or another entitled person in their fight against infringement of their rights, provide these persons with the possibility not only to act against a particular established infringer but also to track the chain of entrepreneurs, e.g. wholesale or small-scale customers, within the meaning of the Directive, who participate in infringement of the rights of these persons on a commercial scale. Information about the quantity of the possessed products or services and their price will enable the fair assessment of the compensation for damages and the amount of the unjust enrichment resulting from infringement of rights.

Only those persons are obliged to provide information who possessed goods infringing the rights on a commercial scale, used services infringing the rights on a commercial scale or provided services used in activities infringing the rights on a commercial scale, or who were indicated by such persons as being involved in the production, storing, processing or distribution of the goods or in the provision of the services. Acts made on a commercial scale are conducts whose purpose is to obtain a direct or indirect economic or commercial advantage; this usually rules out acts by a consumer acting in good faith. The right to information may be asserted before the courts only in the proceedings regarding infringement of the rights; it may not be asserted in the preliminary proceedings.

### **3.2.1.4 Right to Satisfaction**

The right to moral satisfaction usually aims at imposing the obligation to make a public apology, e.g. in the scholarly press subscribed and read by the professional circles.

However, the precondition for admission of the said claim is that an immaterial injury, or at least its danger, has been caused, other than a damage to property or a loss of profit.

Should infringement of the rights result in an immaterial injury, the entitled person shall have a right to a reasonable satisfaction. A reasonable satisfaction may consist also in pecuniary consideration. The court may, upon a motion, assess a reasonable satisfaction in the flat sum amounting to at least double the amount of the licence fee which would have been usual upon the acquisition of a licence to use the right at the time of infringement thereof.

If in the course of his/her activities the infringer neither knew nor was able to know that his/her acts constituted infringement of the rights, the court may, upon a motion, assess a reasonable satisfaction in the flat sum amounting to at least the amount of the licence fee which would have been usual upon the acquisition of a licence to use the right at the time of infringement thereof.

The court shall take into consideration all the relevant circumstances, such as the undesirable economic consequences including the loss of profits sustained by the entitled person, the infringer's ill-gotten gain and possibly also other than economic aspects, such as the moral injury caused to the entitled person by the infringer. (Section 5 of Act No. 221/2006 Coll., on enforcement of the industrial property rights)

### **3.2.1.5 Right to Compensation**

In case of infringement of a right, the entitled person has the right to compensation for the actual damage and the lost profit. The preferential method of the compensation is the pecuniary compensation. Owing to the nature of the intellectual property, this reinstatement is practically out of question.

The court may, upon a motion, assess the damages incurred as the result of endangerment or infringement of the right in the flat sum amounting to at least double the amount of the licence fee which would have been usual upon acquisition of a licence to use the right at the time of infringement thereof.

If in the course of his/her activities the infringer neither knew nor was able to know that his/her acts constituted infringement of the rights, the court may further, upon a motion, assess the damages incurred as the result of endangerment or infringement of the right in the flat sum amounting to at least the amount of the licence fee which would have been usual upon acquisition of a licence to use the right at the time of infringement thereof.

The court shall take into consideration all the relevant circumstances, such as the undesirable economic consequences including the loss of profits sustained by the entitled person, the infringer's ill-gotten gain and possibly also other than economic aspects, such as the moral injury caused to the entitled person by the infringer. (Section 5 of Act No. 221/2006 Coll., on enforcement of the industrial property rights)

### **3.2.1.6 Right to Surrender of Unjust Enrichment**

The right to surrender of the unjust enrichment comes into question in addition to granting satisfaction and the compensation for damages. We are talking about situations when, for example, a legal ground (title) is absent on the part of the user to the use of another person's intellectual property, it being mostly a licence agreement, or where such legal ground originally existed but has dropped, e.g. as a consequence of repudiation of the licence agreement by the licensor. Where the right to surrender of the unjust enrichment in connection with the intellectual property is enforced, it is often a matter of the substantial amounts of money, even reaching millions of Czech crowns. Where the person unjustly enriched was not in good faith, such person is obliged to surrender not only the unjust enrichment which would be equal to the usual price of the contractual licence but also all and any benefits (see Section 458(2) of the Civil Code). However, if a person was in good faith that the unjust enrichment belonged to it, such person keeps the benefits in its ownership.

The Copyright Act contains a special regulation of the unjust enrichment for the area of the copyright, rights related to the copyright and the database maker's rights. The unjust enrichment on the part of the person unlawfully handling a protected article without having acquired the necessary licence amounts to double the remuneration which would have been usual for acquisition of such licence at the time of unlawful handling of the work. The double amount of the unjust enrichment includes both surrender of the property advantage and a sanction based on the

private law for the unlawful use of the intellectual property.

A similar regulation is contained also in Act No. 221/2006 Coll., on enforcement of the industrial property rights. Pursuant to the provision of Section 5 of this Act, the entitled person shall be entitled to a surrender of the unjust enrichment the infringer acquired as a result of endangerment or infringement of the right.

The court may, upon a motion, assess the amount of the unjust enrichment the infringer acquired as a result of endangerment or infringement of the right in the flat sum amounting to at least double the amount of the licence fee which would have been usual upon acquisition of a licence to use the right at the time of infringement thereof.

If in the course of his/her activities the infringer neither knew nor was able to know that his/her acts constituted infringement of the rights, the court also may, upon a motion, determine the amount of the unjust enrichment obtained by the infringer in the consequence of infringement or endangerment of the right, in the flat sum amounting to at least the amount of the licence fee which would have been usual upon acquisition of a licence to use the right at the time of infringement thereof.

The court shall take into consideration all the relevant circumstances, such as the undesirable economic consequences including the loss of profits sustained by the entitled person, the infringer's ill-gotten gain and possibly also other than economic aspects, such as the moral injury caused to the entitled person by the infringer.

### **3.2.1.7 Declaratory Action**

An action to declare that, for example, certain goods are counterfeit or an unauthorized copy from the viewpoint of the intellectual property comes into question only where an action cannot be brought concerning settlement of any of the above mentioned claims. It can be of importance for the future procedure in the public-law area. Pursuant to the provision of Section 31(2) of Act No. 441/2003 Coll., on trademarks, as amended, the Industrial Property Office shall revoke a trademark in proceedings started upon a motion filed within 6 months after the court decision declaring the use of the trademark to be unfair competition conduct comes into force, and pursuant to the provision of Section 29 of Act No. 527/1990 Coll., on inventions and rationalization proposals, as amended, the Industrial Property Office shall transfer the invention application or the patent to the person who is the author of the invention in accordance with the decision taken by the court. If the body competent to hear the legal proceedings with regard to the right to a patent decides that the right belongs to another person, the Office shall replace the name of the patent applicant or patent owner with the name of such other person.

### **3.2.1.8 Right to Publication of Judgement**

The right to publication of the judgement at the expense of the other party is expressly regulated by the Copyright Act and by the Commercial Code in respect of the right against the unfair competition. Pursuant to the provision of Section 4(5) of Act No. 221/2006 Coll., on enforcement of the industrial property

rights, the court may award in its judgement the entitled person whose motion, that the infringer refrain from acts infringing or endangering the right and that the consequences of endangerment or infringement be removed, has been satisfied, a right to make the judgement public at the expense of the infringer who was defeated in the litigation, and also, as the case may be, specify the extent, form and manner of the publication.

## **3.2.2 Criminal Proceedings**

As has already been said, the task of the courts in the criminal proceedings is to decide the guilt of the accused person and to inflict punishments specified by law and/or order other measures. The purpose of the criminal proceedings is to detect a criminal act by a lawful procedure, establish its perpetrator, investigate a deed that accomplishes the elements of a criminal act under the criminal law of substance and bring the offender before the court which will decide the issue of his/her guilt or innocence. If the court finds the offender guilty, it shall impose a penalty or a protective measure on him/her, or it shall refrain from punishment, and then shall execute the penalty or the protective measure, if these were imposed.

From the viewpoint of enforcement of the intellectual property rights, the courts have the competence in the criminal proceedings in case of the below said criminal acts. The elements of these criminal acts are mentioned here only to provide the overview definition of the tasks of the courts in the area of enforcement of the intellectual property rights. A more detailed explication exceeds this purpose.

### **3.2.2.1 Criminal Act of Infringement of Rights to Trademark, Trade Name and Protected Designation of Origin (Section 150 of the Criminal Code)**

The object of this criminal act is an interest in the protection of a trademark, a trade name and a designation of origin of products which performs a very important functions in the economic competition, since it prevents using identical or confusingly similar designations by other persons for their products or services, enables to distinguish products or services of different entrepreneurs and makes the consumers' orientation on the market easier. Last but not least, it also acts in creating the position on the market against other competitors.

A criminal act under Section 150(1) of the Criminal Code is committed by a person who imports, exports or puts into circulation products designated unlawfully by a trademark, exclusive rights to which belong to another person, or by a mark confusingly similar to such trademark. Such person shall be sentenced to imprisonment for up to six months or punished by a statutory penalty or forfeiture.

Similarly, a person shall be punished under Section 150(2) of the Criminal Code who, in order to obtain an economic advantage, uses unlawfully a trade name or any designation confusingly similar to such trade name, or puts into circulation products unlawfully marked by a designation of origin the exclusive right to which belongs to another person, or a designation of origin confusingly similar to such designation of origin.

Putting into circulation means particularly the sale of such products, their exchange, etc. Putting into

circulation means also a transfer of such goods from the producer to the wholesaler, because the market means not only the wholesale market but also the retail market.

The criminal-law trademark protection is relatively narrower compared with the other industrial rights. While in case of the other industrial rights the criminal law refers blanket to the industrial-law regulations and practically any breach of these regulations which reaches a certain degree of danger to society can thus become a criminal act, in case of trademarks the legislators proceeded by expressly stating the exhaustive list of criminally punishable conducts. For this reason, a person affixing a trademark to goods will not be criminally responsible, even in case when such goods are further put into circulation with the knowledge of the person. Similarly, the elements of a criminal act do not apply to persons who store such goods or use such trademark in the business name, advertising or correspondence.

An intention is required from the subjective aspect. If the intention was aimed at obtaining an unjust advantage in a substantial extent for the respective person or another person and the right was infringed in a serious manner, it is a criminal act under Section 127 of the Criminal Code.

### **3.2.2.2 Criminal Act of Infringement of Industrial Rights (Section 151 of the Criminal Code)**

A criminal act of infringement of the industrial rights is committed by a person who infringes the rights to a patented invention, an industrial design, an utility model or a topography of a semiconductor product. This criminal act may be punished by imprisonment of up

to one year or a statutory penalty. Protection is granted only to an invention, an industrial design, an utility model and a topography of a semiconductor product. Therefore, it is not an exhaustive list of all subjects of the industrial property. These are only some of the so called creative industrial rights. Punishable is a person who intentionally infringes one of the rights protected by an invention, an industrial design, an utility model or a topography of a semiconductor product. Usually we are talking about unauthorized use of some of these protected industrial rights.

In case of an invention we are talking for example about production, offering, launching on the market or using of the product which is a subject of a patent, and/or import or storing of the product for such purpose. In case of unauthorized use of a process which is the subject of a patent, the unauthorized use of the process which is the subject of the patent carries a penalty together with offering, launching on the market, using, but also importing or storing of the product, if it was obtained directly by a process which is the subject of the patent for the purpose of production, offering, launching on the market or using of the product.

A criminal act of infringement of the industrial rights can be committed also by indirect use of a patented invention, by conduct consisting in that a person intentionally delivers or offers to deliver to another person, without the consent of the patent owner, a patented invention, means relating to the fundamental element of such invention and serving for its execution, if it is obvious from the circumstances that these means are eligible for execution of and intended for the patented invention.

Infringement of the rights to an industrial design lies usually in

unauthorized use of the industrial design when a product is manufactured according to the industrial design without the consent of its owner, i.e. without a licence agreement, or such product is imported or put into circulation.

The rights to a protected topography of a semiconductor product are infringed by an offender who makes a reproduction of a topography or its independently usable part without the consent of the topography owner, or makes a scheme of the topography for the production purposes, or manufactures a semiconductor product in which a protected topography is contained, or uses for the commercial purposes a topography or a semiconductor product, which contains a protected topography or its independently usable part, as well as a scheme of the topography serving for its production, or imports a topography or a semiconductor product containing a protected topography or its independently usable parts, as well as a scheme of the topography serving for its production.

### **3.2.2.3 Criminal Act of Infringement of Copyright, Rights Related to Copyright and Database Rights (Section 152 of the Criminal Code)**

A criminal act of infringement of the copyright, rights related to the copyright and the database rights is committed by a person who infringes the law-protected rights to an author's work, an artistic performance, an audio or audiovisual recording, radio or TV broadcasting or a database.

It can be generally and briefly said that an author's work is an objectively expressed intellectual creation consisting in an individual representation of an idea. It has a nature of incorporeal

property whose main feature is distinctness. The author's work as the subject of the copyright is not the idea itself, the procedure, principle method, etc., but only the particular copyright representation. The same holds true for computer programmes; therefore, e.g. a new algorithm is not protected.

Rights of performing artists to artistic performances, rights of producers of audio and audiovisual recordings to their recordings and rights of radio and TV broadcasters are ranked among the rights related to the copyright, because of their factual connection with author's works.

The protected rights are especially infringed by a person who appropriates the authorship of a work or publishes any work without the consent of the author, or with the author's consent but with alterations made which were not approved by the author or using the work in such manner that the artistic value of the work is diminished.

The rights are also infringed by an unauthorized production of a copy or an imitation of a work. The copyright is also infringed by an offender who uses a title or a design for his/her work which have already been lawfully used by another author for a work of the same kind if that could create the danger of confusion of both works.

The copyright is also infringed by a person who designs, produces, offers to sell, hire or lend, imports, distributes or uses, in order to obtain a property advantage by provision of services or otherwise, any aids intended for removal, putting out of operation or reduction of functionality of a technical device or other means for protection of rights. Other means are any process, product or part inserted in the process of a device or a product which should prevent or reduce infringement of the

copyright to a work that is made available only with the use of a code or in another manner enabling decoding.

The copyright is also infringed through a removal or modification of any electronic information regarding identification of the rights to the work, or distribution of copies of the work including their import, as well as communication of the work to the public, which has any electronic information regarding identification of the rights to the work removed or modified, without the consent of the author.

The rights of a performer or rights to an audio or audiovisual recording, radio or TV broadcasting, which are the subject of rights related to the copyright, and database rights, are infringed by an offender who adds, without authorization, Czech dubbing to an original video cassette or abridges or alters a work which is a subject of the copyright or otherwise changes the work, its title or the designation of the author. The same applies when connecting the work with another work as well as when including the work in a collective work.

The criminal act of infringement of the copyright, rights related to the copyright and the database rights is a so called prematurely completed offence or threatening offence. There do not have to be necessarily any consequences. For example, making unauthorized copies of a work otherwise than for one's own needs represents a preparation for their future distribution and sale; the offender thus creates means for further conduct. However, with regard to the wording of the Copyright Act, such making of copies constitutes a completed criminal act under Section 152 of the Criminal Code.

The criminal act of infringement of the copyright, rights related to the

copyright and the database rights requires intentional culpability. It is a criminal-law norm with the blanket disposition, where the principle is applied, even in case of a foreigner, that laws are binding for every person even if such person does not know them, because a mistake of law is concerned here, not a mistake of fact.

### **3.2.2.4 Criminal Act of Unfair Competition (Section 149 of the Criminal Code)**

On the basis of these elements of a criminal act, it is possible to sanction conducts which infringe the intellectual property rights but which cannot be classified under the previous elements. These are particularly the rights to a trade secret, know-how, a rationalization proposal and confident information. However, not every infringement of these incorporeal chattels may be regarded as a criminal act. It has to be a conduct which violates the regulations governing the competition in the economic relations or damages the good reputation or endangers the operation or development of the competitor's enterprise. Therefore, such conduct can only be committed by a person who is a competitor of the aggrieved person.

## **3.2.3 Administrative Justice**

The administrative justice courts decide  
a) particularly on actions against the final decisions taken by the Industrial Property Office, i.e. in situations where the ordinary remedy against a decision of the first instance has been exhausted and the matter was decided on by the appeal authority of the Office, in other words, against the final appeals decisions

b) on actions against the final administrative decisions on misdemeanours and administrative torts.

One of the basic conditions of the administrative action is that the claimant **has exhausted the possibility of lodging an ordinary remedy** in the administrative proceedings (usually an revocation or an appeal ) prior to applying to the court. Only when such remedy does not succeed, the claimant's action is admissible; it has to be filed within the time limit prescribed by the law, usually within two months from the day when the decision of refusal in respect of the remedy was delivered. However, some acts prescribe a shorter time limit for challenging the individual decisions of the administrative bodies.

An action against inaction of an administrative body (Sections 79 et seq. of the Code of Administrative Justice) may be filed by a person who was seeking issuance of a decision or a certificate by the administrative body, **the administrative body remained inactive and the person ineffectively exhausted the remedies** which the rules of procedure (usually the Administrative Code) prescribe for the protection against inaction. According to the practical knowledge, inaction of an authority lies not only in the fact that the matter was not settled in time but also in the fact that, due to the transfer of competences between the state administration bodies and the bodies of the territorial self-governing unit, it remains unclear which body should take the decision or issue the certificate.

### **Ad a)**

Competences of the Industrial Property Office are defined by Act No. 14/1993 Coll., on measures concerning the industrial property protection, under

Section 2 the Office makes decisions about granting protection for inventions, industrial designs, utility models, topographies of semiconductor products, trademarks and designations of origin of products, performs activities under the regulations concerning patent agents and keeps the central collection of the patent literature. The Office thus primarily decides within the framework of the administrative proceedings whether the protection may or may not be granted to any of the possible subjects of the industrial property (application procedure) and whether the existing protection was granted rightfully (cancellation or revocation procedures).

**Ad b)**

**ba)**

Act No. 121/2000 Coll., the Copyright Act, and Act No. 200/1990 Coll., on misdemeanours, were amended by Act No. 216/2006 Coll. to the intent that infringement, in short, of the copyrights does not constitute a misdemeanour in the sector of culture under Section 32 of the Misdemeanours Act any more. Instead, Title VI – Administrative Torts, has been added to the Copyright Act, whose Sections 105a to 105c lay down that a natural person commits a misdemeanour by

- a) unlawfully using an author's work, an artistic performance, an audio or audiovisual recording, radio or TV broadcasting or a database,
- b) unlawfully infringing the copyright in the manner specified in Section 43(1) or (2) or in Section 44(1) of the Copyright Act, or
- c) not fulfilling, as a trader participating in the sale of an original work of art, the notification duty under Section 24(6) of the Copyright Act, and that a fine of up to 150,000 CZK may be imposed for a misdemeanour under the subparagraph

a), a fine of up to 100,000 CZK for a misdemeanour under the subparagraph b) and a fine of up to 50,000 CZK for a misdemeanour under the subparagraph c).

It is further laid down here that a legal person or a natural person who is an entrepreneur commits an administrative tort by

- a) unlawfully using an author's work, an artistic performance, an audio or audiovisual recording, radio or TV broadcasting or a database,
- b) infringing the copyright in the manner specified in Section 43(1) or (2) or in Section 44(1) of the Copyright Act, or
- c) not fulfilling, as a trader participating in the sale of an original work of art, the notification duty under Section 24(6) of the Copyright Act, the fines being identical with those imposed on natural persons who are not entrepreneurs.

As for the responsibility of natural persons, the Misdemeanours Act provides that it is a responsibility for culpability with the preclusion of the possibility of recourse within a one-year time limit; as for the responsibility of a legal person, it had to be stated expressly in the Copyright Act, that such person was not responsible for the administrative tort if it proved that it had made all efforts which might be required to prevent the breach of the legal obligation, and that the responsibility of a legal person for the administrative tort expires if the administrative body did not commence the proceedings within 1 year from the day when it learned of such tort, but not later than 3 years from the day when it was committed.

Administrative torts under this Act are heard in the first instance in the devolved competence by the municipal office of the extended competence municipality in whose territorial district the administrative tort was committed; in

the second instance they are heard by the regional authorities.

**bb)**

Pursuant to the provision of Section 33 of the Misdemeanours Act, a misdemeanour is committed in the area of infringement of the industrial rights and the rights to a trade name by a person who:

- a) unlawfully executed rights which are reserved to the owners of these rights by the industrial property protection laws, or
- b) unlawfully used a trade name or any designation confusingly similar to a trade name or a designation peculiar to another entrepreneur, such conduct being punishable by a fine of up to 15,000 CZK.

Contrary to the related criminal act, it is possible to sanction all conducts committed by a person which infringe any industrial rights if such conduct accomplishes the elements of a misdemeanour, including the rights to trademarks or designations of origin. At the same time, the unauthorized use of both a trade name and any designation confusingly similar (such as a designation typical for a certain person), even if not registered, is regarded as a misdemeanour. The administrative protection thus applies also to certain non-registered designations and is wider, in this aspect, than the criminal responsibility for a corresponding criminal act.

**bc)**

Other intellectual property rights, such as a trade secret, know-how or confidential information, are not explicitly protected by the Misdemeanours Act. One option is to classify infringement of these rights under the elements of the unauthorized use of property under the provision of Section 50(b) of Act No.

