



Know IP - Stockholm Network Monthly Bulletin on IPRS

Commentary

A Roadmap to European IP Policy-Making - Helen Disney & Meir P. Pugatch*

IP is becoming one of the most influential issues in today's knowledge-based society. In Europe, IP policies touch upon some fundamental issues, such as external trade, intra-EU harmonisation, the EU's innovation climate, antitrust and competition rules. IPRs also have a crucial impact on the EU's ability to support specific sectors, such as pharmaceuticals, biotechnology, ICT and entertainment.

Not surprisingly, IPRs are also strongly linked to the future ambitions of the EU region, including the so-called Lisbon Agenda, which stated that it was a strategic goal of the EU to become the most competitive and dynamic knowledge-based economy in the world by 2010. However, six years have passed since the Lisbon Agenda was declared and it seems that the EU has yet to achieve the desired outcome.

According to the European Innovation Scoreboard (EIS) report for 2005¹, the innovation gap between the EU, the US and Japan has not narrowed and has possibly even increased. 70% of the EU-US innovation gap is explained by lagging EU performance in three indicators: US Patent Office (USPTO) patents, population with tertiary education and ICT expenditures. The gap in the patenting trends, broadly measured as the ratio of the number of patent grants per person, between

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¹. European Innovation Scoreboard, 2005 <http://trendchart.cordis.lu/scoreboards/scoreboard2005/pdf/EIS%202005.pdf>

the EU, the US and Japan is a serious cause of concern. A gap of 45% was identified between the US and the EU, and, and an even gap deficit of 55% found between Japan and the EU.

Consequently, given the rather unsatisfactory performance of the EU in securing the goals of the Lisbon Agenda, last March the European Council decided to re-launch the Lisbon Agenda.

From an IP perspective, It is therefore worth providing a bird's eye view on some of the issues that emphasise the IP deficiencies in Europe.

Public-private IP collaboration – the need for a pan European Bayh-Dole framework

In a dramatic policy move during the 1980s both the US and Canada passed legislations (so-called Bayh-Dole and Stevenson-Wydler Acts) that brought about an explosion of innovative activities aimed at exploiting the knowledge arising from government and public research bodies. Between 1993 and 2000, US Universities were granted some 20,000 patents, and more than 3,000 new spin-off companies were established. These activities generated income of more than US\$ 1.2 billion for US academic and government institutions alone.²

Europe, on the other hand, is still struggling to adopt a coherent policy that will bring about a boost in these activities. A pan-European framework must be put in place if Europe is to excel in this dimension.

The European Community Patent - a Sisyphean tale

There are some powerful reasons to insist on having a Community Patent.

². See: Association of Universities Technology Managers - www.autm.org



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Today, patent protection in just eight European countries costs about €50,000, around five times as much as in the US or Japan. The European Commission estimates that a Community Patent could cut these costs by half to about €25,000 for 25 Member States (although this would still be more than the US or Japan). A Community Patent would accelerate the pace of patent harmonisation within the Single Market.

Yet, more than 8 years have passed and the signs are definitely not encouraging. Recently (January 2006), the European Commission circulated a new consultation paper on the future of Europe's patent regime¹. This is an encouraging step, but the extent to which this consultation would help energise the process of European patent harmonisation remains to be seen.

Computer implemented Inventions – status quo = stagnation

The patenting of computer implemented inventions has been common practice in the US since the 1980s. It is considered a fundamental element supporting the activities of innovative software companies which are becoming the dominant players in the so-called new economy.

In 2002, the European Commission presented a new Directive seeking to harmonise the patenting of computer implemented inventions in Europe (CIID). Unfortunately, after considerable debates and political struggles, in 2005 the European Parliament rejected this initiative – thereby perpetuating the *status quo*, (some would even argue stagnation) in Europe.

¹. European Commission, Consultation on Future Patent Policy in Europe (January 2006), http://europa.eu.int/comm/internal_market/indprop/patent/consultation_en.htm

Pharmaceutical IPRs – Incoherent, and at times, contradictory policies

The growing innovation gap between the US and the EU is particularly apparent in the pharmaceutical field. And, although the EU has undertaken some significant steps to improve its pharmaceutical IP environment, it has done so quite belatedly compared to the US. Nevertheless, there are still some significant obstacles in the current EU pharmaceutical IP environment, such as parallel imports, incoherence in the patenting of biotech inventions, lack of paediatric drug exclusivity and, most importantly, severe restrictions on the ability of IP owners in Europe to commercially exploit their products (pricing issues).

