WHAT THEY HAVE IN COMMON

All three patent systems involve

- a political intent to encourage innovation through a reward mechanism

- a piece of legislation which defines the framework:
  patentability criteria, rights granted, etc.

- an Office whose task is: - to receive and examine applications,
  - to grant patents on the « deserving » ones
  - to reject the others

- a right of action in court to have disputes on the validity and infringement of a granted patent resolved

DIFFERENCES IN THE LAW

Substantive laws are different

- patentable subject matter is broader today in the US while EU is struggling with the concept of « technical »

- definitions of « prior art » are different (for no obvious reason)

These differences are a nuisance for users but nothing more

The thrust towards harmonization will eventually take care of them

DIFFERENCES IN COURT PRACTICE

Differences are obviously numerous and important but they should not hide some common features:

In reviewing Office decisions to reject, is the role of the CAFC in the US so different from that of the Boards of Appeals of the EPO?

Isn’t the presumption of validity applied by the courts with respect to issued patents at the same rather high level everywhere?

- The real big difference is the role of CAFC as Common Appeal Court, something neither Europe, nor I believe Japan have.

DIFFERENCES IN THE PROCESS

In the US, applications are examined promptly and disposition is (used to be?) reasonably speedy

- hence, users' need for continuations and the like

In Japan, the process allows applicants to defer examination

- a sizable number of applications dropped before examination

In Europe, disposition is de facto deferred by sheer length of the process (at a not negligible cost to the applicant)

- here, too, a sizable rate of abandonments before disposal

DIFFERENCES IN THE PROCESS (2)

Despite these differences, there is a suspicion that at least the US and the EU systems share a common practice with few exceptions:

« If you really want a patent, you have it »
the customer(US) or client (EU) syndrome

USPTO: the reported grant rate was about 64% in 2003.
but literature suggests that actual rate might be about 85%

EPO: the reported grant rate was about 60% in 2003 but that same year (confirming prior years' ratios) :
about 60,000 European patents were granted
about 1,400 applications were rejected

SOME SIMILAR CONSEQUENCES

At least in the US and the EU, society shows signs of uneasiness about the patent system

- too many patents granted, too easily and with too broad a scope
    - the public domain is unduly restricted
    - “the tragedy of the anti-commons”
    - research is discouraged, innovation is stifled
- the patent system is misused
    - hold-up practices
    - evergreening

BUT A BIG DIFFERENCE

Policy makers in the US do not seem to care very much

Policy makers in Japan are on a quite different track: the IP Nation

Not so in Europe:

- if nothing is done, it is the whole patent system which is at stake
- problem is that the EPO has no political backing of its own
- users are probably an important force but they and the EPO may have to agree on a somewhat higher threshold for patentability