200/1990 Coll., on misdemeanours, with the possibility of imposing a fine of up to 15,000 CZK.

These misdemeanours are heard by the municipal office of the extended competence municipality in whose territorial district the administrative tort was committed; in the second instance they are heard by the regional authorities.

**bd)**

Pursuant to the provisions of Sections 23 et seq. of Act No. 191/1999 Coll., on measures concerning import, export and re-export of goods infringing certain intellectual property rights and on amendments of some other acts, as amended, a legal person or a natural person who is an entrepreneur commits an administrative tort when performing business activities by:

- a) submitting a customs declaration for releasing goods, whose manufacture or modification infringed the intellectual property rights, into free circulation or to an export procedure,
- b) submitting an application for releasing goods, whose manufacture or modification infringed the intellectual property rights, for re-export or by applying for their placement in a free customs zone or a free customs warehouse,
- c) violating customs regulations and thus ensuring the releasing of goods, whose manufacture or modification infringed the intellectual property rights, into free circulation, to an export procedure or for re-export, or to one of the procedures with the conditional exemption from the customs duties, or their placement in a free customs zone or a free customs warehouse,
- d) transporting to the customs territory of the Community, or by owning, holding, storing or selling on the territory of the

Czech Republic goods that have escaped customs supervision and whose manufacture or modification infringed the intellectual property rights, or

e) failing to comply with the conditions for management of goods seized under this Act, and/or by failing to comply with the conditions for management of goods transferred gratuitously for the humanitarian purposes.

The said administrative torts may be punished by:

a) imposition of a fine of up to 20,000,000 CZK (A fine of up to 100,000 CZK may be imposed for an administrative tort under Section 23(1)(a) and (b), a fine of up to 1,000,000 CZK may be imposed for an administrative tort under Section 23(1)(e). For an administrative tort under Section 23(1)(c) and (d) of the cited Act, a fine of up to 1,000,000 CZK may be imposed, or a fine of up to 5,000,000 CZK if the offender breached his obligations to a substantial extent, or a fine of up to 20,000,000 CZK if the offender breached his obligations to a large extent);

b) forfeiture of the goods that belong to the offender if they were used or intended for committing the administrative tort or if they were acquired by the administrative tort or if they were acquired for the goods acquired by the administrative tort, even if their value is in striking disproportion to the nature and gravity of the administrative tort.

Obligations were breached to a substantial extent if the customs value of the goods, whose manufacture or modification infringed the intellectual property rights, exceeds the amount of 1,000,000 CZK and, in case of goods that are exported or re-exported, if the statistical value of the goods determined

pursuant to the special legal regulation exceeds the amount of 1,000,000 CZK. Obligations were breached to a large extent if the customs value of the goods, whose manufacture or modification infringed the intellectual property rights, exceeds the amount of 5,000,000 CZK and, in case of goods that are exported or re-exported, if the statistical value of the goods determined pursuant to the special regulation exceeds the amount of 5,000,000 CZK.

The proceedings in respect of an administrative tort fall in the first instance under jurisdiction of the customs office in whose territorial district the administrative tort was established. A fine for the said administrative torts may be imposed within one year of the date when the customs office competent to hear the administrative tort learned of the facts violating this Act, however not later than 6 years from the date of breach of or non-compliance with the obligation. The sanction of forfeiture of goods may be imposed separately or together with a fine.

**be)**

Pursuant to the provision of Section 24 of Act No. 634/1992 Coll., on consumer protection, the authorities specified in Section 23, i.e. the customs offices, the Czech Commercial Inspection or the Czech Agriculture and Food Inspection Authority in the sector of agricultural products, foodstuffs, cosmetics, soap and detergent products and tobacco products, in the sector of trade and services also the local trade offices, shall impose a fine of up to 50,000,000 CZK for a breach of obligations stipulated in Section 8(2), i.e. for a breach of the ban on misleading consumers by offering or selling products or goods infringing certain intellectual property rights, as well as for

storing such products or goods for the purpose of offering or selling them; the nature of the unlawful conduct and the extent of its consequences are taken into consideration when determining the amount of the fine.

In case that several authorities specified in Section 23 of the cited Act are acting, the fine shall be imposed by the authority that first initiated the administrative proceedings. These authorities shall mutually inform themselves about initiation of the proceedings concerning the imposition of a fine. A fine may be imposed within 3 years from the date of the breach of obligations.

#### **bf)**

The provisions of Section 7b(8) to (13) of Act No. 64/1986 Coll., on the Czech Commercial Inspection, entitle the Czech Commercial Inspection to provide the seized products infringing the intellectual property rights for the humanitarian purposes, provided that the receiving organization has completely removed and destroyed the elements infringing the intellectual property rights. Each product has to be marked, using irremovable colour, with the sign „humanita“ (humanitarian) in such manner that the dignity of the persons using these products is not diminished. The products or goods may be provided for the humanitarian purposes to the receiving organizations, which can only be organizational bodies and allowance organizations of the state or of the territorial self-governing units, established for the purpose of providing social welfare or acting in the area of health or education, or other legal persons that were not established for the business purposes, whose subject of activity is solely provision of social welfare or which operate in the area of

health or education, which have been providing the humanitarian aid for at least 2 years and which prove not to have arrears of tax or social security contributions and state employment policy contributions and which are not being prosecuted.

Under the provision of Section 9(2) of Act No. 64/1986 Coll., on the Czech Commercial Inspection, the inspectorate director shall impose a fine of up to 1,000,000 CZK on the receiving organization which has breached obligations under Section 7b(11) and (13) of the cited Act, e.g. by failing to remove the elements infringing the rights, by failing to mark the products or goods with the sign „humanita“ (humanitarian). The decision on the appeal against the imposition of the fine will be taken by the central director of the Czech Commercial Inspection.

### **3.3 Subject-Matter and Territorial Jurisdiction of Courts**

#### **3.3.1 Criminal Proceedings**

The district courts decide all criminal cases as the courts of the first instance unless provided otherwise by the Rules of Criminal Procedure in specific cases.

Further, the district courts make certain decisions in the preliminary proceedings. They order, for example, house searches, decide on custody or phone tapping and recording the telecommunications activity.

The regional courts decide in the first instance on the criminal acts for which the law sets the lower length of imprisonment of at least 5 years or for which an exceptional sentence may be imposed. However, this is not the case of any criminal act to which the intellectual property rights are subject.

However, the regional courts hear actions in the first instance concerning the criminal acts of breach of binding rules of the economic relations under Section 127 of the Criminal Code and of the unfair competition under Section 149 of the Criminal Code even if the lower length of the imprisonment does not exceed 5 years. These criminal acts may, in some cases, apply to the intellectual property rights.

Therefore, the respective district courts have the first instance jurisdiction in respect of taking decisions on the criminal acts of infringement of the copyright, rights related to the copyright and the database rights (Section 152 of the Criminal Code), infringement of the industrial rights (Section 151 of the Criminal Code) and infringement of the rights to a trademark, a trade name and a protected designation of origin (Section 150 of the Criminal Code).

Further, the regional courts hear appeals and complaints filed against decisions of the district courts.

The high courts (in Prague and Olomouc) hear appeals and complaints filed against the first instance decisions of the regional courts. In addition, they decide on ordering certain acts in the preliminary proceedings, e.g. the permission to use an agent. The Supreme Court of the Czech Republic decides on extraordinary remedies, particularly on appeals and complaints about breach of law, and/or on complaints against decisions of the high courts.

As for the territorial jurisdiction, it basically holds true that the proceedings are carried out by the court on which territory the criminal act was committed. If a criminal act was committed in several places (e.g. the accused person has allegedly robbed a number of weekend cottages in several districts),

each court in territory of which the criminal act was committed has the jurisdiction. In such cases, the action is usually heard by the court (from among several courts with jurisdiction) where the action was filed by the public prosecutor.

Where the places of commission cannot be established or if the act was committed abroad, the proceedings shall be carried out by the court in territory of which the accused person lives, works or stays. Where even such places cannot be established, the proceedings shall be carried out by the court on territory of which the criminal act emerged.

### **3.3.2 Civil Court Proceedings**

The provision of Section 9 of Act No. 99/1963 Coll., the Civil Procedure Code, as amended, lays down the subject-matter jurisdiction of the regional courts as the courts of the first instance in disputes

- concerning claims resulting from the Copyright Act, claims for endangerment and infringement of the rights under the Copyright Act and claims for surrender of the unjust enrichment obtained at the expense of the person enjoying the rights under the Copyright Act
- concerning protection of the rights infringed or endangered by unfair competition conduct
- concerning infringement or endangerment of the right to trade secret,
- concerning protection of the name and good reputation of a legal person resulting from the rights to the business name,
- concerning claims resulting from the industrial property, claims for endangerment and infringement of the industrial property rights and claims for

surrender of the unjust enrichment obtained at the expense of the person enjoying the industrial property rights.

Matters belonging to the **subject-matter jurisdiction of the regional court**, except for decision-making on claims resulting from the industrial property, claims for endangerment and infringement of the industrial property rights and claims for surrender of the unjust enrichment obtained at the expense of the person enjoying the industrial property rights, **fall under the territorial jurisdiction of the regional court on territory of which the ordinary court of the party is located**.

The ordinary court of a natural person is the district court on territory of which the natural person is domiciled, or, if the person does not have a domicile, the district court on territory of which the person stays. If the natural person is domiciled in multiple places, his/her ordinary courts are all district courts on territories of which the person lives with the intention of permanent stay.

The ordinary court of a natural person, who is an entrepreneur, is in the matters resulting from the business relations the district court on territory of which the person has the place of business; if the person has no place of business, the district court is determined according to the person's domicile.

The ordinary court of a legal person is the district court on territory of which the legal person has its registered office (provisions of Sections 84 et seq. of the Civil Procedure Code)

### **In disputes**

– concerning claims resulting from the industrial property, claims for endangerment and infringement of the industrial property rights and claims for surrender of the unjust enrichment

obtained at the expense of the person enjoying the industrial property rights, and concerning the right to information, compensation, reasonable satisfaction, withdrawal of products from the market, removal or destruction of products, materials, tools and equipment and the right to publication of the judgement in these matters

– concerning the Community trademarks under Article 92 of the Council Regulation (EC) No. 40/1994 of 20 December 1993, on the Community trademark,

– concerning the Community industrial designs under the Council Regulation (EC) No. 6/2002 of 12 December 2001, on the Community designs,

**the Municipal Court in Prague has the territorial jurisdiction** with effect from 1 January 2008 (Section 6 of Act No. 221/2006 Coll., on enforcement of the industrial property rights).

The appeals against decisions taken by the regional courts in the first instance are heard by the high courts (Section 10 of the Civil Procedure Code).

The appeals against decisions taken by the high courts are heard by the Supreme Court (Section 10a of the Civil Procedure Code).

### **3.3.3 Administrative Justice**

The regional courts and the Supreme Administrative Court hear cases and take decisions in the administrative justice. In case of the regional courts, the administrative justice is executed by specialized benches of judges or by a specialized judge sitting alone.

The regional courts have the subject-matter jurisdiction over proceedings. All proceedings fall under the territorial jurisdiction of the regional court on territory of which the seat of the

administrative body lies, which issued the last-instance decision in the matter or otherwise encroached on the rights of the person seeking protection at the court (Section 7 of the Code of Administrative Justice).

Reviewing the final decisions of the Industrial Property Office falls under the subject-matter and territorial jurisdiction of the Municipal Court in Prague (Section 6 of the Act on Enforcement of the Industrial Property Rights and Section 39(2) of Act No. 6/2002 Coll.).

The regional courts (Municipal Court in Prague) take decisions in the administrative justice in one-instance decision-making. However, a cassation complaint may be filed as the remedy against the final decision of the regional court in the administrative justice.

Cassation complaints are heard by the Supreme Administrative Court (Section 12 of the Code of Administrative Justice).

## **4. Role of Public Prosecutor's Offices**

### **4.1 General**

Act No. 283/1993 Coll., on the Public Prosecutor's Office, came into force on 1 January 1994. During its preparation, various models of conception of the position of the prosecution, or the newly established public prosecutor's office, within the system of state bodies, were referred to. Most often it was suggested that the public prosecutor's office form a separate system of state authorities designed to represent the state in cases defined by law. However, an opinion was put through politically, that the public prosecutor's offices should be arranged as a part of the executive

power, within the framework of the Ministry of Justice.

a)

The public prosecutor's office acts particularly in the criminal proceedings as a public prosecution body and a supervising body in the preliminary criminal proceedings. This results from the provision of the first sentence of Section 4(1) of Act No. 283/1993, on the Public Prosecutor's Office, as amended, which provides that the public prosecutor's office brings on behalf of the state charges in the criminal proceedings and performs the associated duties assigned to it by the Rules of Criminal Procedure, and from the provision of Section 4(2) of this Act, which provides that other competences of the public prosecutor's office in the criminal proceedings are specified by the Rules of Criminal Procedure. The Act on Public Prosecutor's Office contains only a general regulation, details of the position of the public prosecutor's office in the criminal proceedings are governed by the Rules of Criminal Procedure.

Performance of the supervisory tasks in the preliminary criminal proceedings creates the preconditions for implementation of the main role of the public prosecutor's office, i.e. representing the prosecution in proceedings before courts. The public prosecutor's office is in the position of a party in these proceedings (Section 12(6) of the Rules of Criminal Procedure).

Under the provision of the Rules of Criminal Procedure and under the Act on Public Prosecutor's Office, as amended, as well as under Decree No. 23/1994 Coll., a public prosecutor is a person with the dominant position in the

preliminary proceedings. A police body has, admittedly, a procedurally and organizationally independent position; however, it is bound by the instructions of the public prosecutor subject to limitation resulting from the provision of the last sentence of Section 164(5) of the Rules of Criminal Procedure.

If the public prosecutor's office is to fulfil its principal role, i.e. to bring charges in the criminal proceedings on behalf of the state and to fulfil obligations imposed on it by the Rules of Criminal Procedure in connection therewith, it has to create the necessary prerequisites for fulfilment of this role.

In order to achieve this objective, the public prosecutor performs two interconnected functions in the preliminary proceedings. These are:

- the function of supervision in the preliminary criminal proceedings, including the proposing and decision-making function,
- the function of the instance body which takes decisions on complaints against decisions of the investigator or the police body.

Supervision by the public prosecutor in the preliminary proceedings represents a systematic and purposeful control activity focused on finding out the state of investigation, revision of the investigator's practice from the viewpoint of its legitimacy, speed and fluency and immediate removal of the established shortcomings. Its objective also is that nobody should be criminally prosecuted and limited in their rights in the preliminary proceedings without reasons. The public prosecutor's supervision in the preliminary proceedings both creates conditions for the accusatory function of the public prosecutor and constitutes a set of instruments aimed at fulfilment of the dominant role of the public prosecutor in

the preliminary proceedings. Supervision is performed not only from the viewpoint of the legitimacy of practice of the investigator (or the police bodies), but also from the viewpoint of its factual accuracy, justification and completeness.

The public prosecutor is particularly charged with exercising his/her individual powers in the course of the preliminary proceedings, ensuring the overview of the state and results of the preliminary proceedings, taking into consideration the gravity and nature of the criminal case, influencing effectively the course of the proceedings and removing established shortcomings without delay. In serious matters, particularly in custody matters or in matters demanding in respect of elements of case or evidence or legally demanding, the public prosecutor has to check regularly the state of the preliminary proceedings and regulate the course of the preliminary proceedings and their focus through his/her instructions.

### **b)**

In accordance with the provision of Section 5(1) and (2) of the Act on Public Prosecutor's Office, the public prosecutor's office acts in defined cases in the civil court proceedings. The public prosecutor's office may enter initiated proceedings, *inter alia*, in the matter of redemption of deeds, the Companies Register, the Register of Benevolent Associations and the Register of Foundations, certain issues regarding trading companies, cooperatives and other legal persons and bankruptcy and composition, including disputes incited by such proceedings.

The public prosecutor's office may, under Section 42 of the Act on Public Prosecutor's Office, make a proposal for

initiation of the civil court proceedings in respect of invalidity of an agreement on transfer of property in cases where the provisions restricting the liberty of contract of the parties were not respected when concluding the agreement.

Also the public prosecutor's power to propose under Sections 68(6) and 69b(2) of the Commercial Code comes into question (the proposal for dissolution of a trading company or for dissolution of a company and its entry into liquidation under the cited provisions may be made by any state body).

The competence of the public prosecutor's office in the area of the state administration is ruled out from the time of coming into force of the Act on Public Prosecutor's Office.

c)

Act No. 169/1999 Coll., on imprisonment and on the amendment of the related laws, has laid down that supervision of observance of the legal regulations in execution of a punishment shall be performed by the authorized public prosecutor of the regional public prosecutor's office on territory of which the punishment is executed. Supervision of this public prosecutor's activity shall be performed by the authorized public prosecutor of the high public prosecutor's office. In this manner, the public prosecutor's office was partially returned the powers exercised by the former prosecution (which performed supervision not only over the places of service of imprisonment, but also over the places of custody, protective therapy and protective education). Act No. 208/2000 Coll., which amended Act No. 293/1993 Coll., on service of custody, returned similar powers to the public prosecutors also in respect of supervision over the places of custody

with effect from 1 January 2001. Even this activity is performed by the authorized public prosecutors of the regional and high public prosecutor's offices.

## **4.2 In Matters Resulting from Intellectual Property Rights**

### **4.2.1 Criminal Proceedings**

As has already been said, the purpose of the criminal proceedings is, by a lawful procedure, to detect a criminal act, establish its perpetrator, investigate a deed which accomplishes the elements of a criminal act under the criminal law of substance and bring the perpetrator before the court which shall decide the issue of his/her guilt or innocence. The public prosecutor's office acts in these proceedings as a public prosecution body and a supervising body in the preliminary criminal proceedings. The public prosecutor's office brings on behalf of the state charges in the criminal proceedings and performs the associated duties assigned to it by the Rules of Criminal Procedure. From the viewpoint of enforcement of the intellectual property rights, the public prosecutor's office has the competence in the criminal proceedings in case of these criminal acts:

- a criminal act of infringement of the copyright, rights related to the copyright and the database rights (Section 152 of the Criminal Code)
- a criminal act of infringement of the industrial rights (Section 151 of the Criminal Code)
- a criminal act of infringement of the rights to a trademark, a trade name and a protected designation of origin (Section 150 of the Criminal Code)
- a criminal act of the unfair competition (Section 149 of the Criminal Code).

The elements of these criminal acts were briefly mentioned in the article 2.2.

#### **4.2.2 Civil Court Proceedings**

From the viewpoint of the powers of the public prosecutor's office in the non-criminal area, there comes into question application of the provision of Section 42 of the Act on Public Prosecutor's Office in case of agreements on transfers of the intellectual property concluded, for example, in violation of the Public Procurement Act, because this regulation restricts the liberty of contract of parties in the commercial relations. Contracts which are inconsistent with the provisions of this Act are absolutely invalid under the provision of Section 39 of the Civil Code, because the provisions of this Act are cogent and their breach always constitutes a violation of the Act. It is obvious from the nature of the matter that it is not case of breach of any provision (e.g. concerning archiving of documentation on assignment of law). The cited provision enables the public prosecutor to dispute an agreement on transfer of property by filing an action with the court, if the provisions restricting the liberty of contract of the parties were not respected when concluding the agreement. In practice, this institute can dispute particularly some unlawful transfers of the state intellectual property.

It can be further imagined that subject of a dispute incited by the bankruptcy and composition proceedings may be the intellectual property rights. In such case, the public prosecutor's office would be authorized to enter such proceedings. Since the public prosecutor's office represents the interests of the state and not public

interests, it would probably do so only in case when rights of the state could be affected.

#### **4.3 Subject-Matter and Territorial Jurisdiction of Public Prosecutor's Offices**

Pursuant to Section 6(1) of the Act on Public Prosecutor's Office, the system of the public prosecutor's offices is formed in continuity to the system of courts (because a public prosecutor's office is competent under the provision of Section 8(1) of the Act on Public Prosecutor's Office to represent the state before the court at which it acts, unless provided otherwise by a special act) by the Supreme Public Prosecutor's Office, the high public prosecutor's offices in Prague and in Olomouc and the regional and district public prosecutor's offices.

The seats and territories of the individual types and instances of the public prosecutor's offices correspond with the territories of the respective courts. Subject to some exceptions, these principles apply to the seats and territories of the public prosecutor's offices and their branches.

Competences of the district prosecutor's offices correspond in significant features with competences of the district courts. The district public prosecutor's offices act at the seat of the district courts, unless provided otherwise by a special act. The prosecutors from these public prosecutor's offices lead for the public prosecution in proceedings before the district courts as the courts of the first instance.

Similarly, competences of the regional public prosecutor's offices (Municipal Public Prosecutor's Office in Prague) correspond with competences of the regional courts. The regional

public prosecutor's offices act at the seat of the regional courts, unless provided otherwise by a special act. The prosecutors from these public prosecutor's offices lead for the public prosecution in proceedings before the regional courts as the courts of the first instance or the second instance if they decide on appeals and complaints against decisions of the district courts.

The regional public prosecutor's offices further act as the basic link when dealing with initiated complaints against breach of law in criminal cases and when reviewing criminal cases of its own initiative.

