

Lecture
"Future of IP"
by the President of the
European Patent Office
Alison Brimelow
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Ladies and Gentlemen,

I feel very honoured to be invited to share a few thoughts with you on the future of IP though it is not a comfortable time to be gazing at tea leaves. Although the lecture title refers to intellectual property in general, my arguments are mostly and unsurprisingly concerned with the patent system.

"The past is a foreign country, they do things differently there".¹ Talking about the future of IP might start with a look into the past. Consider the following:

- When he argued for the introduction of the first federal copyright act, which he himself signed on 31 May 1790, US President George Washington is reported to have said that this law would increase the stock of knowledge, and "knowledge in every country is the surest basis of public happiness" - a splendid enlightenment thought.
- In 1973, sixteen European countries signed a convention aimed at setting up a "good and just" European patent system, according to its founding fathers Professor Kurt Haertel and Johannes Bob van Benthem, the EPO's first President.
- In 2006 the EPO published a study: "Scenarios for the Future", looking at the future of IP. One of its subtitles reads

- What *global legitimacy* might such (future IP) regimes have?

The first two references are concerned with the intended benefits of the IP System, the third is a somewhat gloomy reflection on how some see things now: the system's development and its unintended consequences.

Our scenarios project was not intended to offer predictions, though I note that some of the "what ifs" are now visible - as the scenario builders point out in my blog from time to time. And it is clearly right that "the world of patenting and IP could evolve in several directions" as the project reported - though I'm not sure that is particularly perceptive, more of a truism.

¹ L.P. Hartley, *The Go-Between*

How is it possible that a system once characterised as bringing "public happiness" and designed to be "good and just" should now see its future put into question?

Well, as Michelin says , 'un peu d'histoire'. We should recall that the history of IP has always been contentious. And if we feel the deck heave beneath our feet, it is only because most of the post-war period was relatively calm for the IP world. But that was not always the case - as George Washington learned pretty fast from his fellow revolutionary Thomas Jefferson.

To understand the current situation of the IP System with a view to discussing its future one has to also consider its development. While that would be well worth a lecture in itself, suffice it to recall some of the IP System's most prominent features:

- Evolution from individual privileges at local level via the formulation of the first modern-day type monopolies and inventors' rights in the Renaissance, to the first comprehensive regional patent system in Europe to a de facto global system today;
- Unremitting expansion of the scope of protection alongside societal and technological developments;
- Continued public debate on the desirability of such a system, and its merits for society.

As I've said, concern about its purpose and future function have been a constant feature in the history of the IP System, as have been attempts at limiting or even abolishing it, running alongside its inexorable growth.

The development, indeed establishment, of the IP System has been driven by perceptions deriving from political and societal evolution and the economic doctrines accompanying that evolution. As of now

- Rapid pace of economic globalisation and technological developments have turned knowledge into an important tradeable good, with IP laws as commonly respected currency converters;
- Extension of the IP System to economies around the world via the TRIPS agreement has led to intense general debates about the legitimacy and justice of the system.
- Volumes of IP rights exceed all expectations, as well as the capacities of the authorities entrusted with the management of these rights. The volume, pace and uncertainty characterising the system prompt me to use the analogy of global warming - as another example of disputed change. As the deck heaves under our feet, we must ask whether our vessel is in a fit state for whatever may come next.

The overriding concern is the acceleration with which some developments and their intended - and also unintended – consequences have been occurring:

The explosive success of the present-day IP System has prompted calls for change - "The system cannot go on like this."

Well, in such circumstances I like to recall Mark Twain: "The report of my death was an exaggeration."