IPRs and antitrust – The balance is broken

In recent years the European Commission has been following a more active policy, which goes beyond the McGill Principle of 1995. 'McGill' established that IPRs should not be abused in a manner that prevents the introduction of new products to the market. Now, however, the Commission's competition strategy seems no longer to be aimed at preventing the abuse of IPRS in cases that involve the possible introduction of new products and technologies to the market. Rather, their strategy seems to be focusing on forcing IP owners to license their IPRs to competing companies that seek to provide more or less the same products. In other words, EU competition rules seem to have shifted from technology-based actions towards income-based actions. Over the long run, this shift may prove extremely counter-productive.

The EU is in dire need of a new 'road map' for its IP policy-making process. A new map is needed and innovation should be its compass.



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Views

The Chronicles of the European Commission and Microsoft: Goliath vs. Goliath – Anne Jensen*

On 24th March 2004 the European Commission found the US software company Microsoft Corporation guilty of having violated EU competition rules. The decision was reached after four years of extensive investigation, or what Microsoft and its supporters have referred to as a modern-day witch-hunt.

Microsoft's alleged violation of EU competition rules concerned Article 82 of the EC Treaty, which states that: "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States" (European Commission).

According to the European Commission and then Competition Commissioner, Mario Monti, Microsoft had, and was continuing to violate Article 82 concerning the abuse of market power, by deliberately restricting interoperability between Windows PCs and non-Microsoft work group servers, and by bundling its Windows Media Player (WMP), a product where it faced competition, with its ubiquitous Windows operating system.

Microsoft's behaviour was said to act as a brake on innovation, in addition to harming the competitive process and consumers, and the Commission decided therefore to slap a fine of €497.2 million on the company.

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More importantly, Microsoft was given 120 days to disclose complete and accurate interface documentation that would allow non-Microsoft work group servers to achieve full interoperability with Windows PCs and servers. Lastly, in an effort to remedy the software bundling, Microsoft was given 90 days to offer PC manufacturers a version of its Windows client PC operating system without Windows Media Player.

Although lodging an immediate appeal to the decision, contesting its legal, political and philosophical underpinnings, Microsoft later went ahead and drafted a 12,000 page document of technical specifications in order to comply with the decision of the Commission.

Unfortunately, this proved insufficient for the new and tough-talking Competition Commissioner Neelie Kroes, who said the information was incomplete and inaccurate. Professor Neil Barrett, the Monitoring Trustee appointed by the Commission to provide impartial technical advice on issues relating to Microsoft's compliance stated that "any programmer or programming team seeking to use the Technical Documentation for a real development exercise would be wholly and completely unable to proceed on the basis of the documentation. The Technical Documentation is therefore totally unfit at this stage for its intended purpose."

Professor Barrett's conclusions formed the basis of the actions taken by the Commission on 21st December 2005, when a Statement of Objections against Microsoft was issued claiming the company had failed to comply with the obligations under the March 2004 decision. Microsoft was given five weeks to respond to the Statement of Objections, or risk fines of €2 million a day, retroactive to 15th December.



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Pushed into a corner by the European Commission and competing companies, Microsoft announced on the 25th January that it would go beyond the Commission's decision and offer competitors to license its server software source codes.

The decision by Microsoft, for whom protection of intellectual property rights is almost a religion, came as a surprise to many observers. However, it seems the software giant realised it could not win against the Commission's demands. Newer trends in the software industry would also suggest that Microsoft will benefit from increasing its interoperability with other products.

If the decision by Microsoft was surprising to many, the reaction from the Commission and its spokesman, Jonathan Todd, was even more unexpected. Instead of immediately declaring a victory against the software Goliath, Mr. Todd claimed that it was "premature" to conclude that making the source code available would resolve the 6 year old battle between the two parties. His Commissioner, Neelie Kroes, said on the phone from Davos, where she shared a stage with world figures such as Brad Pitt and Bono, that the source code is "not the ultimate documentation of anything", and users would need more than just the code to develop software that is compatible with Windows.

Following the Statement of Objections issued by the European Commission on the 22nd December, Microsoft was given until 15th February to comply. On that exact day and more than three weeks after Microsoft announced it would give up its source codes, Commissioner Kroes confirmed she had received a formal reply from the company. She could not say anything, however, about when the Commission is likely to reach its final decision.

Bearing in mind that Commissioner Kroes has a reputation for being hard to please, and the fact that Microsoft's lawyers still believe the company has been treated unfairly and has been denied access to essential legal documents, it is unlikely that this case will end anytime soon.

