

3rd Annual Conference of the EPIP Association

Bern, Switzerland - Gurten Park / October 3, 2008

Panel session on 'Governance of the system, evaluation and the innovation policy challenge'

Presentation by Alison Brimelow, President of the EPO

Many thanks to the organizers for inviting me to this conference.

I am a loyal participant at the EPIP annual conference and I have enjoyed fruitful discussions at this event in the past. This conference is an excellent platform of exchange for academics and intellectual property policy makers. Or should be: I wish we saw more policy makers on a regular basis. This is one reason why the European Patent Office supports it. In our day to day work and practice at IP offices we are often guided by practical needs and by the concerns we have in front of us. Change in our laws and practice tends to be incremental and slow. Elections are not won on i.p. policy and critics of the system get more air time than users. Finding space to think about policy and time then to debate is very difficult. Once people agree on change, it takes an age to implement it: EPC 2000 was drafted in late 80s 90s and came into force in 2007...glacial. However, the EPO has demonstrated that it is concerned about the medium and long term future for the IP-environment. The EPO Scenarios have shown four possible futures for the patent system. Into which, if any, of the four scenarios the future will evolve depends on the prevailing factors that dominate in the four different environments. The EPO Scenarios were designed in 2006 for a future in 2025. But already in 2008 we are realizing that many of the threats and conditions that were pointed out are present today¹.

Therefore, or perhaps nonetheless, the pressure on decision makers to prepare the patent system for the future is increasing, despite the extent to which many see the patent policy as a mixture of some traditional mantras. However, making decisions about the future of the patent system means that we have to remind ourselves about the rationale of the system. What are we trying to do? This rationale is foremost an economic rationale. At the EPO we see ourselves as supporting innovation, competitiveness and economic growth for the benefit of the citizens of Europe.

Innovation, competitiveness and economic growth are very broad concepts where contributions by individual factors are difficult to make out; this is well known to this audience, where we are all aware of the fuzzy impact the patent system has on the economy. We generally assume that patents play an important role for innovation and that innovation will turn somehow into economic growth after all. Frequently patent numbers are used as a performance measure for innovation. You don't need me to tell you that such simple measures have to be treated with care. Patents are legal titles that do not necessarily tell us a lot about the performance of companies in markets. This is even less the case, when we compare innovativeness and competitiveness of economies. More is not always better with patents. Patents are a valuable source of information but they have to be seen in the right context and cannot be the only way to look at innovation.

The patent system should spur innovation, but we know that sometimes patents can stifle innovation and that these days we are contemplating a flood of patent applications where many of these asserted rights have little or no positive influence on innovation at all. Some people go so far as to claim that the system as a whole has failed. My understanding is that we are far from a point of total failure of the system. But yes, it is certainly time and has been for a while to discuss openly the costs and the benefits that the patent system implies for society. And, dare I say, act to change when change is needed.

In this context I have used in the past the expression 'global patent warming'. I will not go into detail on this issue now. I use it to indicate that the health of the system is a contested subject. My colleague Ciaran McGinley will say more in his presentation tomorrow about the conditions that create such global patent warming and he will explain general strategies and possibilities for Intellectual Property Offices to fight against the negative impacts this implies.

As I've indicated, the legitimacy of the patent system is a utilitarian one: Its objective is to encourage innovation. However, the Patent system is only one of the important elements in the process of innovation. Patents exist to encourage innovation and we have some strong indications that the system does indeed do so. The patent system itself by its economic definition intervenes where free markets of knowledge transfer are not working efficiently. It is a market intervention. If after all the patent system distorts markets more than it regulates them in a positive way, then it fails its objective and we seriously have to

start thinking about reforming it. Self-evidently, only an operational system can fulfil its objective. It is the policy makers' and patent offices' task to make the system operational.

Patent offices are not research entities, but we need information to guide our reflection on utility. Traditionally the patent system and its design have principally been the domain of legal scholars. But legislators and patent offices nowadays need more and more advice and information on the economic impact of their work. Little statistically reliable evidence is available on the incentives created by patents, on patents' impact on competition, on detrimental market effects of the system in general and on the overall impact of the system on innovation. Patent offices and legislators should listen carefully to the information provided by the audience of this conference.

Finding the right balance in designing the patent system is a difficult task. Patents should optimize market conditions where the free flow of technological knowledge is not possible. As such the patent system strikes a balance between on the one side giving a proprietary right, providing incentives to invest in research and development and to create innovation and on the other side limiting negative impacts on the free flow of information and its impact on competition. Finding the right balance is the object of the optimal design of the patent system in operational terms. Alternative measures of knowledge protection, open innovation systems and the patent system are not mutually exclusive systems and can perfectly well exist side by side. It is up to knowledgeable players in the markets to decide which type of protection is most appropriate for their purposes.

Finding the right balance requires an overall cost benefit approach to the system. This needs to consider both the private and the social value created by the system. They can be quite different and it is not straightforward that the sum is positive for all players and for all relevant technological areas. There is some empirical evidence on the detrimental effects of the system, but we also have indications of positive welfare effects. Overall, as some economic scholars point out, we lack conclusive evidence that the patent system is creating net value. This is certainly reason for concern in itself, but it also indicates that we still lack sufficiently reliable evidence to come up with final conclusions about the patent system. The starting point of any reform is the system at hand and not an ideal world of markets where technological knowledge is free and easily available. We have to accept the existing system. It is our starting point and we have to work on and with it.