Competences of the high public prosecutor's offices correspond to competences of the high courts. The high public prosecutor's offices therefore act in proceedings regarding ordinary remedies against decisions taken by the regional courts as the courts of the first instance. They further act in proceedings regarding extension of custody under the provision of Section 71(3) of the Rules of Criminal Procedure. The high public prosecutor alone is authorized to submit a proposal for extension of custody for a term exceeding two years in the preliminary proceedings.

The competence of the Supreme Public Prosecutor's Office is in accordance with the competence of the Supreme Court of the Czech Republic. The Supreme Public Prosecutor's Office therefore acts particularly in proceedings regarding complaints against breach of law in criminal cases before the Supreme Court, in making decisions and delivering opinions in respect of interpretation of the acts and other legal regulations published in the Collection of Court Decisions and Opinions, or if some legal question requires unification of the interpretation or if lower-instance

courts made different decisions in respect of such legal question, including questions concerning multiple divisions of the Supreme Court or disputable between the divisions, in proceedings regarding recognition and enforceability of decisions taken by foreign courts on the territory of the Czech Republic, if required by the law or by an international treaty (Section 28(2) of the Act on Courts and Judges and Section 384a of the Rules of Criminal Procedure).

## 5. Jurisdiction of the Police

Under the provision of Section 2 of Act No. 283/1991 Coll., on the Police of the Czech Republic, the police performs, *inter alia*, the following tasks:

- detects criminal acts and establishes their perpetrators;
- conducts investigations of criminal acts;
- detects misdemeanours;
- deals with misdemeanours if so provided by a special act;

### a)

The police body is obliged, on the basis of its own knowledge, complaints and instigations by other persons and bodies, on the basis of which it may be concluded that there exists a suspicion of commission of a criminal act, to conduct all necessary investigations and take all necessary measures in order to establish facts indicating that a criminal act has been committed and leading to the establishment of its offender; it is also obliged to take all necessary measures to prevent criminal activity.

Investigation shall be conducted by the Criminal Police and Investigation Service at the departments with territorially defined competence; the

Minister may also charge other police departments with carrying out investigation and specify their competences.

When performing acts within the criminal proceedings, a police officer is bound by the instructions of the public prosecutor. According to the nature of the matter, the public prosecutor shall instruct the competent department or directly the police officer in respect of the criminal proceedings. In other matters concerning the performance of police tasks, the police officer is bound by the instructions of his/her superiors.

When preventing criminal acts and in connection with the criminal proceedings, a police officer is authorized to use operational means of searching which include: cover documents, undercover means, security technology, special funds and the use of an informer. A police body is further authorized to use the following operational means of searching in proceedings regarding an intentional criminal act: sham transfer, tracking of people and objects and the use of an undercover agent. The use of the operational means of searching may not follow other interests than to establish facts important for the criminal proceedings. These means may only be used if the pursued purpose cannot be accomplished in any other manner or if such accomplishment would be significantly more difficult. Personal rights and freedoms may be restricted only to the essential extent. Audio, visual and other recordings obtained using the operational means of searching in a manner complying with the provisions of the Rules of Criminal Procedure may be used as evidence.

From the viewpoint of enforcement of the **intellectual property rights**, the

police has competence in detecting criminal acts, establishing their perpetrators and conducting investigations in case of these criminal acts:

- a criminal act of infringement of the copyright, rights related to the copyright and the database rights (Section 152 of the Criminal Code)
- a criminal act of infringement of the industrial rights (Section 151 of the Criminal Code)
- a criminal act of infringement of the rights to a trademark, a trade name and a protected designation of origin (Section 150 of the Criminal Code)
- a criminal act of the unfair competition (Section 149 of the Criminal Code).

The elements of these criminal acts were briefly mentioned in the article 2.2.

**b)**

As has already been mentioned, the provision of Section 2 of Act No. 283/1991 Coll., on the Police of the Czech Republic, charges the police with the task of **detecting general misdemeanours** and **dealing with those misdemeanours** that are to be dealt with by the police under a special act.

The current legal regulation in respect of misdemeanours is based on Act No. 200/1990 Coll., on Misdemeanours. Misdemeanours are therefore designated, with a certain degree of inaccuracy, as **identified and codified** administrative torts. Their identification is given by the legal definition of the term „misdemeanour“ as an administrative tort of its kind, while other administrative torts are usually missing their statutory term definition. The codification is connected with the fact that the legal regulation of misdemeanours is contained, to the decisive extent, in the self-contained

Misdemeanours Act, misdemeanours being governed outside this Act only in specific cases.

The current Misdemeanours Act is divided, except for the basic provisions, into the general and special part. It further contains a part laying down the misdemeanour proceedings. It therefore includes both the material and procedural legal issue area.

At the same time, the Misdemeanours Act largely retained the validity of the regulation of those elements of misdemeanours and their recourses which, prior to its adoption, were contained and remain contained in certain special acts. The Act also allowed that, after its coming into force, misdemeanours be governed by other new special acts.

A misdemeanour means a culpable conduct infringing or endangering an interest of society and **is expressly designated as a misdemeanour in the Misdemeanours Act or in another act, unless it is another administrative tort** punishable under special legal regulations or a criminal act. It is a case of general term definition, or the so called general clause of a misdemeanour, which further presupposes a more detailed definition of the individual elements.

From the viewpoint of enforcement of the **intellectual property rights**, the police has the competence in detecting misdemeanours in case of these misdemeanours:

- a misdemeanour under the provision of Section 105a of Act No. 121/2000 Coll., the Copyright Act, as amended;
- a misdemeanour in the area of infringement of the industrial rights and the rights to a trade name under the provision of Section 33 of Act No. 200/1990 Coll., on misdemeanours, as amended;

– a misdemeanour against property under the provision of Section 50(b) of Act No. 200/1990 Coll., on misdemeanours, as amended, where the offender intentionally unlawfully uses a trade secret, know-how or confidential information from the property of another person.

The elements of these misdemeanours have been mentioned briefly above. Pursuant to the provision of Section 58(1) of the Misdemeanours Act, the police bodies are obliged to notify the relevant administrative bodies of misdemeanours that came to their knowledge if they are not themselves competent to deal with them. **The following information shall be particularly contained in the notification: what misdemeanour the act is considered to be, known evidence which proves that it is a misdemeanour and that it was committed by a certain person.** There is surely no doubt that the police body will "learn" of the misdemeanour when performing its competence „**to detect misdemeanours**“. In practice, however, the detection of misdemeanours is likely to have the nature of a („secondary“) result when detecting criminal acts in case that the detected conduct does not accomplish all elements of a criminal act, particularly in respect of the required degree of danger to society, but accomplishes the elements of the respective misdemeanour.

From the viewpoint of enforcement of the **intellectual property rights**, only in case of a misdemeanour against property under the provision of Section 50(b) of Act No. 200/1990 Coll., on misdemeanours, as amended, if the offender uses intentionally and unlawfully a trade secret, know-how or confidential information from the property of another person, the police

body is obliged, under the provision of Section 58(2) of the Misdemeanours Act, to conduct the **necessary investigation in order to establish the person suspected of commission of the misdemeanour and to obtain the evidence necessary for later substantiation before the administrative body**. The police body shall write an official record about the established facts and attach it to the notification. The notification shall be made by the police body not later than thirty days from the day it learned about the misdemeanour.

Within the meaning of the provision of Section 52 of the Misdemeanours Act (per argumentum a contrario), the bodies of the Police of the Czech Republic are not authorized to deal with any misdemeanour that could be taken into consideration from the viewpoint of enforcement of **the intellectual property rights**.

## **6. Jurisdiction of the Customs Administration and the Czech Commercial Inspection**

The Customs Administration of the Czech Republic (hereinafter referred to as „Customs Administration“) has been established by Act No. 185/2004 Coll., on the Customs Administration of the Czech Republic (hereinafter referred to as „Act on Customs Administration“). It consists of the General Directorate of Customs, eight customs directorates and their subordinated 54 customs offices. The Customs Administration is a security body.

### **1)**

The competence of the Customs Administration and its bodies in the area of the intellectual property rights is

established by the immediately binding legal regulation of the Community, i.e. the Council Regulation (EC) No. 1383/2003, concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights. The said Regulation was implemented into Act No. 191/1999 Coll., on measures concerning import, export and re-export of goods infringing some intellectual property rights, which specifies it partially. The Council Regulation (EC) No. 1383/2003 and its implementing regulation, i.e. the Commission Regulation (EC) No. 1891/2004, specify the terms under which the customs office acts against persons who own, hold, store or sell goods whose manufacture or modification has infringed the intellectual property rights in the customs territory of the European Communities.

Act No. 191/1999 Coll. specifies the terms under which the customs office acts against persons who own, hold, store or sell goods whose manufacture or modification has infringed the intellectual property rights in the customs territory of the European Communities (hereinafter referred to as „Community“) according to the immediately binding legal regulation of the Community. It further specifies the terms under which the customs office is authorized to

- a) seize goods where it has reason to believe that their manufacture or modification has infringed the intellectual property rights,
- b) ensure destruction of the goods,
- c) exclude from trading and other handling goods that were recognized by the court as goods whose manufacture or modification has infringed the intellectual property rights,

d) hear administrative torts in case of infringement of this Act. (The merits and sanctions under these administrative torts are mentioned in detail in the article 2.3.).

If goods are seized whose manufacture or modification has infringed the rights of the intellectual property rights owner, the customs office shall, upon request made by the owner of the rights, decide on destruction of the goods and shall ensure its destruction under the supervision by three customs officers without the necessity of further examination as to whether these were really counterfeits. This is a simplified procedure of the customs office, based on the condition that the owner of the right informs the customs office within ten working days after the notification of seizure of the goods that these are counterfeits and hands over to the customs office the written consent of the person making the customs declaration, owner or holder of the goods in respect of destruction of the goods. Samples shall be taken prior to destruction of the goods, which shall be kept by the customs office in such manner that they may be used as evidence in the possible court proceedings. The goods shall be destroyed at the expense of the person making the customs declaration, owner or holder of the goods.

If the court decides in the declaratory proceedings initiated by the owner of the rights that the goods are counterfeits, and no decision has been taken on forfeiture or confiscation of the goods, the customs office shall ensure destruction of the goods at the expense of the person making the customs declaration, owner or holder of the goods. Where the customs office does not know the owner or holder of the counterfeits, the costs of destruction of the counterfeits shall be paid by the

owner of the right. This provision enables the customs office to destroy the seized goods in case that the declaratory proceedings before court take so long that the term for imposition of a fine and confiscation or forfeiture of the goods meanwhile expires.

If the court takes a final decision that the goods are counterfeits and that before further handling of the counterfeits it is sufficient to remove the trademarks, the customs office shall ensure, in accordance with the final decision, their removal and destruction at the expense of the person making the customs declaration, owner or holder of the goods.

The customs office shall ensure, at the expense of the perpetrator of the administrative tort and with the approval of the owner of the right, removal of the trademarks from the forfeited or confiscated counterfeits in accordance with the court decision so that they can be handled in a manner other than selling them;

- making modifications of the forfeited or confiscated counterfeits, with the approval of the owner of the right, without changing the nature of the goods;

- destruction of the forfeited or confiscated goods (counterfeits), trademarks removed in accordance with the subparagraph a) and waste and remains originated during other modifications;

- if the owner of the right gives consent to using the counterfeits after appropriate modification (removal of the trademarks) for the humanitarian purposes, the customs directorate shall decide on which counterfeits are suitable for the humanitarian purposes and which can be gratuitously transferred for the humanitarian purposes to the receiving organization. The receiving organization

is obliged to ensure, at its expense and under the terms specified by the customs directorate, removal of the trademarks or performance of other modifications and destruction of the removed trademarks, waste and remains originated during these modifications. The receiving organizations may only be organizational bodies and allowance organizations of the state or of the territorial self-governing units established for the purpose of providing social welfare or acting in the area of health or education, or other legal persons that were not established for the business purposes, whose subject of activity is solely provision of social welfare or which operate in the area of health or education, which have been providing the humanitarian aid for at least 2 years and which prove not to have arrears of tax or social security contributions and state employment policy contributions and which are not being prosecuted.

## 2)

Other competences of the Customs Administration and its bodies (customs offices) in the area of the intellectual property rights are established by Act No. 634/1992 Coll., on consumer protection, as amended.

Pursuant to this Act (Section 23b), the customs offices supervise observance of the obligations specified in Section 8(2) of Act on Consumer Protection, i.e. also observance of the ban on misleading consumers by offering or selling products or goods infringing some intellectual property rights, as well as by storing these products or goods for the purpose of offering or selling them. When performing this supervision (the law incorrectly uses the terms „supervision“

and „control“ with the same meaning, the same holds true for the terms „customs officer“ and „customs office“ ), the customs offices are, under Sections 23b and 23c of the cited Act, authorized to

- a) inspect legal and natural persons that manufacture, store, distribute, import, export, purchase, sell or supply products and goods to the internal market or carry out any other similar activity in the internal market, **jointly with the Czech Commercial Inspection or independently**, where they have reason to believe that the products or goods infringe some intellectual property rights,
- b) enter, when performing inspection:
  1. workplaces or storage facilities if they have reason to believe that such products or goods infringing some intellectual property rights are offered, stored or sold in such places,
  2. premises of a manufacturer, importer or distributor and require submission of the relevant documentation and provision of truthful information. The manufacturer, importer or distributor may be requested to obtain and submit expert opinions by a professionally qualified person on the subject of supervision or such professionally qualified person may be called in for supervision,
- c) establish the identity of natural persons if they are subjected to the inspection, as well as the identity of natural persons who represent the inspected persons, and ascertain the powers of representation of such persons,
- d) require the necessary documents, information and written or oral explanations from the inspected persons,
- e) take from the inspected persons, for compensation, the necessary samples of products or goods for assessing

whether or not the respective products or goods infringe some intellectual property rights with the intention of misleading consumers. The inspected persons shall receive a compensation in the amount of the price for which the products or goods are offered at the moment of taking the sample.

The inspected persons are obliged to enable the customs officers and the professionally qualified persons invited to participate in the inspection to perform their tasks relating to performance of the inspection.

Pursuant to the provision of Section 23c of the cited Act, a customs officer is obliged, in case that offer, sale, storing, distribution, and/or import or export of products or goods infringing some intellectual property rights, or supply to the internal market of products or goods infringing some intellectual property rights, is provably established, to order seizure of these products or goods.

The customs office is authorized to store the seized products or goods infringing some intellectual property rights out of the reach of the inspected person. The inspected person is obliged to surrender the seized products or goods to the customs officer. If the inspected person refuses to surrender them, the products or goods shall be taken away from the person. The costs of seizure, transport and storage shall be paid by the inspected person. The inspected person is not obliged to pay such costs if it is proved that these are not products or goods infringing some intellectual property rights.

The seizure of the products or goods shall last until the final decision is taken in respect of their forfeiture or confiscation, or until it is proved that these are not products or goods infringing some intellectual property rights. If the measure of seizure is

cancelled, the inspected person shall be returned the seized products or goods intact and without undue delay, except for the products or goods used in the assessment.

The customs office director shall order, in addition to imposition of a fine, also forfeiture or confiscation of the products or goods infringing some intellectual property rights. The state shall become the owner of the forfeited or confiscated products or goods.

The customs office director shall determine that the confiscated or forfeited products or goods shall be destroyed or, where they can be used for the humanitarian purposes, the director may decide that they shall be gratuitously provided for these purposes.

### 3)

Pursuant to Act No. 64/1986 Coll., the Czech Commercial Inspection is a state administration body subordinated to the Ministry of Industry and Trade; it is divided into the Central Inspectorate and the subordinated inspectorates.

Under the provision of Section 2 of the cited Act, the Czech Commercial Inspection inspects legal and natural persons that sell or deliver products and goods to the internal market, provide services or perform other similar activities in the internal market, provide consumer credits or operate market places (market halls) unless the supervision is performed by another administrative authority, unless provided otherwise by this Act.

The Czech Commercial Inspection inspects, inter alia, if consumers are not being misled, offer or sale of products or goods infringing some intellectual property rights being also regarded as misleading consumers, as well as storing of these products or goods for the purpose of offering or selling them.

The Act on the Czech Commercial Inspection provides the inspectorates under the provision of Sections 7b and 7c with the powers identical to the powers of the customs offices.

Where offer, sale or storing of products or goods infringing the intellectual property rights has been provably detected, the inspector is obliged to order the seizure of such products or goods. The Czech Commercial Inspection is authorized to store the seized products or goods infringing the intellectual property rights out of the reach of the inspected person. The inspected person is obliged to surrender the seized products or goods to the inspector. If the inspected person refuses to surrender them, the products or goods shall be taken away from the person.

The seizure of the products or goods infringing the intellectual property rights shall last until the final decision is taken in respect of their forfeiture or confiscation, or until it is proved that these are not such products or goods.

The director of the inspectorate is entitled to order forfeiture or confiscation of products or goods infringing the intellectual property rights. The state shall become the owner of the forfeited or confiscated products or goods.

The director of the inspectorate is authorized to determine that the confiscated or forfeited products or goods shall be destroyed or, where they can be used for the humanitarian purposes, gratuitously provided for these purposes.

The forfeited or confiscated products or goods may be provided for the humanitarian purposes to the receiving organizations, which can only be:

a) organizational bodies and allowance organizations of the state or of the

territorial self-governing units, established for the purpose of providing social welfare or acting in the area of health or education, or

b) other legal persons providing that:

1. they were not established for the business purposes,
2. their subject of activity is solely activity in the areas mentioned in the subparagraph a),
3. they have been providing the humanitarian aid for at least 2 years, and
4. they prove not to have arrears of tax or social security contributions and state employment policy contributions and that they are not being prosecuted.

The products or goods from which the receiving organization has completely removed and destroyed the elements infringing the intellectual property rights may be provided for the humanitarian purposes. Each product or piece of goods has to be marked, using irremovable colour, with the sign "humanita" (humanitarian) in such manner that the dignity of the persons using these products is not diminished.

## **7. Application of Directive of the European Parliament and of the Council on Criminal Measures for Enforcement of Intellectual Property Rights**

The subject and scope of the Directive is defined in Article 1 thereof to the intent that it concerns the criminal measures for enforcement of the intellectual property rights. Likewise in Directive 2004/48/EC, on enforcement of the intellectual property rights, the term „intellectual property rights“ includes all and any intellectual property rights. Likewise Article 17(2) of the Charter of

Fundamental Rights of the European Union according to which „intellectual property shall be protected“, the scope of the criminal protection is horizontal.

The Directive may be used for all provisions of the intellectual property rights provided by the legal order of the Community or by the national legal orders of the member states, e.g. by Directive 2004/48/EC. Statement by the Commission 2005/295/EC applying to Article 2 of Directive 2004/48/EC specifies the list of these rights whose objective is to provide greater legal certainty in the scope of the Directive. The Directive shall apply without prejudice to stricter regulations established in the member states.

Article 3 of the Directive engages the member states to classify any infringement of the intellectual property rights, if committed on a commercial scale, as a criminal act. The Directive mentions also the attempt, complicity and instigation. The commercial scale criterion adopted from Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) concluded on 15 April 1994 which unites all members of the World Trade Organization. Article 61 of the TRIPS Agreement says that „members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of the corresponding gravity. In appropriate cases, remedies available shall also include seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the

offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale“.

Unlawful conduct has to be intentional which should not call in question the special systems of responsibility which were established, such as the system of responsibility of the Internet services providers specified by Articles 12 to 15 of Directive 2000/31/EC, on electronic commerce.

Article 4 governs the types of sanctions: in addition to imprisonment in case of natural persons, it specifies a number of sanctions that may be used for both natural and legal persons: these are fines, confiscation of the property belonging to the convicted person, be it goods that are the subject of the dispute, or means, tools or materials which essentially served for the production or distribution of the respective goods. Other sanctions are prescribed for special cases: destruction of the goods that are the subject of a dispute and of the property which essentially served for the production of the given goods, total, partial, definite or temporary closure of the enterprise or plant which essentially served to commit an unlawful act. A permanent or temporary ban on performing a trading activity may be also prescribed, as well as placement under the court supervision or a court liquidation and the prohibition of access to a public assistance and subsidies. Finally, publication of the court decisions is provided for. This option represents a deterrent and may also serve as means of information for both the entitled persons and the general public.

Article 5 specifies the level of criminal sanctions: unlawful conduct shall be punished by the maximum term of at

least four years' imprisonment, if committed as a part of a criminal conspiracy. The same applies where such unlawful conduct constitutes a risk for health or safety of people. The threshold of 4 years of imprisonment has been set because it generally corresponds with the criterion set to identify a serious unlawful conduct. It is the threshold set in the Joint Action 98/733/JHA and in the proposal for a Council Framework Decision on the fight against organised crime [COM(2005) 6 final] and in the United Nations Convention against Organized Transnational Crime. For natural or legal persons who commit the offences listed in Article 3, the penalties include monetary or non-monetary fines to a maximum of at least 100,000 EUR for cases other than the most serious cases and to a maximum of at least 300,000 EUR for cases of unlawful conduct which constitutes risk for health or safety of people. If such risk is confirmed, it must be possible to take such circumstance into consideration even if the dangerous product has not produced the harmful effect yet.