In the meantime, European politicians continue to speak about the Lisbon Agenda and how Europe is going to become the leading knowledge-based economy in the world by 2010.

Topic of the Month

IPRs, Trade and Experimental Economics - Eskil Ullberg*

In today's knowledge economy it is *ideas* that are traded. These ideas can be traded partly thanks to intellectual property rights. In this discussion TRIPS¹ compliance is assumed (not necessary for the argument though).

Economic productivity is highly dependant on technology (patents on innovations) and that may be a strong reason why innovation processes and patents are important today for an increasing number of companies, not just the traditional industrial concerns. It is common to see 'innovation' attached to the slogans of companies today: 'We Innovate', 'Innovative IT', 'Ideas', etc.

The beginning of a market

However, not very many market *institutions* exist in this area. The gains from trade occur largely through the specialisation effects which are made

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¹. TRIPS= WTO Agreements on Trade Related Aspects of Intellectual Property Rights (TRIPS)



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possible because of exchange. Most of this 'trade' today takes place in the form of private exchange between companies as they license, cross license, buy, sell – or drop rights. Companies also give them away for free use (maintaining the ownership) with the intent to allow others to do further research and then possibly 'buy back' newer technology later.

All this relatively new activity can be seen as ways of exchanging technology for competitive advantage and market access. It also allows for a certain specialisation *between* firms. The value for the technology exchanged is thus rather uncertain without an official price tag and a way to trade anonymously, getting the 'best price.'

The case for experimental economics

This sounds really complex, with thousands of possible parameters and variations, non-linear relations, different national infrastructures, traditions and conflicting interests involved.

But, as a matter of fact, it is the 'ideal case' for markets. Markets are economisers of information, meaning that they don't need much information from each participant to function but aggregate all information from all participants into the price (Hayek¹ 1937, 1945). Traders benefit from this 'economy'. And if a competitive equilibrium price can be reached, that exhausts the *gains* from trade (according to economic theory).

People trading in markets manage to find this equilibrium price without complete information, we just don't really know exactly how. When change in the economic environment occurs, they adjust rapidly and a new price emerges that reflects the new

¹ Hayek F., "Economics and Knowledge", 1937 and "The Use of Knowledge in Society", 1945. Nobel Prize 1974.

economic environment (Smith² 1962, 1982). The markets are in a sense 'complexity reducers' for a company's risk management, and the outcome is a price everyone can see.

In experimental economics a simple economic system is set up with the economic conditions of trade, actors and preferences.

What is traded is often some commodity. Different 'risks' can be traded. The buyers' values and sellers' cost of the commodity traded are defined by the experimenter and the environment can therefore be controlled. The same goes for the market institution where rules and incentives can be changed.

In essence, the complexity of the real world can be captured at some essential level related to trade, and scientific experiments can be carried out (with real people trading in real markets).

University research and economic value – matching supply to demand

One problem to address is finding appropriate recipients for the economic gains derived from intellectual property.

For example, universities and research institutions are trying, often in their own interest, to get additional funds for these research projects on top of the standard protections. These activities which may be triggered by lower budgets to these institutions, is not always driven by a clear understanding of market (consumer) needs.

This kind of 'seller side' motive may not be, in a market context, the best way

² Smith, V., Markets as economisers of information: experimental examination of the "Hayek hypothesis", 1982. "An Experimental study of competitive market behaviour", 1962. Nobel Prize 2002.



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to use university funds if the aim is value to the economy at large from the ideas that come out of the research. This may instead be seen as a way for the universities and research organisations to add funds for their future research without too much insight into what the demand really is.

The solution? This equation may be improved by having a 'centralised' market including the *buyers*. They could be the companies that have a better understanding of the needs in their products and services.

A market would therefore provide them with an opportunity to competitively bid for the technology they would find most interesting, as well as to compare prices between technologies. Some bids would be accepted by sellers. A public price would appear. This price would say a great deal about what technology is most valued. It would also send important signals to the universities about where to invest for the best commercial returns on their research.

A market may not solve all problems but it will provide incentives for trade and investments to match up to real-world needs.

Conclusion

This approach, linking experimental economics to the development of trade in intellectual property, may therefore be a way for governments and other funding organisations of research universities to get more value from their investments in terms of the knowledge that can be transferred to the economy on commercially viable grounds, where it can produce value to many.

