

“THE FUTURE OF IP”

Jon Dudas

Under Secretary for Intellectual Property and
Director of the United States PTO

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These are abridged notes from the lecture by Jon Dudas; the first in the Institute’s high profile series “The Future of IP”.

Opening

Thank you Lord Justice Jacob, Good morning, everyone. I’m pleased to be here with you – thought leaders on intellectual property.

I welcome the opportunity to learn from your experiences regarding intellectual property, its role in our economic growth and competitiveness and its future.

I also look forward to sharing with you my experiences on these issues from the perspective of being the Under Secretary for Intellectual Property and Director of the United States PTO.

First, I want to talk about the importance of IP and contrast that with some very negative perceptions of some.

Secondly, I will share why I believe that IP owners must distinguish the forest from the trees by focusing on quality of patents rather than the quantity of patents.

Thirdly, I will give some real life examples of how I believe a quantity approach has hurt companies and the IP systems.

Finally, I will take any questions or challenges you may wish to make – related to my presentation or otherwise.

My remarks are more to open a dialogue than to give final conclusion. Again, I appreciate the opportunity to share my thoughts and learn from yours.

For the future of IP, look to leaders of nations. Every nation has two big overarching issues – security and prosperity. Security is the one you hear about most often. However, prosperity is long-term security for an individual nation, and the world. Prosperity is innovation, and innovation requires IP.

We have a very real perception gap that threatens our IP system – sometimes domestically in the US – and often internationally.

Some want to tear down IP systems

- (a) Some want to burn down our IP system because they in good faith believe it is broken. They are wrong, but sincere.
- (b) Some do not understand.
- (c) Many others are willing to tear down our system for a more selfish goal – because they stand to gain from a perception that the system as a whole is broken. Their short-term agenda is advanced by the perception that our system is broken.

We have made certain strides internationally in this battle against wrong perceptions. Progress is slow, but there has been progress.

But we are losing ground on the domestic front in many nations that have come to take the importance of IP for granted – like in the US and many nations in Europe. Wrong perceptions about our IP system are growing. Misunderstandings are rampant. And proposed solutions get crazier as time goes by.

Things we can do:

- (a) Focus on quality and strategy
- (b) Prove the IP system is right

About a decade ago, I worked in the Congress of the United States on the Committee that had jurisdiction of all intellectual property laws.

The question presented was how to change the structure of US government to ensure that we maximise the nation's IP.

The Members for whom I worked and other IP visionaries argued that the US government structure required our intellectual property experts to focus narrowly on the technical and legal aspects of the intellectual property system – largely to the exclusion of focusing on how to maximise the incredible strategic advantage intellectual property provides for innovation, competitiveness and productivity of every nation's economy.

To make matters worse, other entities within the government were essentially setting IP policy and strategy – without even knowing it – and usually without necessarily understanding the intellectual property system. The result of this structural imbalance caused problems on two fronts:

- (1) establishing and implementing a consistent strategy for intellectual property, and
- (2) even meeting the administrative goals of the agency.

Despite strong resistance, a few years of strong positioning, diplomacy and negotiations these visionaries were successful. Although neither the process nor the outcome was perfect, it did indeed change the way that the US government was structured and administered.

The statute creating the position I now hold is responsible for advising the President on intellectual property policy issues and advising Federal departments and agencies

on matters of intellectual property in the United States and intellectual property protection in other countries.

I will share with you just a few examples of how these changes – essentially establishing a government Chief IP Officer – made a difference in allowing the USPTO to better strategize, co-ordinate and achieve IP goals for the US government:

- (1) End of diversion increase of fees
- (2) Meeting goals – record breaking years
- (3) Meeting of the Five Largest offices
- (4) Reaching out to developing nations
- (5) Patent reform debate

The realization that the US government needed to restructure came at an important time. The world was becoming flatter. More countries were entering labor markets and competing with US industries across all markets every day. In other words, the US was in the middle of experiencing the phenomenon that its most important economic assets were knowledge assets.

Like governments, the time has more than come for all who benefit from IP to focus on IP quality, policy and strategy.

I have had CEOs tell me they check their stock price 30 days a day – 30 days a day they look at the computer to see what their company's value is that minute.

Yet some of those same brilliant CEOs become less focused when the discussion turns to the asset that makes up – on average – about 80% of their company's assets and value. This is a flip from only 35 years ago where it was only about 20%.

As the world gets flatter, every nation finds its strengths for competing in the world markets. As the world markets move closer to efficiency and perfect competition, prices get lower and lower and margins get smaller and smaller.

Innovation and intellectual property is increasingly becoming the one edge that companies have. When you innovate and own the invention, you own something that can be built upon but that earns you a real margin for a limited time.

Most in the world have properly concluded that more innovation is the key to economic and productivity growth – both in companies and in nations.

Most also realize that you need to protect your innovations – usually with patents. So, obviously, more innovation within a company or a nation has meant more patents within that company or that nation.

So far, so good. More innovation means more economic growth and more productivity. More innovation also means more patents.

Even better – this system of disclosing technology and the resulting economic growth feeds on itself. It is a virtuous cycle in which more innovation leads to more innovation.

The connection between innovation spurring patents is so strong that scholars and data gatherers have used the number of patents in a company or a nation as a proxy for how much innovation in that company or nation.

This is a great measure so long as people continue to get patents solely to protect new innovations.

But that is not always the case. There are many reasons today that individuals and companies seek patents that are not related to innovation. The reasons are legal and do not violate any rules. They often even serve an important purpose – to maximize shareholder value.

But what are the other reasons to get a patent? Let me tell you of some of the issues company executives have told me:

- (a) Cross licensing
- (b) Standards bodies
- (c) Wall Street loves us
- (d) This is my area

Focus must be on extracting quality and value.

Each of these strategies of getting more patents – and there are more – trade on the idea that more patents means more innovation rather than more innovation means more patents. That is the tail wagging the dog. The key is figuring out which patents matter and which is a quality patent. Then quantity would no longer be a proxy.

Imagine a similar strategy in oil drilling or gold mining. You could buy all the land you could possibly get or you could figure out where the oil or gold is. If do the latter, you save costs to yourself as well as increase information and efficiency for the markets (thereby increasing value).

Those tools for finding oil and gold exist, and those who use them stay in business. Those tools for determining strategic value in patents also exist, and it takes a real IP strategy and communication to manage that task.

If you do not have an IP strategy, others will.

If you do not explain IP strategy, others will.

What are the hidden and often unintended dangers?

- (a) Antitrust bodies
- (b) Standards bodies
- (c) Courts
- (d) The public

Is there any evidence that this happened, and how you can make a difference – for your company, your client or IP as a whole?

Let me give you a number of real life examples of where caring more about numbers of patents and less about value of patents has had terrible consequences and why a clear IP strategy would make a difference:

- (a) Missing maintenance fees on critical patents or failing to declare an essential patent is just sloppy.
- (b) Bonuses based upon number of patents has led to silly filings like a better way to take a phone message (from a Fortune 50 company).
- (c) Most prolific patentor fired.
- (d) A company gets sued or wants to assert rights but does not know what is the value of its patents.
- (e) Other times it is the opposite. For example, in some cases executives at a company believes its patents are all valuable and enforceable and all those asserted against it are insignificant and invalid. This leads to a rude awakening in deals or the courts.

Major patent offices have initiatives to convince companies to stop what has been referred to as “junk patenting.”