Article 6 provides for the full or partial confiscation of the property belonging to a person convicted of unlawful conduct committed in the circumstances set out in Article 5. Its construct refers to the provision of Article 3 of the Council Framework Decision 2005/212/JHA of 24 February 2005, on Confiscation of Crime-Related Proceeds, Instrumentalities and Property.

The framework decision of 13 June 2002 represents the framework necessary for creation of the joint investigation teams. In order to facilitate investigation of criminal activities concerning unlawful conduct infringing the intellectual property rights, the member states have to enable the affected owners of the

intellectual property rights or their representatives, as well as experts, to contribute to the investigation led by these teams. Conducting investigation in this area is very difficult indeed and it is often necessary, in order to establish that the products are counterfeits, to obtain active participation of the victims, representatives of the holder of the intellectual property rights or experts. The victims or their representatives can also quickly determine in case of doubts whether the products found during the investigation are counterfeits. This facilitates the obtaining of evidence in respect of unlawful conducts infringing the intellectual property rights within the framework of investigation conducted by the joint teams. The member states have enough room for considerations in this respect.

The objective of Article 8 is to ensure that investigation or prosecution concerning unlawful conducts in the matter of counterfeiting and piracy not be dependent on a declaration or accusation made by a person who is a victim of unlawful conduct, at least where such conduct occurred on the territory of a member state. Such measure is necessary in order that the investigation of unlawful conducts infringing the intellectual property right may be conducted under favourable conditions. The thing is, it often happens that stocks of products are discovered which are suspected of being counterfeits but sometimes it is difficult to quickly contact or identify the holder of the intellectual property right in the internal market. Enterprises which become victims of unlawful conduct may be located anywhere within the Community and these can be often small or medium enterprises, not only big enterprises producing generally known goods. It would not be

appropriate to require, within the framework of investigation, that the victim lodge a complaint first. The intellectual property right is often infringed without the holder of the intellectual property right being aware of that, and the failure to lodge a complaint does not constitute negligence on the part of the victim in this area.

The time period for implementation of the Directive into the national law is

determined in the length of eighteen months, which is based on what was laid down by other directives. The Directive comes into force on the twentieth day after its publication in the Official Journal in accordance with the provisions of Article 254(1) of the Treaty establishing the European Community.

**II. Mgr. Vladimír Abraham**

**Crime in the area of infringement  
of the intellectual property rights**



# **Content**

<b>1. History of Crime .....</b>	<b>47</b>
<b>2. Forms of Criminal Activity.....</b>	<b>47</b>
2.1. Product Counterfeiting.....	47
2.2. Music Piracy .....	49
2.3. Piracy of Audiovisual Works.....	51
2.4. Software Piracy.....	52
2.5. INTERNET.....	53
2.5.1. FTP Servers.....	53
2.5.2. Peer-to-Peer (P2P) Networks .....	53
2.5.3. Subtitles and Covers .....	54
2.6. Sui Generis Right of Database Maker.....	55
<b>3. Police Statistics in Area of Intellectual Property Rights .....</b>	<b>55</b>
3.1. Monitored Indicators .....	55
3.2. Statistics in Area of Infringement of Rights to Trademark, Trade Name and Protected Designation of Origin (Section 150 of Criminal Code) .....	56
3.3. Statistics in Area of Infringement of Industrial Rights (Section 151 of Criminal Code) .....	56
3.4. Statistics in Area of Infringement of Copyright, Rights Related to Copyright and Database Rights (Section 152 of Criminal Code) .....	56
<b>4. Organized Crime .....</b>	<b>57</b>
4.1. Characterization and Development .....	57
4.2. Signs of Organized Crime.....	58
4.3. Profit Minimization and System Shortcomings .....	58
<b>5. Basic Concepts of Criminal Law .....</b>	<b>59</b>
5.1. Criminal Act .....	59
5.2. Police Body .....	61
5.3. Criminal-Law Protection .....	62
<b>6. Conclusion .....</b>	<b>69</b>





## **1. History of Crime**

The Police of the Czech Republic registered the first contacts with the criminal activity in this area during 1990, where cases of **infringement of the rights to a trademark, a trade name and a protected designation of origin** were investigated. These were particularly cases of selling denim goods unlawfully designated by the trademark of the Levi's company.

It has to be mentioned in this connection that strict centralization was a typical sign of the management of the Czech economy until the second half of the year 1990. The state and its institutions managed all economic activities (production, trade, services) through a plan. The political and economic changes and transition to the market economy model resulted in the expansion of the private enterprise sector, birth of new entrepreneurial entities. Their activities did not ignore the area where the subject of production, trade and services arises from the intellectual property.

Forms and methods of committing criminal activity depend on the offenders' subject of interest from the very beginning. At the beginning of commission of this criminal activity, the offenders' subject of interest were **trademarks** which increased the saleability of second-class products that were using them. Later, the subject of interest were individual works (music, film, TV works and particularly works having the nature of software) where the saleability was increased either by a lucrative low price or by being a certain time ahead of the official production, distribution and sale.

In the area of trademarks, the criminal activity lied especially in putting

into circulation or sale of **products unlawfully designated by trademarks**. This activity was preceded by the manufacture itself of such goods within the Czech Republic and later by import of the goods, particularly from Asia, and their subsequent distribution in the sales network. The central role in committing criminal activity was played (and is still played at the present time) especially by stall-selling of textiles, sports goods, shoes, electronics, watch-and-clock goods and other goods.

In the copyright, this was a case of **unauthorized handling of works** that were subject to protection under the copyright or subject to a right related to the copyright. Essentially, we were talking about illegal (pirate) production, copying, distribution and sale of audio cassettes and visual media. This criminal activity was later extended by illegal production/copying and sale of compact discs and particularly copying of software programmes without the consent of the entitled person, i.e. the holder of the rights to a particular work.

## **2. Forms of Criminal Activity**

### **2.1. Product Counterfeiting**

The nature and objective of the product counterfeiting is usually use of a trademark for an inferior product which thus improves its marketability. In the area of trademarks, this means particularly putting into circulation of products unlawfully designated by a trademark or by a mark confusingly similar to such trademark. This activity is preceded by the manufacture itself of such goods, or by its import and subsequent distribution.

The central role in the counterfeit products distribution is played by the infamous stall-selling of textiles, sports goods, shoes, electronics, watch-and-clock goods and other goods unlawfully designated by trademarks of renowned, world-famous firms, therefore by the abuse of single inscriptions and various logos of companies that are generally renowned and that evoke immediately in each of us a certain idea in respect of the quality, colours and, in particular, the price level of these products.

The abuse of similarity to an established brand constitutes a problem for the owner of such brand but also for consumers, because the quality of the copy mostly does not match the quality of the original. Three types of activity are regarded as negative conduct in connection with the protection and use of trademarks. These activities are:

- a) the area of counterfeiting trademarks,
- b) the area of counterfeiting and imitating labels,
- c) the area of competitor's goods packaging

This form of criminal activity itself does not directly trouble individual citizens, it plagues particularly enterprises and exclusive importers using legal practices, which endangers their very existence. If goods are imported to the Czech Republic with such price level that not even input raw materials for the manufacturing process can be purchased for this price in the domestic market, there is no wonder that the discontent of the domestic manufacturers increases. It is a bare fact that many shoemaking and textile companies had to discontinue their activities, because they were not able to compete with this persisting criminal

activity and the connected grey and black economy<sup>1</sup>.

These undesirable economic ties manifest themselves more or less in the area of importing textiles, shoes, industrial and distillery goods. We talk especially about the „communicating vessels“ of two forms of realization:  
a) under-invoicing of the quantity or the value,  
b) increase of the price by counterfeiting.

Both forms of realization aim particularly at obtaining illegal profits or more advantageous position in the market.

In the previous years, meaning around the year 2000, the incidence of counterfeit textiles and shoes was essentially a matter of import. Counterfeit textile goods were imported especially from Turkey and counterfeit shoes particularly from China. At the present time, the development in this area of counterfeiting has returned to the beginning, i.e. to the period between 1992 and 1995, because counterfeits are again being manufactured on the territory of our state (at least partially). The crucial fact has to be emphasized on this occasion, i.e. these are not cheap and primitive copies as was the case at the beginning, but high-quality and very successful works.

The reason of this change is particularly the fact that the powers of the customs bodies were extended around the year 2001 and at the same time more emphasis was laid on the border and customs procedures. That is why the counterfeiters (offenders) changed their behaviour. Only products

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<sup>1</sup> GREY ECONOMY – a complex of economic relations breaching common ethic and moral standards of the society, which are on the edge of the law and hard to punish – corruption is the main factor.

or semi-finished products are imported, which are designated by trademarks only when in our territory.

The channels of these „hot“ goods into the Czech Republic are very diverse. Probably the most common is truck transport, which is usually operated by domestic forwarders. Another common traffic route is represented by containers shipped to the Czech Republic by air or by sea to Rotterdam or Hamburg and then by rail to the Czech Republic.

Nowadays, a serious threat is the sale of counterfeit goods via the Internet which is clearly outside any control by the supervising bodies. The activity and cooperation of all repressive bodies has to be focused, if it is not too late, on the criminal activities related to counterfeiting of the so called sensitive goods in the near future. These are particularly counterfeits of medicines and pharmaceuticals, foodstuffs, alcoholic beverages, cosmetics, hygienic articles, etc.

Counterfeits of the commodities given in the example do not endanger the owners of the intellectual property rights, they endanger the very consumers. Counterfeit medicines and pharmaceuticals, for example, can cause serious health problems to those who use them and even death in the worst case. The same holds true for counterfeits of alcoholic beverages and other goods of daily use and consumption.

Since the Czech Republic is bound by the international treaties from the area of the intellectual property, importing counterfeits of any goods is not easy at all, but considering the level of profits, it is still a very good business.

## 2.2. Music Piracy

The concept of music piracy is not exactly defined by any legal regulation. In most cases this term defines unauthorized copying and distribution of music recordings on audio media or of audiovisual recordings without the consent of their authors, performers and producers. According to this interpretation, a pirate means generally an offender (from the viewpoint of the criminal law) who performs unlawful activity in the area of infringement of the copyright. This term, within this meaning of the word, is not laid down in the Criminal Code, but it is already generally widespread term, much used not only by organizations acting in the area of the protection and enforcement of the copyrights but also by the general public.

A general factor acting in favour of the mass development of the pirate copies production is the fact that the very nature and possibility of consumption of these products is decidedly international because, in the area of music work in particular, the product has a highly international character. Not only author's works with performances of performing artists but also protected personality constituents are becoming the subject of this antisocial conduct or plundering.

The following conditions in particular motivate, facilitate and enable development of this undesirable antisocial activity:

- a) existence of a considerable demand for copies;
- b) relatively large amount of leisure time or, in other words, much greater possibilities of the use of copies;

- c) overall expansion of the reproduction technology;
- d) price affordability.

## **Types of Music Piracy**

### **a) Bootlegs**

Bootlegs are unauthorized music recordings of live performances. The pirate – „bootlegger“ records a concert without the approval of the performer (and the concert organizer) on a recorder smuggled in.

The development and today's technical level of these activities make the pirates' activity a lot easier, midget microphones with excellent parameters can be smuggled imperceptibly even through a thorough search of persons. The microphones themselves are unnecessary if the pirate connects to the cable or mixing desk, or if he buys off the technical personnel for this purpose. This type of piracy is equally widespread in the field of rock, pop, jazz and the classical music. Two forms of realizing these live recordings have taken shape in the recent years:

- „typical“ bootleg addresses collectors and is sold under the counter on the grey or black market,
- „listener's“ bootleg addresses a common customer and can be obtained in a regular music shop.

Unauthorized radio recordings and unauthorized releases of unreleased studio recordings are also often classified in this group. Such designation is not quite fitting because these products use other sources than true live recordings. However, this classification has become accepted and is partly justified because „bootlegs in a broad sense“ enter the market via the same channels as the true bootlegs.

### **b) Pirate Copies**

In case of all forms of stolen copies, the pirate uses the existing available audio media as a master. Based on the type and number of masters used by the pirates, this group may be divided into three main areas:

- typical pirate copies – they take over completely the sample audio medium, bringing it on the market in different form as an original. Fictitious labels are used which give the impression that it is a legal licensed product. Experts can make out a pirate product right away, because a work by a top artist cannot be published under different label than the original.
- pirate compilations – the set comprises multiple original titles in an order which does not exist in this combination with the original producers. These are usually presentations of up-to-date monthly hit charts. The subtype of the compilation piracy is licence fraud when interested music firms are sold licences that cannot be obtained from the owners and right holders. Actually, these licence agreements are just papers without any value. The authorization to grant the user rights is substantiated with forged agreements or a chain of agreements which cannot be tracked to the beginning, to the very artist.
- pirate mix – this form does not consist in copying whole titles one after another; music fragments are edited to create a coherent uninterrupted whole. The input material here are available audio media. Also „sampling“ is counted among pirate mix. It is the technically most difficult stage where the single instrumental or vocal sequences (down to the single music fragments of the existing audio medium) are played in the digital form over to the computer. Special SW

programmes are then used to handle this input material appropriately; one's own pieces may be added. The resulting work is presented as one's own work.

### c) Identical Counterfeits

Counterfeits differ from pirate copies particularly in imitating exactly and relatively rigorously the external appearance of the master. They concentrate exclusively on common consumers because they are hard to be distinguished from the original and can confuse even experienced traders. They have been appearing in the market for a number of years, originating mostly in Eastern Asia and Eastern Europe. When being imported to our domestic market, these counterfeits should give the impression of legal import of authorized media.

It is virtually impossible for the uninitiated person, and very difficult for experts, to evaluate whether a product is a counterfeit or an original product. From this results the dangerousness of such form of piracy, because to identify, as an uninitiated person, a pirate CD mixed among the original production is essentially impossible at the shop. Such counterfeit can be safely identified only in special laboratories. This fact makes the fight against this form of piracy more difficult.

### d) Music Files Offered within Peer-to-peer (P2P) Network

Illegal offering of music (and audiovisual) files via the Internet within the framework of the Peer-to-peer (also P2P) exchange networks belongs among the newest and currently very widespread forms of the music piracy. The P2P processes and system are described in the section titled Internet.

## 2.3. Piracy of Audiovisual Works

In the area of audiovisual works we talk especially about attacks against the copyright of producers of these works who are the only persons that may give the consent to the use of the given film work. Without this consent, copies of film works may not be made and subsequently distributed. The producer, being the executor of the copyright to a film work, may grant the right to the use and distribution (distribution right) to a distribution subject on the territory of a certain state through a licence distribution agreement. The entity that has been granted the distribution right becomes the person authorized to distribute the particular film work within the framework of the exactly specified and defined forms of such distribution (cinema, home video, public performance), in a particular territory and for a certain period of time.

Pirate media of audiovisual works were usually intended for the domestic use if we ignore the frontier market places. Apart from this form of use, its unauthorized use in public performances often occurred. Typical for this form of use are video projections in video cafés, video clubs and long distance buses, which represent the most common examples of infringing the copyright. The parallel holds true in these cases, like in case of music production, that every entrepreneur needs to secure the consent of the rights owners prior to the projection.

The technical development in the area of these technologies and the fight between competitors have caused a significant decrease in purchase prices of the burning technology itself as well as blank media. These influences have naturally started copying (burning) of

DVD's (or CD's) on a large scale in such manner that a stop can be effectively put to this phenomenon only by catching the onset of a new technology from this field.

## 2.4. Software Piracy

Software piracy means all attacks on the copyright and other rights to computer programmes (databases) that are specified in the Copyright Act.

The are many reasons for the use of computer programmes in violation of the contractual arrangements or completely unlawfully in the Czech Republic. With the dynamic development of the computer technology and more and more frequent utilization of computers in households, the use of computer programmes in violation of the licence arrangements is becoming a common practice. A very positive news is the finding that using legal software is becoming an important part of the corporate culture. The first subject to start dealing with legal software systematically and effectively was the state administration which codified a well-developed methodology of handling software means.

The foundations of software piracy are usually laid in elementary schools where the pupils breach law on a massive scale by essentially innocent lending and exchange of computer programmes. This habit establishes negative impacts in the near future as it becomes a normality. On the other hand, the older generation does not consider such conduct as unlawful, often because of the lack of information.

### Types of Software Piracy

Software piracy cannot be easily specified and sorted into areas where all

cases of illegal handling of computer software equipment could be classified. Below are mentioned its most common displays.

**a) End User Piracy** – is the most widespread type of software piracy. It works on the principle of using multiple copies of one software package on several computers and/or distributing the copies of the respective software to other interested persons.

**b) Home Piracy** – this type of piracy has many common features with the end user piracy category. Home piracy includes all activities from innocent exchange of diskettes and CD's with friends, via using illegally obtained software on the family computer, to operating a non-profit BBS for the purpose of illegal distribution of software. An important aspect here is the purchasing power and the price of the software package. Home piracy is, for quite understandable reasons, probably the hardest detectable and regulatable form of piracy.

**c) Reseller Piracy** – this type of piracy is committed by commercial companies that sell computer hardware with pre-installed illegal copies of some computer programmes or load software onto the systems without providing the original diskettes and manuals.

We have to place among these cases also the instances when an unsuspecting customer is sold a software withdrawn from the distribution. This type of software piracy is spreading all over the world, picking up the intensity at the same time.

**d) BBS/Internet Piracy** – the BBS (Bulletin Board Systems) abbreviation has no meaningful equivalent in the Czech language. Basically, BBS comprises one computer running in the fully automatic mode with at least one

modem connected. An interested person who calls the modem number communicates with the installed BBS programme and can browse its offer. The Internet is nowadays so common a technology that it needs no further introduction.

This type of piracy is realized by electronic transfer of legal software. This type of piracy is conditioned by the fact that the system operator or user load legal software onto BBS or the Internet, or download it there from, for the purpose of making and using another copy without the respective licence.

**e) Corporate Piracy** – it is similar in many aspects to the BBS or Internet piracy. In this case, „the root of all evil“ are LAN networks of a firm or an enterprise where one legally installed copy of a certain programme is potentially open to non-licensed access by hundreds of employees. Virtually no attention is usually paid to the security of access to the individual parts of the networks and security measures to this effect are essentially regarded as wasting money and human resources. There is not wonder that the idea to obtain easily and without any risk free access to a certain software or its copy is so tempting for the employees.

**f) Industrial Piracy** – this type of piracy is based on the fact that an individual or a group of individuals copies and distributes software, on a large scale, in order to obtain a substantial property advantage. The largest extent of the industrial piracy is regularly typical for developing countries where even government-owned enterprises, often churning out thousands of CD media daily, participate in the production of pirate copies. This type of software piracy is rather rare in the Czech Republic.

## 2.5. INTERNET

The copyright infringement on the Internet occurs in cases when files are made accessible (e.g. through web pages or the so called peer-to-peer networks) whose content is an author's work.

### 2.5.1. FTP Servers

FTP servers belong among the basic Internet services. FTP servers function on the principles of direct loading and downloading for which, unlike the exchange networks, the storage space of a certain server is used. The file is placed on this server from which the interested persons download it. FTP servers are often used for distribution of illegal content by both non-professional pirates (public, usually short-term functionality servers with a limited volume of data) and professional pirates (secret servers with no public access and with a large volume of data).

Direct downloading is downloading by means of an Internet browser without the use of specialized programmes. Direct downloading is closely connected with the creation of a large number of the so called file hosting servers<sup>2</sup> of the Rapidshare.de or MegaUpload.com type or the Czech servers Nahraj.cz or eDisk.cz.

### 2.5.2. Peer-to-Peer (P2P) Networks

The newest and very popular form of piracy in the area of music and audiovisual works is the offer of digital

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<sup>2</sup> Usually foreign servers intended for storing of large files. They appear to fight against placements of illegal contents on them but they actually feed on it. Files can be downloaded from and uploaded to the servers using just an Internet browser.

files containing author's works via the Internet within the framework of the peer-to-peer (also P2P) exchange networks.

Sharing, as a term used in connection with this type of piracy, means such conduct when a user makes part of his/her hard disk accessible together with the stored files to other P2P network users. At the same time, the user enables the other users to download the files. In case of some networks, the user who makes certain files available also informs the other interested users which files he/she shares by means of a list of files.

In the more general sense of the word, the Internet sharing means that various users make files mutually available, thus sharing them through a certain P2P network. In order to perform this activity, the P2P network user has to have a special programme (P2P client) installed. Using this programme, the user connects to the network and records the offers. At the same time, the user searches for a requested file and in case of need contacts the demanding and offering person.

Here are some of the best known networks:

**Napster** – the network was purchased by another company after its activity had been suspended by courts, today functioning on a legal basis;

**FastTrack** – network used by the Kazaa client; its activity has been suspended by courts;

**Soulseek** – a centralized network focused mainly on music;

**Gnutella** – a decentralized network of a small importance;

**eDonkey** – a centralized network with a large number of controlling elements (very popular);

**Direct Connect** – a globally decentralized network (popular);

**BitTorrent** – a globally decentralized, currently probably the most popular network.

### 2.5.3. Subtitles and Covers

Two widespread forms of infringement of the copyright are also related to the Internet piracy:

- a) distribution of subtitles (either a protected translation of the original dialogues or an unauthorized translation of the original dialogues that was created without the approval of the authors and may not be distributed),
- b) distribution of scanned DVD and CD covers (pictorial, graphic and photographic works allowing to make a printed cover for a downloaded and burned work).<sup>3</sup>

The popularity of servers on which subtitles are placed results from the fact that most pirates download works from foreign networks where no Czech localization is usually available. The subtitles themselves are saved in a small text file and shown directly, when playing the film, with the use of a player (e.g. BSPlayer) or a specialized programme (e.g. VobSub) which enters them in the picture independently of the player.