Knowledge Resources

WIPO AND SMEs – Guriqbal Singh Jaiya & Caroline Schwab *

The World Intellectual Property Organisation (WIPO) is an international organisation dedicated to promoting the use and protection of works of the human spirit. These works -- intellectual property -- are expanding the bounds of science and technology and enriching the world of the arts. Through its work, WIPO plays an important role in enhancing the quality and enjoyment of life, as well as creating real wealth for nations.

With headquarters in Geneva, Switzerland, WIPO is one of the 16 specialised agencies of the United Nations system of organisations. It administers 23 international treaties – dealing with different aspects of intellectual property protection. The Organisation counts 183 nations as member states.

WIPO has a pivotal role in the global community in ensuring a balanced, dynamic and creative development of the international intellectual property system. In seeking to create a safe, friendly, easily navigable, expanding and inclusive intellectual property environment that will satisfy individual needs for the collective good, the Organisation has also sought to involve a growing diversity of partners and interlocutors in the drive to find solutions to intellectual property challenges across the board.

One of the striking features of the road

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the Organisation has recently travelled is the increasing emphasis on inclusion.

With the mounting importance of intellectual property assets in business dealings and, therefore, in wealth creation; with the expanding territory being covered by the intellectual property system; and with the growing realisation that intellectual property concerns each one of us, as a potential creator and innovator, there is a steadily intensifying focus on ensuring that all stakeholders have a voice that is heard in the intellectual property debate.

The debate on development issues continues to accelerate and to be deepened and enriched by constructive input from a wide range of sectors and new initiatives and comprehensive input from Member States, who have recently inaugurated a provisional committee to discuss proposals to set a WIPO Development Agenda.

WIPO's SMEs Division -
www.wipo.int/sme/en

Small and medium-sized enterprises (SMEs) represent over 90% of enterprises in most countries worldwide. They are the driving force behind a large number of innovations and contribute to the growth of the national economy through employment creation, investments and exports. Despite the importance of SMEs for the vitality of the economy and the potential offered by the IP system for enhancing SME competitiveness, SMEs often underutilise the IP system.

In October 2000, WIPO Member States endorsed a proposal to establish a substantial new program of activities, focusing on the intellectual property-related needs of SMEs worldwide. WIPO's program of activities for SMEs aims to encourage a more effective

use of the intellectual property system by SMEs worldwide. The program seeks to raise awareness of the relevance of intellectual property for small and medium-sized business and promotes initiatives to make the IP system more accessible, less cumbersome and more affordable for SMEs.

WIPO's SME initiative aims to:

1. Promote a more active and effective use of the intellectual property system by SMEs;
2. Strengthen the capacity of national governments to develop strategies, policies and programs to meet the intellectual property needs of SMEs;
3. Improve the capacity of relevant public, private and civil society institutions, such as business and industry associations, to provide IP-related services to SMEs;
4. Provide comprehensive web-based information and basic advice on IP issues to SME support institutions worldwide.¹

WIPO's activities for SMEs are guided by the need to look at practical concerns and challenges faced by companies in this sector. The role of intellectual property rights in the overall business strategy of an enterprise is presented from a managerial perspective. The relevance of patents and utility models is highlighted within the context of the R&D and product development strategy of an enterprise. Similarly, trademarks, industrial designs and geographical indications are

¹ See WIPO's SME documents/guides and brochures under: <http://www.wipo.int/sme/en/documents/guides/> and the new interactive Intellectual Property Panorama module under: http://www.wipo.int/sme/en/multimedia/flash/module_1/intro.htm



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portrayed as tools to enhance an enterprise's marketing strategy, including the need for market access, market segmentation and product differentiation. Copyright and related rights are seen as key tools in the development of a knowledge-based service-oriented economy.

Some of the key activities of the SMEs Division include:

1. Development of comprehensive and user-friendly promotional information materials, guides and training packages;
2. Organisation of training seminars for specific target audiences (in partnership with relevant international or national institutions);
3. Research studies on issues relating to the business use of IP in various countries;
4. Assistance to SME support institutions, such as innovation centres, incubators, chambers of commerce, R&D institutions and others to establish IP-related support services to their members and clients;
5. SME website with articles, case studies and best practices targeted to entrepreneurs and SME support institutions; and
6. Circulation of a monthly electronic newsletter on intellectual property for SMEs.

Activities are conducted largely in partnership with organizations working to promote SME development at local, national and international levels in order to integrate intellectual property within a broader framework that addresses the multi-faceted business challenges faced by SMEs.