I believe that we cannot allow the patent system to drift towards dysfunctionality, so we have to keep the system under permanent review and if necessary control. Patents can only work in an economically beneficial way if the benefits can be appropriated and are not overwhelmed by negative externalities that the system might produce. This means that we need more clarity on where the disfunctionalities are, especially where the system creates barriers to technology transfer and where it blocks access to technological knowledge of general public interest. In a process of permanent self-regulation and reform of the patent system the analytical work done by academia is extremely helpful. Further economic research is required in order to be able to base decision making on solid empirical grounds. And I note here that we should also be aware of the risk of using the patent system as a lightning conductor for society's wider, or more diffuse anxiety about science and innovation.

Concluding remarks:

Wherever the patent system is a burden and actually might stifle innovation, reform of the system has to be considered. But we have to be sure of the evidence. It is only by granting high-quality patents that we can ensure the marketability and economic success of landmark inventions. In order to maintain a patent system that helps to create innovation and economic growth, the big challenges for the European Patent Office and other stakeholders are to maintain a high quality patent system, to discourage low quality patent applications and to fight against abusive practices.

In EPO's view, the following areas of research are of particular interest for the European Policy for Intellectual Property:

- **Uncertainty in the patent system.** Certain practices by attorneys and applicants, in total consistence with the legal framework, create uncertainty with competitors and in general on markets. To effectively combat these detrimental practices IP offices would need to know more about how to define and measure these practices and the related uncertainty they create on markets.
- **Quality elements of the patent system.** A high quality patent system is desired. But what does this actually mean? There is no coherent understanding of quality in this context. Quality is an elusive concept and has become a "buzz" word used to

mean different things to different people. For quality to have a meaning it must be related to a specific function. What is the economic impact of a specific patent quality once it is defined? Can we really create an index? If so, great...

- **Fee structure.** What is the economic rationale behind the fee structure of the patent system? Would a change in the structure help to solve some of the problems that the system is facing? Currently, the system is witness to some undesirable behaviours, such as poor initial drafting, abuse of divisional applications, delay tactics, and patenting strategies that undermine its integrity. A cost-covering procedural fee structure for work as it is performed at EPO could help to fight against some of abusive behaviours. A change in the structure of fees is important and necessary. How far are cost covering procedural fees a reasonable concept for EPO and what can we say about the concrete economic implications of such a structural change? We must remember that the current financial model appears to be hard wired into the thinking of policy makers in Europe. The case for change needs to be very robust and persuasive.
- **Patent value indicators:** Information is mainly available on the private value of patents. How far can we also consider the social value of patent rights and provide more concrete evidence of patent value for European economies? Such indicators would be extremely helpful for policy decisions at the intergovernmental level. To politicians such statistics could send an objective message of how to interpret patent volumes and related activities. they would provide more fact based evidence of the impact of patenting on the general economy, innovation and economic growth.
- **Follow-up of the Scenarios project:** Some parts of the future of the patent system that we pointed out two years ago have arrived already. Patenting related foresight activities has turned out to be helpful and will be even more so in the near future.

I am looking forward to interesting discussions and exchanges of views at this conference. I hope that this conference will contribute to gathering useful information and to giving concrete advice for shaping the patent system in a socially optimal way. Thank you!

Alison Brimelow

¹ **Grey scenario:** WIPO filing figures (increasing numbers/workload), increasing number of PPH between a plurality of offices e.g. USPTO and UK/Canada/Korea, also JPO<->UKIPO (further efforts to rationalisation/harmonisation), IP auctions in Europe - London, Munich, Amsterdam - (financial tool) or "ipxchicago" financial exchange based on IP to open in 2010 (Scenarios suggested 2012...) and OECD report on Creating Value from Intellectual Assets; EPLA (harmonisation - Scenarios suggested 2009 or later).

Green scenario: The Power of Collaborative Innovation" (central topic of WEF Davos 2008); WHO resolution WHA 61.21. "Global strategy and plan of action on public health, innovation and intellectual property" (prize funds for neglected diseases); Thailand/Brazil issue compulsory licenses for AIDS and cancer medicines; Inquiry into the pharmaceutical sector by EC DG Competition; Microsoft decision of ECJ partly concerning patents; EC (Study: Economic impact of Open Source) and many governments (e.g. City of Munich) promote open source software; Two Nobel prize winners, Joseph Stiglitz and John Sulston, demand prize funds for drugs; Open innovation initiatives by many companies (e.g. Procter & Gamble); ever decreasing respect of IP on the internet (e.g. UK Olswang Consumer Convergence Survey 2007, Gowers review); food and energy/oil crisis in 2008.

Red scenario: ICT standards wars, linked to geopolitical aspirations (China's WAPI); breakdown of Doha round, increasing protectionism; talks on TAFTA gain momentum (see IHT on 5 September 2008: "Liberalizing trans-Atlantic trade"); Proliferation of regional Trade Agreements (also South-South) and their agglomerations, link with political/military alliances; political considerations (official EU negotiation mandate to Mandelson) for introducing environmental and labour standards as additional requirements for new FTAs (+ eco-consumers demanding airmiles penalties for products from other regions); rise or right wing populist movements (isolationism); proliferating PCT languages and authorities.

Blue scenario: Consolidation (M&A) to reduce cost of accessing technology; Scientists for hire; Tech standards as Technical Barriers of Trade (WTO); Proliferation of research institutes – Asia, Africa, Americas; Strengthening/weakening of enclaves by beneficiaries of status quo provisions; Increased role for competition authorities; Digital Right Management; Deadlock in the UN negotiations, related to IP and climate change, ahead of Copenhagen 2009, may lead to differentiated IP regimes for key environmental technologies (de facto or de iure).