For each film there are many versions of the rip<sup>4</sup> which can differ in timing (left out signature tunes); therefore there exist also multiple edited versions of subtitles. For this reason, the author of the subtitles defines data for a particular use on the subtitles server.

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<sup>3</sup> Source: [www.cpufilm.cz](http://www.cpufilm.cz)

<sup>4</sup> Rip – Designation for a film downloaded from any medium (cinema, TV, DVD) and compressed to the standard size of one or two CD's for the purpose of the pirate distribution.

## **2.6. Sui Generis Right of Database Maker**

According to law, a database means a set of independent works, data or other elements organized systematically or methodically and individually accessible using electronic or other means, regardless of the form of their expression. A database can, but does not always have to, be a collective author's work.

A database is a collective work:

- in case it represents, by the manner of its selection or arrangement of its content, a unique result of the author's creative activity (Section 2(5) of the Copyright Act), or
- in case it represents, by the manner of its selection or arrangement of its content, the author's own intellectual creation (Section 2(2) of the Copyright Act).

In the last mentioned cases when a database is, at the same time, a work within the meaning of the Copyright Act, two types of rights are created in respect of the database:

- the copyright in respect of the database as a work on the one hand,
- the sui generis right of the database maker on the other hand.

In addition to these rights relating to the database per se, there can, of course, exist also the copyright to the single works which form parts of the database content. The sui generis right of the database maker is created in respect of the database, regardless of whether it is a collective work, if the making, verification or demonstration of the database content represents a significant contribution from the qualitative or quantitative point of view, regardless of the fact whether the

database or its content are a subject of the copyright protection or other protection.

A maker of a database is a natural or legal person that makes the database at their own responsibility or for which the database is made, at their instigation, by another person. Therefore, the maker of a database can, but does not have to, be the author of the database as a collective work; mostly it is not the case.

## **3. Police Statistics in Area of Intellectual Property Rights**

### **3.1. Monitored Indicators**

The criminal statistics were transferred to the computer processing method in 1973. At that time, the numbers of detected criminal acts in the area of the intellectual property were shown in the order of units in the statistics. On this occasion, it has to be emphasized that these are data for the whole federation including Slovakia. Practically from the beginning of 1993, objective statistical data can be presented in respect of the detection and the rate of solving of the concerned criminal acts on the territory of the Czech Republic.

Another important shortcoming in the area of statistical monitoring is the fact that the criminal statistics provided (until the end of 1996) no possibility to express exactly the particular number of criminal acts committed within a certain time period. Or, more precisely, they recorded the issue of the intellectual property in a combined form (Section 149 – unfair competition, Section 150 – infringement of the rights to a trademark, a trade name and a protected designation of origin, Section 151 – infringement of the industrial rights and

Section 152 – infringement of the copyright, included). These records did not enable to specify how many criminal acts were committed under the individual provisions of the Criminal Code.

Upon the request made by the then Economic Crime Investigation Section, the Directorate of the Criminal Police Service attached to the Police Presidium of the Czech Republic, the statistical indicators have been sorted according to the individual criminal acts since the beginning of 1997.

The criminal statistics indicators are divided into the basic groups as defined by Act No. 140/1961 Coll., the Criminal Code, and as present in the area of the intellectual property to the present time, i.e.

- a) infringement of the rights to a trademark, a trade name and a protected designation of origin (Section 150 of the Criminal Code),
- b) infringement of the industrial rights (Section 151 of the Criminal Code),
- c) infringement of the copyright, rights related to the copyright and the database rights (Section 152 of the Criminal Code),
- d) damage to and abuse of a recording on an information media (Section 257a of the Criminal Code),
- e) unfair competition (Section 149 of the Criminal Code).

### **3.2. Statistics in Area of Infringement of Rights to Trademark, Trade Name and Protected Designation of Origin (Section 150 of Criminal Code)**

From the current statistics facts can be read, which show us the development and present state in this area of crime. It is obvious from the statistics that the Czech Republic experienced an increase in the number

of criminal acts, both detected and solved, from 1997 until 2000. The number of prosecuted persons grew as well. Tied to this indicator, an upward trend in damage caused by the subject-matter criminal activity was recorded.

This issue experienced a radical change in 2001. From that year to the present time (the year 2006 serves as the last indicator), the crime stagnates at 1/4 of the criminal activity detected in 1999.

### **3.3. Statistics in Area of Infringement of Industrial Rights (Section 151 of Criminal Code)**

It is obvious from the previous text that also in this area of infringement of the intellectual property rights genesis can be successfully tracked only since 1997. The criminal statistics concerning this criminal activity reveal us clearly that this area is not the target of the offenders' interest in the long-term. A slight increase of the subject crime could be observed only in 2001 and 2002, but the rate of detected cases in this area has returned to the level of 1997 in the last few years. Within the framework of the Czech Republic, this crime has a very low occurrence, being in the order of units.

### **3.4. Statistics in Area of Infringement of Copyright, Rights Related to Copyright and Database Rights (Section 152 of Criminal Code)**

If we compare the criminal statistics from the area of counterfeiting (Section 150 of the Criminal Code) with the criminal statistics from the area of piracy (Section 152 of the Criminal Code), it is quite obvious that these two types of crime have, in principle, a lot of things in common. These are, in particular, the

genesis and development, the number of attacks against the protected interests, their rise and decline, the amount of damage.

The statistics make it clear that there occurred **a jump increase** in the number of the criminal acts, both detected and solved, in the area of infringement of the copyright in the Czech Republic from 1997 until 1999. The upward trend in caused damages tied to this indicator was recorded, much like counterfeiting, also in case of this criminal activity.

Similar to counterfeiting, the piracy issue experienced a radical change in 2002 and particularly in 2003. From that year to the present time (the year 2006 serves as the last indicator), the crime stagnates at 1/7 of the criminal activity detected in 1999.

## 4. Organized Crime

### 4.1. Characterization and Development

The organized crime has become one of the most dangerous social problems, affecting different spheres of our society. The situation which developed by transition from the planned economy to the market mechanisms and at the same time liberalization of law and economy have created suitable conditions for development of the organized crime also on the territory of our republic. These conditions can be clearly defined as economic transformation connected with large movements of assets, quick creation of the market and capital accumulation, opening of the borders and the associated migration of people.

The organized crime represents a specific type of wide-ranging criminal activity, showing a number of formal features identical with the business activity. This crime is organized in order to achieve the maximum profits regardless of the applied means and spheres of business. It responds to the structure of the public demand, whether resulting from the insufficient satisfaction or factitious demand.

The existential substance of the organized crime lies in the provision of goods and/or services which are limited (or prohibited) by law but which are demanded by the population regardless of the moral barriers created by society. The purpose of the organized crime is to achieve profits, the commission of criminal activity itself being secondary. Therefore, criminal activity can be perceived as a specific instrument for achieving the main objective – permanent and maximum profit.

The economic power of the organized groups aims, in the long-term, to integrate into the political and state bodies and to secure the real power in the state. Thanks to the continuously achieved high profits, the organized crime is able to unbalance the social and political system.

The Government of the Czech Republic adopted in its Resolution No. 673 of 29 October 1997 the Updated Strategy on Combating Organized Crime which comprised the time schedule of the Ministry of Interior's activities in combating the organized crime. A part of this time schedule is „to develop a conception for combating the trade with counterfeit and piracy goods“.

The developed conception which presented an objective analysis of the total extent of crime in the area of the intellectual property became the basis for the governmental decision. The

Government identified in its Resolution No. 342 of 18 May 1998 the complete sector of the intellectual property rights as a security risk.

Especially foreign criminal organizations operate on the territory of the Czech Republic in the area of infringement of the intellectual property rights. They penetrate into our territory with the help of various cover firms (whose members obtain their residence permits for the purpose of employment in their own firm or in a firm run by another related person). Trading companies set up and legalized in the above mentioned manner create the basis for illegal migration which subsequently forms the human resources of the criminal organizations.

## **4.2. Signs of Organized Crime**

professional approach;

- hierarchy of management, planning, division of labour;
- technical background, use of the modern technologies;
- advisers, high-quality up-to-date information;

riches:

- high profits create huge financial means which can be invested in the development and improvement of the criminal procedures;
- high profits enable to ensure a relative security for the organizers and their assistants;

international connection and operation:

- unrestricted movement of people, or restricted to a very low degree;
- very difficult control of the flow of money;
- tax havens and money-laundering activities;
- unrestricted on-line flow of information;

infiltration of the official social structures:

- compromising;
- abuse;
- corruption.

## **4.3. Profit Minimization and System Shortcomings**

It results from the previous text that the criminal activity is organized for the purpose of achieving profits. The crime in the area of the intellectual property generates high profits which are repeatedly invested in the development and improvement of the criminal procedures.

High profits of the organized crime create the possibility to finance various transactions which result in the loss of the competitive strength of companies running their business within the limits of the legal norms and in the dependence of the whole sectors of the national economy on illegal capital flows.

One of the efficient methods of combating this type of criminality is seizure and confiscation of the unlawfully acquired means. Now we have to realize that while most members of an organized group participate in commission of criminal activity itself, only the top members of the organization (usually the top link of the organizational hierarchy) manipulate the means acquired through criminal activity. It would be probably naive to think that the organization leader himself legalizes the means. In order to do so, various co-operations are effected with organizations that have nothing in common with the subject-matter criminal activity. Outwardly, the organizations look like absolutely legal companies with the legitimate subject of business. As a rule, the legalization is performed as a service for a consideration.

It is quite clear from the text of the previous paragraph that to establish the origin of the means coming from the organized criminal activity in the area of counterfeiting and piracy is a significantly more difficult issue than to detect the very criminal activity of the organized structure. In order to combat effectively this type of crime, at least the following has to be changed:

- the present view of the issue,
- to define the crime in the area of the intellectual property clearly as organized crime if there is no lack of the political and legislative will,
- to classify this type of crime among serious criminal acts,
- the approach in combating this criminal activity; without elimination of profits coming from the organized crime, the organized crime itself cannot be eliminated (profit is the Achilles' heel of the organized crime),
- to eliminate displays by their belittlement,
- orientation of employees focused only on detection and documentation of the primary (source) crime,
- the view of the time-consumingness – activities focused on combating the legalization of profits coming from the organized crime are very time-consuming,
- to follow the economic elaboration of the individual organized groups which consists in documentation of all assets and their movement.

## **5. Basic Concepts of Criminal Law**

### **5.1. Criminal Act**

A criminal act is only such conduct whose elements are specified in the

Criminal Code and which poses a danger to society. Therefore, two conditions have to be fulfilled at the same time. The first condition is formal, saying that only such conduct can be a criminal act, which is specified as a criminal act by law. Therefore, if certain conduct is not described in law, it cannot be a criminal act however dangerous or immoral it is. This is one of the fundamental principles of the legal state, no crime without law (*nullum crimen sine lege*).

However, this formal approach could lead in some cases to criminalization of acts which, admittedly, correspond with the legal definition of a particular criminal act but which, at the same time, do not pose a danger to society. For this reason, law also requires the fulfilment of the material condition which limits the sphere of criminal acts only to those which pose a danger to society. The degree of danger to society has to be higher than negligible (higher than small in case of minors). Therefore, if somebody commits an act which formally accomplishes the elements of a criminal act but which does not reach the degree of danger to society required by law, the matter cannot represent a criminal act but may be assessed for example as a misdemeanour. The degree of danger to society is assessed by the court as well as by all bodies responsible for the criminal proceedings based on the significance of the protected interest affected by the criminal act, on the method of commission and the consequences of the act, taking into consideration the circumstances of the act, the offender's person and his/her motives.

Conduct of an offender may be evaluated as a criminal act only in case of culpable conduct. In some cases, the intentional culpability is required for the

accomplishment of the elements of the criminal act (e.g. theft), in other cases the culpability attributable to negligence is sufficient (e.g. bodily injury in a traffic accident).

### **Attempted Crime and Preparation of Criminal Act**

Not only completed criminal acts are punishable. Also the offender, who only attempted a criminal act which was not completed, is criminally liable. In case of an attempted crime the punishment is imposed within the same penal rate as in the case of a completed criminal act. The conduct of an offender, who e.g. shot at someone with the intention of killing them but missed, is from the viewpoint of the criminal liability assessed in the same way as if the offender did not miss.

In case of particularly serious criminal acts (those with the upper length of imprisonment of at least 8 years, to put it in a simplified fashion), the preparation for the criminal act is punished in the same manner as the act itself. Unlike an attempt, the preparation does not lead to the immediate completion of the criminal act, it ensures, however, the conditions for completion of the criminal act (e.g. an offender gets himself a gun with the intention of killing somebody with it).

Elements of the criminal acts in the area of the intellectual property are not included in the group of particularly serious criminal acts within the meaning of the provision of Section 41(2) of the Criminal Code. For this reason, the stage of preparation is not punishable in case of these criminal acts (Section 7(1) of the Criminal Code).

### **Criteria of Degree of Danger to Society**

The general guideline for assessment of the degree of danger to society is provided in the provision of Section 3(4) of the Criminal Code in the form of the demonstrative list of facts which have to be taken into account when determining the degree of danger to society of a particular conduct. It clearly follows from the construct and interpretation of the term „danger to society“, that its assessment takes into account multiple criteria, the question of what weight should be attributed to the individual criteria depending on the nature of the particular case. Each case has to be assessed individually with regard to both the formal and material elements of the respective offence. It can be deduced from the systematic classification of criminal acts of infringement of the rights resulting from the intellectual property protection, that the legislators intended, with regard to the generic object of the economic criminal acts, to punish within the framework of the criminal law especially more serious infringements of these rights.

We can try to build an exemplary list of facts which can generally have impact on the degree of danger to society constituted by infringement of these rights, these circumstances being identified in the literature<sup>5</sup> as crucial for assessment of the degree of danger to society of the given conduct:

- **significance of the protected interest** affected by the act.
- **method of committing the act** – offender infringing the rights acted in a group or with the help of other offenders.

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<sup>5</sup> Novotný, Dolenský, Jelínek, Vanduchová – Trestní právo hmotné – I. obecná část (The Criminal Law of Substance – I. General Part), 3-rd publication, Prague. Codex 1997

- **duration and intensity of the act** – the case is especially how long the offender was infringing the rights, how often he used e.g. illegal computer programmes.
- **consequences** – nature and impacts of the infringement of the rights are again considered.
- **extent of damage** – the amount of caused damage can be of importance in determining the degree of danger to society in a particular case, but its assessment is problematic. However, even without reaching an accord regarding the method of quantifying damages it may be said from the relative point of view, that e.g. a higher number of installed illegal programmes means a higher amount of damage (however quantified) and therefore also higher degree of danger to society of the offender's conduct in the particular case.
- **circumstances under which the act was committed** – It is said that, inter alia,<sup>6</sup> criminal acts which are on the increase in a particular time and place have a higher degree of danger to society.
- **offender's person** – the offender's personality and behaviour should be assessed with regard to the committed offence. We are talking about the personal and professional position of the offender, his behaviour before and after the act, the offender's attitude towards the criminal act, etc.
- **degree of culpability** – the general rule here is that a direct intention shows a higher degree of danger to society. Also the fact whether the act was premeditated, pre-arranged may be of importance.
- **motive** – the question here is for what reason the offender committed the

offence of infringement of the copyright. The reasons could be plain reluctance to pay for legal products, effort to cause damage to the affected entities and, last but not least, it could be a sort of entertainment (particularly in case of juvenile offenders).

## 5.2. Police Body

A police body is one of the bodies responsible for the criminal proceedings and basically it means a department of the Police of the Czech Republic or its smaller organizational unit performing tasks in the criminal proceedings. Police departments act most often in the position of a police body, being divided into departments with the territorially defined competence and departments with the competence in the whole territory of the Czech Republic.

The following bodies also have the position of a police body:

- department of the **Ministry of Interior** (Inspection of the Ministry of Interior) in proceedings concerning criminal acts committed by police officers,
- the authorized bodies of the Military Police in proceedings concerning criminal acts committed by members of the **armed forces**,
- the authorized bodies of the **Prison Service of the Czech Republic** in proceedings concerning criminal acts committed by members of this service,
- the authorized bodies of the **Security Information Service** in proceedings concerning criminal acts committed by members of this service,
- the authorized bodies of the **Office for Foreign Relations and Information** in proceedings concerning criminal acts committed by members of this Office,
- the authorized customs bodies in proceedings concerning criminal acts committed by breach of customs

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<sup>6</sup> Šámal, Púry, Rizman, Trestní zákon (The Criminal Code), Commentary, 3-rd publication, Prague, C.H.Bech 1998

regulations, regulations on import, export and transit of goods, even if it concerns members of the armed forces, the above mentioned services or office, further in proceedings concerning criminal acts committed by breach of regulations when placing and acquiring goods in the member states of the **European Union**, if such goods are transported through the state border of the Czech Republic, and in proceedings concerning **tax** offences if a customs body is the **tax administrator**.

These other bodies perform verifications, the investigation is conducted by a department of the Criminal Police and Investigation Service. Investigation of criminal activities committed by members of the Police of the Czech Republic, the Security Information Service and the Office for Foreign Relations and Information is conducted by a public prosecutor.

In case of long-distance sea navigations, investigation of criminal acts committed on board a ship may be conducted by the ship captain.

### 5.3. Criminal-Law Protection

The criminal-law protection of the intellectual property rights is laid down in the fourth section of the Title 2 of the special part of Act No. 140/1961 Coll., the Criminal Code, as amended, Sections 149 to 152. The individual provisions of the criminal-law norms are provisions with the so called blanket disposition, which means that they contain legal terms governed by norms of another legal branch.

When detecting criminal acts and examining whether some elements of a criminal act have been accomplished,

the police body has to assess the specific definitions in other legal regulations.

The rule applies which says that ignorance of the blanket rule is considered much like ignorance of the criminal rule and therefore it does not exempt the offender from guilt.

In case of all elements of the concerned criminal acts, law requires the intentional culpability, criminal acts attributable to negligence do not occur in the area of protection of the intellectual property rights.

„The criminal law as the ultima ratio law, i.e. a law whose instruments are and have to be used when and only when the use of other instruments of the legal order is out of question or obviously inefficient. At the same time, the criminal law and the criminal classification of a certain conduct has basically no room where it would be substituting the personal activity of individuals in respect of protection of their rights and legal interests in the area of the common relations based on the private law. Otherwise, people would not be enjoying equal rights in their mutual relations and public authorities would be lacking respect for the equality of citizens, thus leading to the breach of Article 1 of the Charter and Article 1(1) of the Constitution. In other words, conducts infringing rights resulting from the civil law regulations have to be fought against particularly using the private law instruments, if these are insufficient, administrative sanctions should be applied and as the last instrument, the criminal law. The approach to the contrary, i.e. the use of the criminal-law procedure without the prior use of instruments of the other branches of law, would be inconsistent with the above indicated criminal repression subsidiarity principle which

demands that the state apply the criminal law instruments moderately. **When judging under the criminal law a conduct which, from the civil-law point of view, is a dispute concerning payment of a certain amount of money, the matter has to be primarily viewed from the viewpoint of the civil law and the fact has to be considered, whether the conditions are given for employment of the extreme instrument of repression – the criminal law<sup>7</sup>.**

### **1) Unfair Competition – Section 149 of Criminal Code**

The elements of the criminal act of the unfair competition are accomplished, under the provision of Section 149 of the Criminal Code, by a person who damages the good reputation or endangers the operation or development of the competitor's enterprise through conduct which is inconsistent with the regulations governing the competition in the economic relations or with the customs of the competition.

The elements of this criminal act are defined in general terms which practically leads to a certain ambiguity in assessment of such cases (regional law).

In case of a criminal act of the unfair competition, the Criminal Code requires intentional conduct which has to include all essential characteristics of the elements of this criminal act. Conduct has the accomplishing nature, therefore it has to meet these conditions:

- it has to be inconsistent with the regulations governing the competition in the economic relations,
- it has to occur in the economic competition,
- it has to damage the good reputation or endanger the operation or development of the competitor's enterprise.

The objective of this provision of the Criminal Code is to protect participants in the economic competition, not to protect the economic competition itself.

#### **Terms of the elements of the criminal act:**

Conduct which is **inconsistent with the regulations governing the competition in the economic relations** is specified in the provisions of Sections 44 to 52 of Act No. 513/1991 Coll., the Commercial Code, as amended.