News & Events

DIME Intellectual Property Events - March 23rd & 24th 2006 - Birgitte Andersen¹

Dynamics of Institutions and Markets in Europe (DIME) is a Network of Excellence of social scientists in Europe, working on the economic and social consequences of increasing globalisation and the rise of the knowledge economy. It started in 2005 and is sponsored for 5 years by the 6th Framework Programme of the European Union. Further general information on the DIME Network of Excellence can be found at <http://www.dime-eu.org>.

The Intellectual Property Rights(IPR) elements of the DIME Network currently focus on research on patents, copyrights and related rights. DIME's IPR research is viewed as being at the forefront of research as it addresses current political IPR debates affecting businesses, nations and societies today. These issues also challenge state of the art thinking and the existing analytical frameworks that dominate the theoretical literature on IPRs in the fields of economics, management, politics, law and regulation theory. Further information on the DIME IPR research and activities can be found at: <http://ipr.dime-eu.org>.

In connection with this, Dr Birgitte Andersen (Reader in the Economics and Management of Innovation at Birkbeck College, University of London) is hosting several upcoming events in London under the auspices of the DIME (Dynamics of Institutions and Markets in Europe) Network of Excellence.

¹. Reader in the Economics and Management of Innovation at Birkbeck College, University of London, Dr. Andersen may be contacted at IPRevent@bkc.ac.uk



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Public lecture: 'Intellectual Property Rights (IPRs) and the Knowledge Fundamentals for Today's Business and Society', Birkbeck College

A PUBLIC LECTURE given by Professor Cristiano Antonelli who is a leading thinker, writer and renowned academic. He will debate, challenge and provoke on the issues of: 'Intellectual Property Rights (IPRs) and the Knowledge Fundamentals for Today's Business and Society'. Professor Cristiano Antonelli is Managing Editor of the journal 'Economics of Innovation and New Technology' and Professor of Economics of the University of Torino. He is the co-editor of the Kluwer series 'Economics of Science Technology and Innovation'. His previous positions include Rockefeller Fellow at the MIT and economist at the OECD. Professor Philip Dewe (Vice Master at Birkbeck College, University of London) will open the public lecture which is chaired by Professor Daniele Archibugi. The event will be closed by Dr Birgitte Andersen.

This London event is March 23 2006, 16:00 – 17:00 followed by a Drinks Reception. The lecture is free and open to the interested public.

Intellectual Property Rights (IPR) Workshops

Other events on the agenda at Birkbeck are two consecutive INTELLECTUAL PROPERTY RIGHTS (IPR) WORKSHOPS on 'The Rules, Norms and Standards on Knowledge Exchange...Are they effective? What do you think...?'

Workshop One is on March 23rd 2006. This workshop is entitled 'The Rules, Norms and Standards in the Institutional IPR environment.' Here we will debate:

Does the current IPR system effectively achieve it's objectives of:

- Stimulating innovation-based competition
- Facilitating spill-over, expanding knowledge based ideas and the creative expressions of ideas
- Rewarding inventiveness and creativity throughout the economic system;
- Facilitating sustainable development of firms and industries.
- What are the implications for IPR policy at a national and international level?

Workshop Two is on March 24, 2006. This workshop is entitled 'The Rules, Norms and Standards of Corporate and Industry IPR Practices when Profiting from Innovations in Technology and Creative Expressions'. Here we will debate:

- What kind of collaboration, competition, IPR governance, IPR markets, licensing practices and industrial context does this generate?
- How does this effect the performance of IPR based firms and industry sectors?
- What are the implications for the appropriate strategic management of IPRs at corporate and industry level?

Presenters and Chairs include a range of recognised IPR scholars including Professor Daniele Archibugi (Italian Research Councils and Birkbeck College, University of London), Professor Yannis Caloghirou (University of Athens), Professor Lee N. Davis (Copenhagen Business School), Professor Luigi Marengo (University of Pisa), Professor Ed Steinmueller (Science and Technology Policy Research Unit - SPRU), Professor Bart Verspagen (Eindhoven Centre for Innovation Studies), Professor Nick Von Tunzelmann (Science and Technology Policy Research Unit - SPRU) and many others.



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London workshop events are *targeted at the academic community* and those who hold an interest in critical IPR debates.

Contact

The Venue for all the events is the Clore Management Centre, Torrington Square, Birkbeck College, University of London, Bloomsbury, London.

You can reserve a place for the public lecture by emailing your name and institution to Dr Birgitte Andersen at her account: IPRevent@bbk.ac.uk . If you are interested in participating in the academic workshops, please download workshop programme and registration form: http://ipr.dime-eu.org/ipr_workshops and submit the registration form to Dr Birgitte Andersen by emailing it to her account: IPRevent@bbk.ac.uk.