The basic provision is Section 44 of the Commercial Code, Unfair Competition, which provides that:

- 1) The unfair competition means conduct in the economic competition which is contrary to the good morals of the competition and capable of causing harm to other competitors or consumers. The unfair competition is prohibited.
- 2) The unfair competition under the paragraph 1 means particularly:
  - (a) misleading advertising,
  - (b) misleading designation of goods and services,
  - (c) creating of the danger of confusion,
  - (d) taking advantage of the reputation of another competitor's enterprise, products or services,
  - (e) bribery,<sup>8</sup>
  - (f) disparaging,
  - (g) comparative advertising,
  - (h) breach of a trade secret,

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<sup>7</sup> Text of the decision, file ref. 1. ÚS 69/06 (regarding punishability of reproducing works without any agreement with the collective copyright administrator)

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<sup>8</sup> Šámal, Púry, Rizman, Trestní zákon (The Criminal Code), Commentary, 3-rd publication, Prague, C.H.Beck 1998

(i) endangering consumers' health and the environment.

The cited provision contains the general clause in the paragraph 1. Fulfilment of this clause is sufficient for labelling the assessed conduct as unfair competition (in relation to the Commercial Code, not in relation to the criminal law).

The paragraph 2 is an exemplary list of special cases. Their definitions and analyses are mentioned in the primary methodological part. For the list of special cases (and not only for them and in relation to the Commercial Code), the general clause has to be always fulfilled.

- **customs of the competition** – this term is not regulated by any legal norm. The commentaries instance publication of information about a producer which is not related to the producer's economic activity (e.g. from the past) but still is capable of causing damage to the producer as a competitor. This term can also comprise wooing away experienced employees.

- **to damage the good reputation or endanger the operation or development of the competitor's enterprise** – the meaning of these terms is clear, they represent the consequence of the criminal act. We could only mention that the endangerment does not have to be necessarily serious.

- Damage to the reputation or endangerment of the operation or development of the enterprise does not have to be proved in any special way or by experts. It is sufficient to document credibly the rise of certain damage or harmful consequence, because virtually any harm consequentially endangers the development of an enterprise.

- **competitor** – is every person participating as an entity in the economic competition; however, any person may be an offender.

In case of this criminal act, the combination is ruled out with the criminal act of infringement of the rights to a trademark, a trade name and a protected designation of origin under Section 150 of the Criminal Code and the criminal act of infringement of the industrial rights under Section 151 of the Criminal Code. The reason for ruling that out is the fact that the mentioned criminal acts are in the speciality relation to Section 149 of the Criminal Code.

## **2) Infringement of Rights to Trademark, Trade Name and Protected Designation of Origin – Section 150 of Criminal Code**

The elements of the criminal act of infringement of the rights to a trademark, a trade name and a protected designation of origin – Section 150 of the Criminal Code – are accomplished by the person who imports, exports or puts into circulation products or services unlawfully designated by a trademark the exclusive right to which belongs to another person or by a mark confusingly similar to such trademark.

A person shall be similarly punished who in order to obtain an economic advantage:

- a) uses unlawfully a trade name or any designation confusingly similar to such trade name, or
- b) puts into circulation products unlawfully marked with a designation of origin the exclusive right to which belongs to another person or with a designation of origin confusingly similar to such designation of origin.

This provision of the Criminal Code also represents a norm with the so called blanket disposition.

The trademark has to fulfil the condition for registration in the trademark register kept by the Industrial Property Office. The owner of the trademark has the exclusive right to designate their products or services with the trademark which is registered for them, or to use the trademark in connection with such products or services. Nobody may use a designation identical with or confusingly similar to the trademark for products or services identical with or similar to the ones for which the trademark is registered, nor use it in connection with such products or services, particularly by placing it on the products or their packaging, by offering or launching on the market products with such designation or using such designation in a trade name, correspondence or advertising, without the consent of the trademark owner.

First of all, we have to realize that a criminal act under Section 150 of the Criminal Code is an intentional criminal act. That means that the offender has to wish to breach an interest in protection of the rights to a trademark, a trade name or a protected designation of origin. Therefore, the offender has to know that the goods put by the offender into circulation are counterfeits, or has to, at least, take into account such possibility and be aware of it for such case.

#### **Terms of the elements of the criminal act:**

**trademark** – a designation made up of words, letters, numbers, a drawing or a shape of a product or its packaging, or their combination, which enables to distinguish products or services coming from different entrepreneurs.

**confusingly similar mark** – is a mark which can be easily confused with a

trademark because of the similarity of both designations. Confusing similarity has to be assessed from the viewpoint of the consumer who the product is intended for.

**imports, exports or puts into circulation** – this term has to be understood as applying to any distribution of a product, be it sale to the end users, wholesale or e.g. distribution in the form of promotion articles.

**economic advantage** – not only financial profit but also any other advantages in the economic competition are regarded as an advantage.

**trade name** – a name under which an entrepreneur or a company undertakes legal acts when carrying on the business activity. This is a wider term than the term „business name“ defined by the Commercial Code. The provision of Section 8 of the Commercial Code, as amended, defines the business name as the designation under which an entrepreneur is registered in the Companies Register. An entrepreneur who is not registered in the Companies Register shall not be subject to the provisions on the business name. If such entrepreneur is a natural person, he/she shall undertake legal acts under his/her first name and surname; if such entrepreneur is a legal person, it shall undertake legal acts under its designation. An entrepreneur who is not registered in the Companies Register may use, in carrying on the business activity, a distinguishing addendum or other designation with its first name and surname or its designation, providing that such addendum or designation is not misleading and its use is compliant with the legal regulations and the good morals of the competition; such addendum or designation is not a business name and is protected by the

unfair competition rights in the same manner as a trade name.

**designation of origin** – designation of origin means the name of a region, a specific place or a country used to designate the goods originating in that region, in case that the quality or characteristics of such goods are exclusively or predominantly due to a particular geographical environment with its inherent and human factors and that the production, processing and preparation of such goods takes place in the defined area (the provision of Section 2(a) of Act No. 452/2001 Coll., on protection of designations of origin and geographical indications). However, for the criminal law purposes the term „designation of origin“ may not be interpreted only in the narrow sense of the definition of the Act on Protection of Designations of Origin and Geographical Indications. The criminal law protection has to be afforded not only to designations of origin but also to geographical indications, particularly with respect to the European legislation governing the issue area of designations of origin and protected geographical indications, which became a part of the Czech legal order following the accession of the Czech Republic to the European Union.

### **3) Infringement of Industrial Rights – Section 151 of Criminal Code**

The elements of the criminal act of infringement of the industrial rights under Section 151 of the Criminal Code are accomplished by a person who infringes rights to a protected invention, industrial design, utility model or topography of a semiconductor product; such person shall be punished by imprisonment of up to two years or by a monetary penalty.

The rights protected by this provision of the Criminal Code are defined in the exhaustive manner; it concerns an invention, an industrial design, a utility model and a topography of a semiconductor product.

The subject of protection are the rights to the results of creative intellectual activity.

### **Terms of the elements of the criminal act:**

The terms used in the provisions concerning this criminal act are interpreted in the primary methodological part. It is quite obvious that the infringement of the protected rights has to be intentional and that the industrial right enjoys the protection upon the registration in the relevant register of the Industrial Property Office.

### **4) Infringement of Copyright, Rights Related to Copyright and Database Rights – Section 152 of Criminal Code**

The elements of the criminal act of infringement of the copyright, rights related to the copyright and the database rights under Section 152 of the Criminal Code are accomplished by the person who infringes the law-protected rights to an author's work, an artistic performance, an audio or audiovisual recording, radio or TV broadcasting or a database.

A more severe punishment is imposed on a person who obtains a substantial advantage through such conduct or who commits such conduct in a substantial extent.

This provision of the Criminal Code is also a norm with the so called blanket disposition which contains the legal terms regulated by norms of other legal branch than the criminal law, particularly

the copyright and the rights related to the copyright.

The elements of the criminal act protect against infringement of the rights protected by the Constitution and by the Copyright Act. In this connection, the principal legal norm is Act 121/2000 Coll., on copyright and rights related to copyright (the Copyright Act), as amended.

### **Terms of the elements of the criminal act:**

**infringement** – the definition is to be found in the Copyright Act which defines what is infringement of the rights. In addition to these definitions, the legitimate ways of the use of a work are defined in an exhaustive manner in the Copyright Act that are not regarded as infringement of these rights (e.g. quotations, official and reporting licence). Therefore, the justification of infringement of the copyright is not based only of the consent of the author.

**statutory protection of the rights** – contrary to the industrial rights, the copyright protection is enjoyed by all works without the author being obliged to request the protection in any manner.

**substantial advantage** – this term is defined by profits from criminal activity. It has to be remembered in this connection that the applicable judicature presupposes taking the offender's expenses into consideration.

**substantial extent** – the term may be applied not only to the number of sold illegal copies but also to the extent of the copyrights infringed by the offender. The offender's conduct may be assessed as „in a substantial extent“ also in cases when a distribution of a large number of copies is not documented but the offender offers sale of a large quantity of titles.

It therefore holds true from the viewpoint of evaluation of the subjective aspect of conduct of the perpetrator of this criminal act, that ignorance of the Copyright Act is considered much like ignorance of the criminal rule, and therefore it does not exempt the offender from guilt.

The elements of this criminal act are not included in the group of particularly serious criminal acts within the meaning of the provision of 41(2) of the Criminal Code. For this reason, the stage of preparation of this criminal act is not punishable (Section 7(1) of the Criminal Code). When making decision regarding a criminal act, its development stage has to be always considered.

Databases also form a subject of the protection under the Copyright Act. The Explanatory Report to the Copyright Act states that an independent subject of the copyright is also a collective work where a creative activity occurs in the very selection or arrangement of the whole by its maker. In such situation, a database can be regarded as a collective work which contains solely certain facts that do not have, individually, the particulars of a work within the meaning of the copyright. And it is the databases compiled on the basis of a certain key that have a substantial value in the commercial world. They are mostly compiled by firms, be it marketing or other firms. From the viewpoint of the Copyright Act, they are the employee-work under Section 58 of the Copyright Act.

### **5) Misdemeanours in Area of Intellectual Property**

Less serious conducts infringing the rights in the area of the intellectual property protection may be punished under Act No. 200/1990 Coll., on misdemeanours, as amended, except

for misdemeanours from the sphere of the Copyright Act. A change occurred here (by Act No. 216/2006 Coll., amending Act No. 121/2000 Coll., on copyright, rights related to copyright and on the amendment to certain acts (the Copyright Act), as amended, and some other acts, of 25 April 2006) and misdemeanours were moved from the Misdemeanours Act to the Copyright Act itself.

New provisions under Sections 105a, 105b and 105c have appeared in the Copyright Act under Title VI, Administrative Torts. The breakthrough fact is that, in addition to punishment of a natural person for commission of a misdemeanour in the area of infringement of the copyright, the possibility has been codified to punish a legal person or a natural person who is an entrepreneur for an administrative tort in connection with infringement of the copyright. The sanctions were increased significantly as well.

### **Concept of misdemeanour**

A misdemeanour means culpable conduct infringing or endangering interests of the society. Such conduct has to be expressly termed as a misdemeanour in the Misdemeanours Act or in another act, it must not be another administrative tort punishable under special legal regulations or a criminal act.

A misdemeanour is not conduct employed by any person in order to:

- stave off, in a reasonable manner, a directly threatening or persisting attack against a law-protected interest, or
- ward off a danger directly threatening a law-protected interest, unless such conduct has obviously caused as serious consequence as is the consequence which was threatening and unless this danger could have been

warded off in another manner in the given situation.

### **Concept of culpability**

Unless the law expressly provides that intentional culpability is required, culpability attributable to negligence is sufficient to establish the responsibility for the misdemeanour.

A misdemeanour is committed out of **negligence** if the offender:

- knew that his/her conduct might infringe or endanger a law-protected interest, but relied, without adequate reasons, on the fact that he/she would not infringe or endanger such interest, or
- did not know that his/her conduct might infringe or endanger a law-protected interest, although he/she should and could have known that considering the circumstances and his/her personal situation.

A misdemeanour is committed **intentionally** if the offender:

- wanted to infringe or endanger a law-protected interest by his/her conduct, or
- knew that his/her conduct might endanger a law-protected interest, and, in case he/she infringed or endangered such interest, was aware of that.

Such conduct also means the failure to act in a manner to which the offender was obliged under the circumstances and according to his/her personal situation.

**Misdemeanours in the area of infringement of the industrial rights and infringement of the rights to a trade name – Section 33 of Act No. 200/1990 Coll., on misdemeanours, as amended.**

The elements of a misdemeanour in the area of infringement of the industrial property rights and infringement of the

rights to a trade name are accomplished by the conduct of a person who:

- a) unlawfully exercised rights reserved for the owners of these rights by the industrial property protection laws,
- b) unlawfully used a business name or any designation confusingly similar to a business name or another designation typical of another entrepreneur.

A fine of up to 15,000 CZK may be imposed for a misdemeanour under the previous paragraph.

**Misdemeanours in the area of the copyrights – Section 105a of Act No. 121/2000 Coll., on copyright, rights related to copyright and on the amendment of certain laws (the Copyright Act), as amended.**

A natural person accomplishes the elements of a misdemeanour by:

- a) unlawfully using an author's work, an artistic performance, an audio or audiovisual recording, radio or TV broadcasting or a database,
- b) infringing the copyright in the manner specified in Section 43(1) or (2) or in Section 44(1), or
- c) not fulfilling, as a trader participating in the sale of an original work of art, the notification duty under Section 24(6).

A fine of up to 150,000 CZK may be imposed for a misdemeanour under a), a fine of up to 100,000 CZK for a misdemeanour under b) and a fine of up to 50,000 CZK for a misdemeanour under c).

## **6. Conclusion**

The problem of crime in the area of protection of the intellectual property rights and other negative phenomena connected with these antisocial manifestations are very contemporary issues for the present-day Czech

Republic. This area of crime has undergone a dramatic development from both the quantitative and qualitative point of view since 1990, so that combating this phenomenon has become the state interest and essentially one of the burning issues of our time.

It has been established from the police statistics that crime in this area stagnates, from the quantitative point of view, at the level by no means favourable for the Czech Republic. From the qualitative point of view, this type of crime experiences a rapid development, particularly on the Internet. Highly dangerous is the finding that the age of the perpetrators of criminal acts is disproportionately decreasing together with the development and availability of the information technologies.

In order to fight successfully against these negative phenomena including this type of crime, we have to use two basic strategies to the full extent – preventive and repressive.

**Repressive policy** constitutes a defensive strategy of the crime control; its mostly repressive part is focused on the past, on particular events, criminal acts that have already occurred.

**Preventive policy** aims at the future – it represents an offensive strategy of the crime control, relying particularly on non-repressive means. It deals with lowering the probability of committing criminal acts.

Both approaches are specific, they have to form a single well-balanced whole and complement each other in order that the fight against crime be successful. The hoped for objective, i.e. to combat effectively infringement of the industrial property rights, may be achieved only if these conditions are observed.



**III. JUDr. Zdeněk Hraba**

**Powers and competences of the State  
Agricultural and Food Inspection Authority  
(SZPI) in the area of enforcement of the  
intellectual property rights**



## **Content**

<b>1. Terminology .....</b>	<b>75</b>
1.1 Power and Competence .....	75
1.2 Authority and Body .....	75
1.3 Powers and Competences of SZPI .....	77
<b>2. Conception of Control Activity .....</b>	<b>78</b>
<b>3. Legal Basis of SZPI's Powers and Competences in Respect of Inspecting Enforcement of Intellectual Property Rights .....</b>	<b>83</b>
3.1 Competences under Act No. 634/1992 Coll., on Consumer Protection .....	84
3.2 Competences under Act No. 110/1997 Coll., on Foodstuffs and Tobacco Products....	85
3.3 Competences under Act No. 146/2002 Coll., on State Agricultural and Food Inspection Authority .....	86
<b>4. Powers of SZPI in Area of Protection of Intellectual Property Rights .....</b>	<b>91</b>
4.1 Powers in Establishing Stage of Control .....	91
4.2 Powers in Stage of Responding to Results of Control of Observance of Intellectual Property Protection Regulations.....	93
4.2.1. Powers and Obligations of SZPI under Section 5 of Act on SZPI.....	93
4.2.1.1 Prohibition.....	93
4.2.1.2 Imposition.....	93
4.2.1.3 Seizure.....	93
4.2.1.4 Storing.....	93
4.2.1.5 Decision.....	93
4.2.2. Powers and Obligations of SZPI under Section 11 of Act on SZPI .....	93
4.2.2.1 Imposition of Fine of up to 3,000,000 CZK .....	93
4.2.2.2 Imposition of Fine under Special Legal Regulations .....	94
4.2.2.3 Imposition of Forfeiture or Confiscation .....	94



The State Agricultural and Food Inspection Authority (hereinafter referred to as „SZPI“) was established by Act No.146/2002 Coll., on the State Agricultural and Food Inspection Authority, as amended (hereinafter referred to as „Act on SZPI“). According to the legal definition of the provision of Section 1 of the Act on SZPI, the State Agricultural and Food Inspection Authority is an administrative authority subordinated to the Ministry of Agriculture with competences in respect of performance of the state supervision.

## 1. Terminology

### 1.1 Power and Competence

„Competence“ is referred to in the science as a property of legal entities or bodies. In this conception it means the scope of what they may or are authorized to do. However, in the sphere of the public law the term „competence“ proved to be too vague to express the difference between power, competence and jurisdiction and for these terms to be separated concept-wise.

The Constitutional Court therefore decided in its decision of 9 October 2003, file ref. V.ÚS 150/01, that „it is necessary to insist on **distinguishing** strictly between powers and competences. **As the power** of a state body **has to be perceived the very implementation of the state authority in the relevant form** (i.e. in the rule-making form or individual decision-making form), while **competences are a fully specific material definition of**

issues implemented in the power executing process. Competences of bodies executing the public authority are provided for only by law that cannot be departed from by an agreement between bodies, unless the law ...“.

In the said decision, the Constitutional Court considers competences to be competence as an institute of the law of substance and jurisdiction as an institute of the law of procedure. In the administrative law, jurisdiction expresses which of the bodies having the same competence has the territorial and subject-matter jurisdiction to decide in a particular case. This differentiation between competence and jurisdiction is very important in the branches of the public law particularly in cases where competence of the individual authorities or bodies was specified generically (identically for a number of units).

Therefore, the power of SZPI is performance of the state supervision, being implementation of the state authority, and the competence of SZPI is, briefly speaking, the supervision of activities of natural and legal persons that put into circulation agricultural products, cut flowers and foodstuffs or raw materials used for their manufacture or tobacco products.

### 1.2 Authority and Body

In the institutional sense, an authority is a general designation of an organizational unit which is assigned a certain subject-matter and territorial competence. As far as an administrative authority is concerned, this designation is identical, as regards contents, with the older designation of these authorities by the term „body“ (state administration

body), which is still prevailing in our country. In this sense, an authority is the main term of the organizational law of the public administration.

In the functional sense, an authority is a narrowly defined scope of matters provided by law, which are performed individually by natural persons or in a body as bodies of the state or other bearer of the public administration, within the scope of competence specified directly by law (e.g. the president of the republic, government, regional council) or specified for the authority in the institutional sense, within the framework of which they perform certain functions (e.g. ministers, chairmen or presidents of authorities). In this concept, an authority may be expressed as a performance of the entrusted office by an authorized body.

The complexity of ties, confusion in terminology and particularly difference of various theoretical ideas from the legislative declarations of the institutes „authority“ and „body“ may be overcome if we proceed from the constitutional regulation in force when distinguishing between a body and an authority, if we respect the institutional and functional point of view and accept the generally admitted conception that only a natural person or a body of such persons may form a legally adequate body.

Although our Constitution does not define the general term „authority“, it defines an administrative authority in the institutional sense, i.e. as an organizational unit. Article 79(1) of the Constitution of the Czech Republic provides: „The ministries and other administrative authorities may be established, and their competences provided for, only by law.“ One note

relating to competence: Through this provision, the Constitution clearly says that competence, as a scope of certain matters (tasks), is defined by law for the single administrative authorities. Competence is associated with an administrative authority as an organizational unit, not with an authority understood as performance of a certain office.

By defining an administrative authority as an organizational unit, i.e. in the institutional sense, the Constitution in force replaced in the legislative practice the former designation of this authority as a "state administration body". However, it has not eliminated thereby certain problems relating to the legislative use of the terms „body“ and „authority“. This holds true particularly in cases when the term „body“ or „authority“ is defined in the functional sense.

The Czech legal regulation in force suggests that the terms „authority“ and „body“ are becoming more clearly outlined and that their use in the legal regulations from the sphere of the public law could be more unambiguous. If we reserve the institutional meaning for the term „authority“, as an organizational unit distinguished in the sphere of the public administration by being only an organizational part of the bearer of the public administration as a legal entity, and the functional meaning for the term „body“, lying in a certain power of a natural person performing clearly defined tasks of the body of the bearer of the public administration, there could be a noticeable shift in the effort at clarification of the unification and identical perception of both institutes in the whole public administration. The public administration activity is regulated

not only by the administrative law, but also by other legal branches which often lay claim to their own terminological expression of certain phenomena, which is inappropriately projected in the legal regulations and application practice. A certain role is also played by the still existing older laws made before the current Constitution of the Czech Republic came into force, whose terminology is not in tune with the possible above-indicated unification. It cannot be overlooked that the term „authority“ used to be used as a mark of a certain office (office of the president, the prime minister, a regional governor, but also of a judge, a member of the parliament). This tradition finds its expression in theory, legislation and application practice up to the present day. Two examples for all: building authority, navigation authority. These are not administrative authorities as institutions, but functional places (organizational units) of an administrative authority, a municipal or regional authority in the first case and jointly the Ministry of Transport and Communications and the State Navigation Administration in the second case.

### **1.3 Powers and Competences of SZPI**

The provision of Section 1 of the Act on SZPI defines the powers of SZPI as performance of the state supervision. At the same time, in the provision of Section 2 and further in the text, the Act on SZPI refers to the SZPI's competence as „control“. One cannot fail to see that this legislative-technical inconsistency unnecessarily obscures and complicates the legal order.

The general theory of law usually defines the term „supervision“ as an

activity consisting in the examination and evaluation of a certain conduct from the viewpoint of compliance of the conduct with the legal norms applied towards objects independent of the supervising body, it being an activity without the powers to order or make decisions but with the legal obligation of objects of supervision to solve the issues touched by the act of supervision. However, activities whose nature consists in comparing the actual state with the required state are termed using various terms in the terminology of the applicable legal order and the science disciplines – control, supervision, surveillance, inspection. A substantial effort has been dedicated in the literature to distinguishing the meaning of these terms without reaching any generally accepted conclusions. We probably have to agree with the opinion that in the current legal state the terms control, supervision, surveillance cannot be exactly distinguished, because they have not become (and probably will not become) clear terms. Since the legal regulations use different names for activities of the same type and, on the other hand, use the same term for different activities, the attempts to define these terms generally, specify their distinguishing features, cannot be successful in the given situation. Therefore, it has to be always examined which content the individual terms provide for the specific legal regulations.

In case of the powers and competences of SZPI, the mentioned, very (and first of all quite unnecessarily) confused terminology situation is complicated by the fact that the legal regulations governing the SZPI's competence in the area of the intellectual property clearly use the terms **supervision, state supervision or control** with the same meaning.

Based on the legal regulation, the SZPI's competences may be defined as follows:

1. it is an activity of a **special state authority** (subject point of view)
2. it is an activity **consisting in establishment of the actual behaviour of objects** of control in the particular legal relationships between the manufacture and trade of particular goods
3. it is an activity consisting in **comparing the actual established behaviour with the legal norms requirements** in respect of the legal relationship between the manufacture and trade of particular goods
4. it is an activity consisting in the subsequent enforcement of the administrative responsibility (however, regulated by various legal regulations)

It is obvious from the above definition, that the concept of the SZPI's activity in the area of enforcement of the intellectual property rights, as resulting from the particular legal regulation, **is identical with the definition of control as treated in the Czechoslovak and Czech literature from the branch of the state and law theory and the administrative law.**

## **2. Conception of Control Activity**

We cannot fail to see that the said conception of the SZPI's activity in the given area (but also outside it) represents a legal view, which, however, does not fully exhaust the content of its activity. The activity of SZPI in the area of enforcement of the intellectual property rights can be considered also from the wider view of the management theory, because it is connected with the

management of the society through the legal norms, and formed therefore, in a way, a part of the society management system.

In the management theory, there is no uniform view of the concept of the control activity although its significance is accepted by all theorists who seriously investigated functioning of the social systems. We distinguish the regulatory and negation conception of control, which emphasize the repressive aspect of this activity; the professional, informational or cybernetic conception of control, or conception of control as the last phase of management, perceive control as a factor of balance between the desirable and actual state and acknowledge the feedback information function of control. Historically the youngest conception of the control activity, proceeding from the critical review of the conceptions hitherto, regards control as an integral part of the target interaction processes. This concept accepts what is contained in the individual existing concepts of control, these aspects of control, however, representing its whole content.

The control activity includes, admittedly, a regulatory, repressive, informative, professional aspect, these aspects, however, represent only a half of the term „control“. The second half of the content of the control activity is, according to this conception, employment of control in the target interaction process, because control is one of the instruments and methods – and therefore a part – of the target interaction system. Its role is not only „to inform“ and actively enforce, within the framework of its functioning, or influence enforcement of the desirable state, but also to influence retroactively the very creation of values, objectives and programmes.

In my opinion, if the activity of SZPI counts, through its nature, among the control activities from the viewpoint of the management theory, it is also possible and appropriate to perceive such activity really as an integral part of the target interaction processes. However, this means that the activity of SZPI in this broader conception should be perceived not only as an activity whose purpose is to enforce or influence enforcement, within the framework of its subject, of the desirable state of the legal relations, but also, as its equivalent part, to influence retroactively the very creation of the legal norms and other programmes connected with enforcement of law in society. It is an activity whose substance lies in establishing the actual conduct of the subjects of law in the legal relations, in comparing such conduct with the law requirements; if discordance is detected, the administrative responsibility is enforced.

The SZPI control activity process has two basic aspects. The cognitive aspect, related to information and its obtaining and evaluating, and the influencing aspect which is connected with the enforcement of forcible means. The relationship between the two aspects may be expressed to the intent that the recognition is a prerequisite of an effective enforcement of the influencing aspect and influencing is a prerequisite for the very sense of control.

The purpose and sense of the control activity is – in general – both to achieve the balance between the actual conduct in the legal relationships and the conduct prescribed by the legal norms by eliminating differences between these conducts and to maintain the balance between the actual and required conduct by not permitting differences between them.

The control theory pays a great attention to the stages or phases of the control activity because only by understanding them it is possible to determine the whole content of the control action, which is a process proceeding in certain phases. If we proceed from the general definition of the control process, it has to be remembered that it has basically two aspects, the cognitive aspect and the influencing aspect. It follows from the concept and purpose of the cognitive aspect that it has to consist in both establishment of the facts and their critical evaluation, comparison with the legal norms criterion. It can be therefore said that the cognitive aspect of the control process comprises two items, two closely united and interconnected phases – the phase of establishing the facts and the phase of their critical evaluation. Each of these two phases had its own patterns which had to be respected if supervision was to be effective.

The cognitive aspect of the control process cannot begin only at the moment of establishing (information about) infringement of a right; this would eliminate the very recognition as active establishment of facts by the SZPI bodies from the control process. Therefore, the cognitive process, the facts-establishing phase and the phase of the critical evaluation of the facts, begin and have to begin at the moment of the actual establishment (recognition) of the actual conduct of the object of control in particular legal relationships; in some cases this establishment could merge with information from other sources and infringement of a right in a particular legal relationship. The control process may be ended after the cognitive aspect of control with its phases of establishing the facts and the

critical evaluation of the facts was enforced, because no infringement of a right might have been established, whether because it does not exist or because it has not been recognized. In such case, the control process, the phase of establishing and evaluation of the actual conduct in the legal relations proceeds and is implemented, no doubt, without any infringement of a right having been established.

The beginning of the establishing phase of the control process has to be seen in the moment of commencement of the actual recognition of the actual conduct in the legal relationships in respect of the given object of control at the moment of practical mutual interaction (be it conveyed through written materials, personal testimonies, etc.) of the subject of recognition (inspector) and the object of recognition. At this moment, the first stage of the control process starts, a stage which may be designated as the cognitive stage. In its course, two phases can be distinguished – the facts-establishing phase and the phase of the critical evaluation of the facts according to the criterion of compliance with law. In practice, both phases proceed more or less at the same time, because the objective of this control process stage is to recognize the facts instituting infringement of rights; however, this could not have been done in other manner than by selecting those facts according to their evaluation from the viewpoint of compliance with the legal norm.

Unless a fact was recognized when establishing and evaluating the facts which would establish infringement of a right, the cognitive (first) stage of the control process ends with recognition of the facts establishing infringement of a right including causes and conditions of

such infringement and persons responsible for such infringement. Recognition of the facts establishing infringement of a right was a precondition for implementation of the second stage of the control process, i.e. the stage which can be designated as the responding stage. The beginning of this stage had to be connected with the decision-making of the SZPI's body regarding the manner in which to respond to the established infringement of rights, which instrument was used to remove infringement of the right including causes and conditions of such infringement, to enforce the respective type of the legal responsibility. It can be said that in this stage it is first the decision-making phase which merges into the phase of the very application of any of the instruments available to SZPI. Application of these instruments against those objects of control in whose activity infringement of a right was established, in whose activity a right was infringed, ends the response stage.

The stage of verification of the response results consists again in establishment of the facts and their critical evaluation. In this stage, the immediate criterion for evaluation of the established facts is purposefulness (but only from the viewpoint of removal of infringement of the right). The said stage of verification of the response results and therefore the whole control process is ended after it is established that the legal responsibility for such infringement of the right was enforced, or that measures were taken by means of which infringement of the right was removed. If established to the contrary, i.e. if it was established that infringement of the right had not been removed or that the respective legal responsibility had not been enforced, the whole supervision process was completed.

The subject of recognition in the SZPI's control activity is conduct of the objects of control in the particular legal relationships, conduct which represents a breach of the requirements of the legal norm. Unlawful conduct, as the subject of recognition of the control activity in this area, manifests certain specific characteristics resulting from the peculiarities of implementation of law in production and trade entities. Specificities of breaching or getting round the legal orders and prohibitions in the activities of these entities, particularly in the effort of the acting persons to avoid the peremptory effect of law, which prevents individuals and their teams from obtaining unreasonable and unfair advantages at the expense of other law subjects.

This effort results from the general human tendency to reach more and more advantageous proportion between the expended efforts and the obtained benefits. The human tendency to maximize the outputs and minimize the inputs may be, without question, fundamentally beneficial to society, it has, however, also unacceptable, antisocial forms. The effort to reach the extent of the individual benefits disproportionate to the expended efforts thus leads to breaching or getting round the legal orders and prohibitions. These are particularly intentional conducts directly breaching the requirements of the legal norms, conducts getting round the legal orders and prohibitions and also conducts infringing rights. Unlawful conduct in these cases usually was and is incited by incorrect moral attitudes, the value orientation of the acting persons, which are further strengthened – this has to be particularly emphasized in connection with control in the given area – by imitating the conduct of other

entities and by, more or less, exceptional recourse of such conduct.

Another source of infringement of rights in this area by the said entities can be seen in the lack of knowledge and skills needed to perform a certain activity or hold a certain office. The lack of the legal knowledge and skills is a consequence of the human tendency to lead a comfortable life and, for the most part, a consequence of the considerable extent of law. This often leads to absorbing law by the trial and error method, by trying which legal norms are enforced, and therefore their knowledge is necessary, and which are not. However, one cannot ignore, in this connection, the existence of some inconsistencies between the normative legal requirements and the non-legal (particularly economic) requirements. The subject of recognition in the general supervision was – as can be deduced from the above mentioned typical situations – always a more or less complicated problem situation, conduct of employees of the object of the general supervision, in a particular legal relationship, unlawful conduct which had its causes and conditions. From the viewpoint of the cognitive process, some specific features of this subject of recognition may be defined.

a) Unlawful conduct is a phenomenon which is negatively assessed by the whole society. At the same time, it is a phenomenon which represents behaviour of people acting as employees or representatives of a body or an organization representing a certain partial social interest. As a consequence, infringement of a right creates a certain conflict situation in which the infringer of the right resists, more or less actively, the recognition of his/her conduct and its causes.

- b) Infringement of a right as a subject of recognition is defined by a large number of legal regulations from various legal branches governing a number of very distinct legal relations.
- c) Infringing conduct has a very diverse nature and forms; in numerous legal relations it exists next to conduct which is in compliance with law, the external displays of conduct breaching law and conduct which is in compliance with law being from a great part (or completely, in case of getting round and abusing law) identical.
- d) The cognitive process is usually marked by high uncertainty of the initial information (or rather its absence) about infringement of the right.

It follows from these specific features of the subject of recognition that recognition performed by SZPI has to respect the existence of a large number of possible pieces of information and the relatively limited possibilities of their processing. Therefore, if the recognition is to be effective, it has to be selective and heuristic, selecting the most essential for the set objective, but in the most detailed and fundamental manner, it has to depend on the preliminary knowledge of the subject being recognized, it has to be systematic and has to unite establishment of the facts with their evaluation.

The phase of evaluation of the established facts in respect of the subject of recognition immediately follows the establishing phase or rather, in view of the necessity to select significant facts, mingles with it. The subject-matter of the evaluation phase is the comparison of the established facts regarding behaviour of the subject of law in a particular legal relationship with the rights and obligations of this subject, as those were defined by the legal norm, with the content of the legal relationship.

The evaluation criterion was therefore the legal norm. In the conclusion of the evaluation phase, the inspector takes a decision about the result of evaluation of the established facts. From the viewpoint of logic, this is a judgement. However, a judgement in the control process has to be, unlike common judgements in logic, an expression of certainty, it has to be a categorical judgement. However, a perfect knowledge of the subject of recognition is needed for that, which encounters a lot of difficulties in practice. They result in problematic judgements occurring sometimes in SZPI's response acts in relation to deducing the respective form of the legal responsibility. Therefore, it is not appropriate at all to overvalue the essential importance of truthfulness, timeliness and completeness of recognition in the phase of establishing the facts. However, the evaluation phase is always influenced by the personal qualities of the inspector. If the inspector lacks the skills (legal as well as other), he/she is necessarily limited not only in the phase of establishment of the facts, but also in the phase of their critical evaluation. Also the question of the complexity and unambiguousness of the evaluation criteria (i.e. the legal norm) is important for the evaluation phase. The existence of the possibility of various interpretations of a legal regulation necessarily complicates evaluation of the established facts and decreases the effectiveness of the whole control process.

The second stage of the control process follows the value judgement which expressed a discordance between the actual conduct of the subject of law and the requirements of the legal norm and which concluded the cognitive stage of the control process. In the stage of response, the inspector first decides on

which of the available legal instruments should be used as a response to the established discordance and then delivers the chosen legal act.

### **3. Legal Basis of SZPI's Powers and Competences in Respect of Inspecting Enforcement of Intellectual Property Rights**

Until the publication of the Act on SZPI, the inspection in the area of foodstuffs was performed by the Czech Agriculture and Food Inspection Authority, the state veterinary administration bodies and the public health protection bodies. The Czech Agriculture and Food Inspection Authority was established by Act No. 63/1986 Coll., on the Czech Agriculture and Food Inspection Authority, in order to inspect the obligations, establish and remove shortcomings in respect of natural and legal persons producing or putting into circulation agricultural products, soap and detergent products or tobacco products and foodstuffs, and to determine whether these products and foodstuffs comply with the requirements laid down by special legal regulations. The Czech Agriculture and Food Inspection Authority was governed, in accordance with Section 15(3) of Act No. 2/1969 Coll., on establishment of ministries and other central bodies of the state administration of the Czech Republic, as amended, by the Ministry of Agriculture.

Act No. 146/2002 Coll., on the State Agricultural and Food Inspection Authority, was adopted as the legislators' response to the changes of the related legal regulations, e.g. Act No. 64/1986 Coll., on the Czech Commercial

Inspection, as amended, Act No. 166/1999 Coll., on veterinary care and on the amendments to some related acts, as amended, as well as preparation of new acts, e.g. the Act on Protection of Designations of Origin and Geographical Indications and on the amendment of Act No. 634/1992 Coll., on consumer protection, as amended, including the need for harmonization of the Czech legal order with the respective EC directives.

The main objective of the Act on the State Agricultural and Food Inspection Authority was to reach the interconnection of competences with the other control bodies: the Czech Commercial Inspection, the State Veterinary Administration and the public health protection bodies in the supervised area, adjust the control activity in accordance with the Community law and with the obligations resulting from the international treaties which are binding for the Czech Republic, e.g. the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be Used for such Carriage, the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, and – last but not least – the Agreement on Trade-Related Aspects of Intellectual Property Rights.

Act No. 146/2002 Coll. also responded to the new division of the state connected with the adoption of the Constitutional Act No. 347/1997 Coll., on establishment of higher territorial self-governing units, as amended, and on the amendment to the Constitutional Act No. 1/1993 Coll., the Constitution of the Czech Republic, as amended.

Through this Act, SZPI was established as an administrative authority subordinated to the Ministry of Agriculture which approves its Rules of Internal Governance. The director general of SZPI is appointed, controlled and removed from the office by the minister of agriculture. SZPI consists of the Central Inspectorate and the regional inspectorates in the continuity with the previous structure of CAFIA. This structure does not create any obstacles to cooperation with the bodies of the newly established units of the territorial administration nor any obstacles to the proper performance of inspection. The Czech Agriculture and Food Inspection Authority was dissolved on the basis of the provision of Section 18 of the Act on SZPI, its rights and obligations were transferred to the State Agricultural and Food Inspection Authority.

The specific competences of SZPI in respect of **inspecting** enforcement of the intellectual property rights are based on:

### **3.1 Competences under Act No. 634/1992 Coll., on Consumer Protection**

**The competences are based on the provisions of Act No. 634/1992 Coll., on consumer protection**, as amended, which terms this activity as supervision of the consumer protection:

Pursuant to Section 23(2) of this Act, supervision of fulfilment of the obligations specified in Section 8 and 8a of this Act in the sector of **agricultural products, foodstuffs, cosmetics, soap and detergent products and tobacco products** is performed also by the

Czech Agriculture and Food Inspection Authority, rights and obligations of which were transferred by Act No. 146/2002 Coll. to SZPI.

The provision of Section 8 of the cited Act on Consumer Protection defines the **obligations in the area of the intellectual property rights** inspected by SZPI as the **ban on misleading consumers**. Pursuant to the paragraph 2 of this Section, breach of this obligation, and therefore prohibited misleading of consumers, also the offer or sale of products or goods is considered to be infringing some intellectual property rights, as well as storage of such products or goods for the purpose of offering or selling them. Storing products or goods infringing the intellectual property rights means their placement in storing areas, vehicles, offices or other non-residential premises and in selling points including stall-selling.

Under the provision of Section 2(1)(r) of the Act on Consumer Protection, the following are regarded as products or goods infringing some intellectual property rights:

1. counterfeits, which means products or goods, including their packaging, on which a designation is affixed, without the consent of the trademark owner, identical with or confusingly similar to a trademark, which infringes rights of the trademark owner under a special legal regulation, and further all things bearing such designation (marks, logos, labels, leaflets, service instructions, warranty documents, etc.), even if stated separately, and separate packaging bearing such designation,
2. unauthorized imitations, which means products or goods that are a copy or include a copy produced without the

consent of the owner of the copyright or related rights or without the consent of the owner of the rights to an industrial design, if making such copy infringes these rights under special legal regulations,

3. products or goods infringing rights of the owner of a patent or a utility model or rights of the owner of a supplementary protection certificate for medicinal products and for plant protection products under a special legal regulation,

4. products or goods infringing the rights of the person enjoying the protection of the registered designation of origin or geographical indication.

The provision of Section 8a(1) of the cited Act on Consumer Protection defines the obligations inspected by SZPI as the **obligation of the owner** or co-owner of a patent, owner of an author's certificate, owner of a trademark, owner of the copyright or other right protected by the Copyright Act or owner of the right to a registered industrial design or utility model, or his/her proxy to **submit, upon request, to the supervision body the documentation necessary to evaluate products or goods**, within the period of 15 working days after the notification, the owner of the above said intellectual property rights being responsible for the truth, accuracy, completeness and validity of the documentation handed over. The owner of the rights is obliged to inform the supervision body, without delay, about all and any changes which might have impact on the correctness of the evaluation of the products or goods. Should the supervision body have doubts regarding legitimacy or factual accuracy of the presented documentation, the supervision body shall notify the intellectual property right

owner accordingly. The intellectual property right owner shall present a written statement in respect of the shortcomings found in the documentation within the period of 15 days after being delivered such notification.

The competence of SZPI in respect of imposing sanctions under the Act on Consumer Protection is regulated in the provision of Section 24 of this Act.

### **3.2 Competences under Act No. 110/1997 Coll., on Foodstuffs and Tobacco Products**

The competences of SZPI are further based on the provisions of **Act No. 110/1997 Coll., on foodstuffs and tobacco products**, as amended, which terms this activity, for a change, as „state supervision“:

Pursuant to the provision of Section 14(1)(b) of the Act on Foodstuffs and Tobacco Products, the state supervision of compliance with the obligations specified by this Act is performed, inter alia, by the State Agricultural and Food Inspection Authority.

In the provision of Section 10(1)(b) of the cited Act, **obligations in the area of the intellectual property rights** controlled by SZPI are defined as prohibition of putting into circulation misleadingly designated foodstuffs, and in Section 11(2) as the obligation to remove such foodstuffs without delay from further circulation. As for the comprehension of the term „misleadingly designated“, the mentioned provision of the Act on Foodstuffs and Tobacco Products refers to the Act on Consumer Protection, i.e. to the above said provision of Section 8(2) of the Act on

Consumer Protection, and therefore – *inter alia* – designated in a manner infringing some intellectual property rights.

The competence of SZPI in respect of imposing sanctions under this Act is regulated in the provision of Section 17 of the Act on Foodstuffs and Tobacco Products.

### **3.3 Competences under Act No. 146/2002 Coll., on State Agricultural and Food Inspection Authority**

Last but not least, the competences of SZPI are also defined by the provisions of Act No. 146/2002 Coll., on the State Agricultural and Food Inspection Authority, as amended:

The control competences of SZPI in the area of the intellectual property rights are defined in the provision of Section 3 of the Act on SZPI by a reference to other legal regulations governing the obligations of the objects of control in the area of the intellectual property rights. According to this construct, SZPI inspects, in case of natural and legal persons, agricultural products, soap and detergent products and foodstuffs or raw materials designed for their production and/or tobacco products from the viewpoint of

- ca) whether these products, foodstuffs or raw materials and/or tobacco products meet the requirements specified by special legal regulations or by international treaties which are binding for the Czech Republic and which have been promulgated in the Collection of International Treaties or in the Collection of Laws,
- cb) whether the conditions specified by the special legal regulations or the international treaties are complied with in

- the production or putting into circulation of these products, foodstuffs or raw materials and/or tobacco products,
- cc) whether the inspected persons have fulfilled the obligations laid down by the special legal regulations or the international treaties,
- cd) whether consumers are not being misled,
- ce) whether the rights of the persons enjoying the protection of a registered designation of origin or geographical indication of products, foodstuffs or raw materials and/or tobacco products are not being infringed,
- cf) whether the inspected persons fulfil the obligations resulting for them from the immediately binding regulations of the European Communities.

However, the viewpoints of the control activity mentioned above under the subparagraphs cd) to cf) only duplicate what has already been specified under the subparagraphs ca) to cc).

Control of enforcement of the intellectual property rights on the part of SZPI is therefore limited to the control whether consumers are not being misled within the meaning of Section 8 of the Act on Consumer Protection, pursuant to which the offer or sale of products or goods infringing some intellectual property rights is also regarded as misleading consumers, as well as storing of these products or goods for the purpose of offering or selling them, and whether the rights of persons enjoying the protection of a registered designation of origin or geographical indication of products, foodstuffs or raw materials and/or tobacco products are not being infringed.

However, a breach of the mentioned obligations in the production and trade of foodstuffs and tobacco products,

therefore broadly speaking counterfeiting and other infringements of the intellectual property rights, comes into question relatively seldom in practice and those are mostly **cases of unauthorized marking of foodstuffs by a protected geographical indication or infringement of the rights to a trademark.**

### **1) Registered designations of origin and geographical indications**

Protection of designations of origin and geographical indications is regulated by Act No. 452/2001 Coll., on the protection of designations of origin and geographical indications and on the amendment of the Act on Consumer Protection. This Act replaced the previous legal regulation from 1973 with respect to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and in accordance with the Council Regulation (EEC) No. 2081/92, on the protection of geographical indications and designations of origin. Pursuant to this Act, a designation of origin means the name of a region, a specific place or a country used to designate the goods originating in that region, in case that the quality or characteristics of such goods are exclusively or predominantly due to a particular geographical environment with its inherent natural and human factors and that the production, processing and preparation of such goods takes place in the defined area; in respect of agricultural products or foodstuffs, also traditional geographical or non-geographical names designating goods originating in a defined region, which fulfil other legal conditions within the meaning above, are considered as designations of origin.

A geographical indication is defined by the Act as the name of a region used

to designate the goods originating in that region in case that such goods possess a specific quality, reputation or other characteristics attributable to that geographical origin and that the production or processing and/or preparation of such goods takes place in the defined area. Therefore, the difference between a designation of origin and a geographical indication lies especially in the intensity of the bond between the goods marked by a respective designation and a certain geographical region. The degree of this bond is lower in case of geographical indications. It is sufficient that a certain quality, reputation or other characteristics of the goods can be attributed to the geographical origin of a certain product, it is not necessary that the quality or characteristics of the goods be exclusively or predominantly due to a particular geographical environment of the respective area. Secondly, it is sufficient that the production or processing or preparation of the respective goods take place in the defined area, while in case of a designation of origin it is necessary that both the production, processing and preparation of the respective goods take place in the defined area.

In the European Union, the area of geographical indications and designations of origin is governed by the Council Regulation No. 2081/92 of 14 July 1992, on the protection of geographical indications and designations of origin of products. This Regulation governs the protection of designations of origin and geographical indications of agricultural products intended for human consumption and foodstuffs; it does not, however, apply to wines and spirits. This Regulation – unlike the Czech Act on Protection of Designations of Origin – does not grant

the protection to designations of origin of products other than agricultural products and foodstuffs. The legal regulation made through this Regulation is exclusive to the intent that expressions protected by a designation of origin or protected geographical indications or similar traditional national designations may be used only on agricultural products and foodstuffs that comply with the conditions of the Regulation. The Court of Justice of the European Communities has reached the conclusion that the member states may not use the national legal regulations to change a designation of origin the protection of which they requested through the Regulation and protect such designation on the national level.

Designations of origin and geographical indications based on the Regulation 2081/92 are registered by the Commission. Requests for the registration are presented to the Commission through the respective national body of the member state where the given geographical region lies. If the Commission considers the request as justified, it shall publish the specification in the Official Journal of the European Communities. Each member state may lodge a protest against the registration within the period of six months after the publication, the relevant bodies of the member states being obliged to ensure that the persons with the justified economic interest be entitled to comment on the request. If the protest is inadmissible or if no protest has been lodged, the Commission shall register the name in the register.

#### **Registered designations/indications are protected against:**

– a direct or indirect commercial use of the registered designation/indication on

products to which the registration does not apply, where such products are comparable to the products registered under that designation/indication, or (if the products are not comparable) where the use of the designation/indication takes advantage of the good reputation of the protected designation/indication;

- any abuse, imitation or reminiscence, even where the real origin of the product is indicated or where the protected designation is translated or accompanied by expressions such as „kind“, „type“, „imitation“, „style“, etc.;
- any other false or misleading information in respect of the provenience, origin, nature or basic characteristics of the product, indicated on the packaging, advertising materials, etc., in a manner that could give a false impression regarding its origin;
- all other practices liable to mislead the public as to the true origin of the product.

The registration of a designation of origin or a geographical indication does not establish the exclusive right of a single entity to use the respective designation, i.e. the right of the registered entity only. The right to a designation of origin or a geographical indication belongs to all entities meeting the law-prescribed conditions, regardless if they are or are not registered in the register. A registered designation of origin or geographical indication may be used by every person who produces, processes and prepares the respective goods with the corresponding quality or characteristics **in the defined area**. Owing to this nature of the protection, no licences may be granted in respect of registered designations of origin or geographical indications. These designations may not be pledged either. The protection of a designation of origin and a geographical

indication originates on the date of registration in the register. Such protection is not limited in duration.

A registered designation of origin or geographical indication may be legitimately used, placed on goods in particular, by each person who produces, processes and prepares the respective goods in the defined area. Except for the said entities, nobody may use or abuse registered designations, appropriate or imitate them or use them as a designation of a type of goods. A ban may be demanded on the use of the registered designation of origin or geographical indication for comparable goods that do not fulfil the conditions provided by the relevant specification.

### **Registered designations of origin and geographical indications are protected against**

- any commercial use of the registered designation/indication for any goods to which the registration does not apply, any abuse, imitation or reminiscence of the registered designation by comparing or by designating a type,
- any false or misleading information in respect of the geographical origin and characteristics of the goods on their packaging, during transport, in advertising, and
- any conduct resulting in misleading in respect of the origin.

### **2) Right to a trademark is the basic right to a designation.**

A trademark is not a result of creative activity of a human being, it is a designation. This designation can, but does not have to, be a result of creative intellectual activity. If this is the case, such designation may be protected, in addition to the trademark right instruments, also by e.g. the copyright. However, the possible creative nature of

a designation protected as a trademark is irrelevant for the trademark law protection issues.

There are three types of trademarks valid on the territory of the Czech Republic:

- national trademarks registered by the Industrial Property Office of the Czech Republic;
- international trademarks according to the Madrid Agreement Concerning the International Registration of Marks and the Protocol relating to that Agreement, providing that such international trademark has been designated for the Czech Republic;
- the Community trademarks registered by the Office for Harmonization in the Internal Market with the seat in Alicante, Spain; these trademarks have uniform effects in the whole territory of the European Union, therefore also in the Czech Republic.

Effects of the national and international trademarks on the territory of the Czech Republic have basically identical legal treatment, set by Act No. 441/2003 Coll., on trademarks and on the amendment to Act No. 6/2002 Coll., on courts, judges, assessors and state administration of courts and on amendments to some other acts, as amended. This Act implements the provision of Directive No. 89/104/EEC, to approximate the laws of the member states relating to trademarks, into the Czech legal order.

International trademarks according to the Madrid Agreement or the Protocol have basically the same effects on the territory of the Czech Republic as national trademarks, therefore from the viewpoint of enforcement of the rights to these trademarks it is, in principle, not important whether the rights are

enforced in respect of a national or an international trademark (a significant exception is the provision about the mutual dependence of international and national trademarks during the first 5 years following the registration of the international trademark and the provision about the so called avis de refus (see below in 1.5.8.)).

On the other hand, the legal treatment of the Community trademarks is set by the Council Regulation No. 40/94, on the Community trademarks. This Regulation governs both conditions for the registration of the Community trademark and the course of the application proceedings, and – with a few small exceptions – the effects of the Community trademark. Therefore, the Community trademarks are not basically subject to the provision of Act No. 441/2003 Coll. and the legal regulation is governed directly by Regulation No. 40/94. However, even the Community trademarks are subject to the provisions of Act No. 221/2006 Coll., on enforcement of the industrial property rights. In addition to the above said three categories of the registered trademarks, also generally known trademarks within the meaning of Article 6bis of the Paris Convention for the Protection of Industrial Property (see below 1.5.8.) are valid on the territory of the Czech Republic.

A trademark is a designation which can be graphically represented, made up particularly of words, letters, numbers, a colour, a drawing or a shape, or comprising the product packaging, which is able to distinguish products and services of different enterprises, or, if you like, of competitors and other persons. However, a designation meeting these conditions may not be protected by itself but only in

connection with certain products or services. A designation as a trademark has to fulfil first of all its distinguishing function which serves to consumers for distinguishing products and services. That means that such designation has to be original, by its content and form, to the extent that the consumers be able to match the respective products or services with a particular entity.

As for verbal designations, particularly imaginative designations, more words creating a phrase, and also first names, surnames and trade names, are susceptible of protection. Also designations in the form of abbreviations, i.e. a sequence or combination of several letters or numbers, are susceptible of protection provided, however, that such abbreviation is not commonly used. Also designations consisting of a combination of verbal and pictorial elements are susceptible of protection. These designations rank among the designations with a great distinguishing capacity for consumers.

Slogans may represent a trademark particularly if the original motto or challenge is completed with another distinguishing element, e.g. the abbreviation of the trade name or the principal trademark of the owner. Designations consisting exclusively in a colour or a combination of colours may represent a trademark providing they have the distinguishing capacity in relation to the goods or services for which the protection is required. Three-dimensional trademarks usually correspond with the shape of a product or its packaging and may be protected if they are captured in an original form which is not commonly used.

The rights of the trademark owner have two aspects. The positive aspect of the rights of the trademark owner lies in that the trademark owner has the exclusive right to use the trademark in connection with the products or services for which it is protected. This positive aspect of the trademark right results in the entitlement of the trademark owner to claim against the third persons that prevent the owner from executing this right. Other entitlements of the trademark owner have the nature of negative entitlements, because they lie in the law-sanctioned option of the trademark owner to exclude from the use of a designation registered as the trademark, or a designation creating the probability of confusion with such designation, the third persons acting without the consent of the trademark owner. This exclusive right of the trademark owner applies solely to the use of the trademark in the commercial relations. The use of the trademark in the commercial relations means particularly:

- affixation of the designation on products or their packaging;
- offer of products under this designation, their launch on the market or their storage for this purpose and/or offer or provision of services under this designation;
- import or export of products under this designation;
- use of this designation in commercial documents and in advertising.

From another point of view, the right of the trademark owner can be defined to the intent that the owner of the trademark has an exclusive right to use the trademark and to exclude from such use other persons, the right to use the trademark himself/herself, give the consent to its use by third persons and

to have disposal of the trademark, i.e. in particular to transfer it or encumber it with lien.

## **4. Powers of SZPI in Area of Protection of Intellectual Property Rights**

### **71**

#### **4.1 Powers in Establishing Stage of Control**

Pursuant to the provision of Section 4 of the Act on SZPI, the SZPI employees charged with carrying out SZPI's control tasks ("inspectors") are authorized, when performing the control activity, to:

- 1. under Act No. 552/1991 Coll., on state control, as amended:**
  - a) enter buildings, facilities and plants, lands and other premises of the inspected persons, if these are connected with the subject of inspection; the inviolability of dwelling is guaranteed,
  - b) request that the inspected persons submit, within the prescribed time, original documents and other papers, data records on the computer equipment memory media, their print-outs and programme source codes, samples of products or other goods,
  - c) acquaint themselves with the classified information if they present the security certification for the relevant degree of classification of such information, issued under a special legal regulation,
  - d) request that the inspected persons provide true and complete information regarding the facts being established and related facts,

- e) secure documents in justified cases; the inspectors have to confirm the acceptance of the documents in writing for the inspected person and let the person have copies of the accepted documents,
  - f) request that the inspected persons submit a written report regarding removal of the found shortcomings within the prescribed time,
  - g) impose disciplinary fines in cases specified by this Act,
  - h) use the telecommunications system of the inspected person when its use is necessary in order to secure the inspection,
  - i) inform the inspected person about the commencement of the inspection and present the authorization to perform the inspection,
  - j) observe the rights and law-protected interests of the inspected persons,
  - k) hand the accepted documents over to the inspected person without delay once the reasons for taking them over have ceased to exist,
  - l) ensure proper protection of the accepted original documents against their loss, destruction, damage or abuse,
  - m) make a record of the inspection results,
  - n) maintain confidentiality regarding all facts learned during performance of the inspection and not to abuse knowledge of these facts.
- requirements specified by special legal regulations and international treaties,
- b) request that the inspected persons remove the found shortcomings or take immediately the necessary measures for their removal,
  - c) establish the identity of the inspected natural persons,
  - d) establish, when inspecting a legal person, the identity of the natural persons representing the legal person during the inspection, as well as their authorization to representation,
  - e) inspect, at their own instigation or at the instigation of another state body, consumer or other person who proves the legal interest in the matter, the observance of the ban on misleading consumers,
  - f) make copies or print-outs of the written materials submitted for inspection,
  - g) make photo documentation in connection with the performed inspection,
  - h) take samples for the monitoring purposes within the framework of their competence,
  - i) request the owner of the intellectual property right to submit the documentation necessary for consideration whether the ban on misleading consumers has not been breached.

## **2. under the Act on SZPI, the inspectors are further authorized, when performing the inspection, to:**

- a) take from the inspected persons samples of products, foodstuffs or raw materials and/or tobacco products in order to establish whether these products, foodstuffs or raw materials and/or tobacco products meet the

## **4.2 Powers in Stage of Responding to Results of Control of Observance of Intellectual Property Protection Regulations**

### **4.2.1. Powers and Obligations of SZPI under Section 5 of Act on SZPI**

#### **4.2.1.1 Prohibition**

SZPI is entitled and obliged to **prohibit**:

1. the production or putting into circulation of products, foodstuffs or raw materials and/or tobacco products in case that these products, foodstuffs or raw materials and/or tobacco products do not meet the requirements specified by special legal regulations or international treaties,
2. the use of packaging, devices and equipment which obviously do not meet the requirements specified by special legal regulations.

#### **4.2.1.2 Imposition**

SZPI is entitled and obliged to **impose**:

a measure for seizure of the offered, sold or stored products, foodstuffs and/or tobacco products that are designated or offered in a misleading manner.

#### **4.2.1.3 Seizure**

SZPI is entitled and obliged to **seize**: products, foodstuffs and/or tobacco products that do not meet the requirements of special legal regulations, until the inspectorate takes the final decision in respect of their forfeiture or confiscation, or until it is proved that these are not such products, foodstuffs and/or tobacco products.

#### **4.2.1.4 Storing**

SZPI is entitled and obliged to **store**: the seized products, foodstuffs and/or tobacco products that do not meet the requirements of special legal regulations, 8), 16) in a manner which rules out any handling thereof until the inspectorate takes the final decision in respect of their forfeiture or confiscation, or until it is proved that these are not such products, foodstuffs and/or tobacco products.

#### **4.2.1.5 Decision**

SZPI is entitled and obliged to **make a decision**:

on destruction of the seized products, foodstuffs or tobacco products at the expense of the inspected person who put such products, foodstuffs or tobacco products into circulation.

### **4.2.2. Powers and Obligations of SZPI under Section 11 of Act on SZPI**

#### **4.2.2.1 Imposition of Fine of up to 3,000,000 CZK**

SZPI is entitled and obliged to **impose**:

on the inspected person that has put into circulation products not complying with the requirements laid down by this Act, or has not observed the conditions for the manufacture or putting into circulation of these products specified by this Act, or has not complied with the measures ordered under this Act, or has hampered or frustrated the performance of inspection, or has breached an obligation laid down by an international treaty, a fine of up to 1,000,000 CZK; in

case of a repeated breach, a fine of up to 3,000,000 CZK.

A repeated breach of obligations means a breach of obligations committed by the inspected person within 1 year from coming into force of the decision by which a fine had been imposed on the person for a previous breach of obligations under this Act.

A fine of up to 5,000 CZK may be imposed in a ticket procedure for a less serious breach of the said obligations if the breach of obligations is reliably established and the person who breached the obligation is willing to pay the fine on the spot.

#### **4.2.2.2 Imposition of Fine under Special Legal Regulations**

SZPI is entitled and obliged to **impose:**

on the inspected person that breached obligations specified for the production or putting into circulation of products, foodstuffs or raw materials and/or tobacco products in the area of the intellectual property protection, a fine under the terms and in the amount specified by special legal regulations. In such cases, the fine may not be imposed under subparagraph a).

The terms and amount of the fine are regulated by the referred special regulations as follows:

ba) Pursuant to the provision of Section 24 of Act No. 634/1992 Coll., on consumer protection, as amended, SZPI shall impose a fine of up to 50,000,000 CZK for breach of obligations in the area of the intellectual property protection stipulated in Section 8(2) and 8a(1) of the Act on Consumer Protection; the nature of the unlawful conduct and the extent of its consequences are taken

into consideration when determining the amount of the fine. However, SZPI is only entitled to impose this fine in case of agricultural products, cosmetics, soap and detergent products, because its application to foodstuffs and tobacco products is ruled out by the provision of Section 23(2) of the Act on Consumer Protection.

A fine under the provision of Section 23(1) of the Act on Consumer Protection of up to 5,000 CZK may be imposed in a ticket procedure if the breach of obligations is reliably established and the person who breached the obligations is willing to pay the fine.

bb) Pursuant to the provision of Section 17 of Act No. 110/1997 Coll., on foodstuffs and tobacco products, as amended, a fine of up to 50,000,000 CZK may be imposed on an operator of a foodstuffs enterprise who puts into circulation foodstuffs and tobacco products and who breaches the obligations specified in Section 10(1), therefore the products are misleadingly designated from the viewpoint of the intellectual property protection.

When deciding on imposition of a fine and its amount, the seriousness, manner, duration and consequences of the unlawful conduct are taken into consideration; if the unlawful conduct lies in misleading consumers by infringing some intellectual property rights, the imposition of the fine may not be waived.

#### **4.2.2.3 Imposition of Forfeiture or Confiscation**

SZPI is entitled and obliged to **impose:** forfeiture or confiscation of the products, foodstuffs or tobacco products which are

not in compliance with special legal regulations.

The SZPI's procedure concerning the imposition of fines and taking decisions on forfeiture or confiscation of products, foodstuffs or raw materials and/or tobacco products is subject to Act No. 500/2004 Coll., the Administrative Code.

These decisions fall under the subject-matter jurisdiction of the inspectorates. These are:

- a) Inspectorate of the Central Bohemian Region and the Capital City of Prague with the seat in Prague,
- b) Inspectorate of the South Bohemian Region and the Vysočina Region with the seat in Tábor,
- c) Inspectorate of the Pilsen Region and the Karlovy Vary Region with the seat in Pilsen,
- d) Inspectorate of the Ústí Region and the Liberec Region with the seat in Ústí nad Labem,
- e) Inspectorate of the Hradec Králové Region and the Pardubice Region with the seat in Hradec Králové,
- f) Inspectorate of the South Moravian Region and the Zlín Region with the seat in Brno,
- g) Inspectorate of the Olomouc Region and the Moravian-Silesian Region with the seat in Olomouc.

Their territorial jurisdiction is, under the provision of Section 11 of the Administrative Code, determined by the place of activity of the party accomplishing the elements of a specific administrative tort. Where more inspectorates have the territorial jurisdiction and there is no other agreement, the proceedings shall be held before the inspectorate where the application was filed first or which acted first by virtue of its office. In other cases or where it is impossible to determine

the territorial jurisdiction, it shall be established by a decision of the Central Inspectorate.

The appellate proceedings against decisions of any inspectorate in the said matters fall under the jurisdiction of the Central Inspectorate.

In other cases, i.e. in the given case in respect of the decision-making of the inspector under the provision of Section 5 of the Act on SZPI, the Administrative Code does not apply to the proceedings under the Act on SZPI. The remedy against any decision of an inspector under this provision are objections, which are decided on by the inspectorate.