If we look more specifically at the patent system now we find an area of conflict where opinions are deeply divided:

- Critics of the system mainly claim that the system has gone out of balance: individual profits derived from the IP System outweigh the benefits for society;
- Proponents of the system call for even stronger protection of IP in view of increasing competition and risk-taking in the global economy;
- Some economists feel that the patent system fails to do its job properly, which is to support innovation - the recently published book "Patent failure" is only the latest in a series of critical surveys - surveys which are in turn criticised;
- Some consumer organisations advocate a transition from a proprietary to a non-proprietary innovation culture to better serve the interest of the consumer. This might result in alternative concepts for the promotion of innovation, but can I comment here that in the end somebody has to pay.
- Some civil society organisations engage in emotionally loaded arguments against IP rights in specific areas of technology. "Living matter" - mainly biotechnology and genetics - and "abstract inventions" - mainly software and methods for doing business - are the most prominent examples. Others are likely to follow. And it is easy to tap into a subliminal anxiety of many that science and government can't be trusted.

This conflation of perceptions and beliefs, not always supported by corresponding factual evidence, in a society which has been called "Kaleidoscope" creates uncertainty about the future of IP. Our scenarios referred to the need for "reflexive navigation" to steer clear of the shallows or uncharted waters.

The "Scenarios for the Future" study of the EPO gives four possible outlines for a future course of development of the IP System. They depend on the driving forces on which they are based:

- The demands of business (which are at least in part the demands of society, surely? I think it is nonsense to construe a structural antithesis, though the fit is not perfect and there are points of unease and conflict).
- Geo-political developments, such as the emergence of new powerful economies, but also the needs of the least-developed countries;
- Society and the benefits it can derive from the IP System, but society's wants are rarely coherent/consistent especially when it comes to paying;
- Technology, its impact on society and the systemic risks as well as opportunities it embodies. You only have to look at the broad, sweeping and iconoclastic tenor of post-war planning to see how much more risk-aware, risk-averse and doubtful of technology society has become since then - while clinging passionately to our dependence on the internal combustion engine.

So, where does this leave us? "Shape the future or someone else will do it for you". Aversion to change is common, but even so it is remarkable how stuck we have become.

The PCT and the EPO were both rational and visionary developments. Have we exhausted our capacity for reason and vision? It sometimes looks like it. We have been stuck for 30 years on a unitary right for Europe and for the delivery of a litigation system which is up to the real job. "Wake me up when it's over" perhaps, but 'over' is really not what we want.

I have no original proposals up my sleeve here. We have a pretty good idea of what needs doing:

- Substantive elimination of duplication rather than drift to "lowest common denominator" in a global system;
- criteria for patentability that are relevant and optimal;
- that means proper application of the law and, if necessary, making it tighter;
- Appropriate institutional reforms in Europe (and indeed elsewhere);
- Make sure that your fee/funding regime supports the delivery of a high-quality patent examination system.

But we find it very hard:

"O where are you going? said reader to rider,
That valley is fatal when furnaces burn,
Yonder's the midden whose odours will madden,
That gap is the grave where the tall return."²

- I will start with duplication. Yes I know it's useful for many. But it is not rational. Nor is our response to proposals for reform. Even the IP 5 projects are now prompting a recoil : "But we'd have to change". Indeed.
- Pangloss is with us: All is for the best in the best of all possible worlds. Well, manifestly it is not so. In parts of the world, indeed. But universally? I think not.

Duplication of work, or "unnecessary duplication", as I've said, can be useful, not only as "belt and braces", but by offering opportunities for differential exploitation. In a world without backlogs, one could shrug. But the world is awash with unexamined patents, and patent offices do pretty much the same thing by way of search several times over. I know that is an oversimplification, but once we abandoned our paper search files, we entered the age of substantive convergence. I think the term for this development is "game changer".

The reasons we continue with inherent duplication are mostly to do with doubt and habit. Various efforts over years of confidence building have been little more than dipping a toe in the water. In this context the agreement of the IP 5 at Jeju in Korea last October ought to be significant. I hope devoutly that it is. In Jeju we launched 10 Foundation Projects. They address:

² W.H. Auden, *O where are you Going?*

- Common Approach for a Hybrid Classification
- Common Documentation Databases
- Common Search and Examination Support Tools
- Common Approach to sharing and documenting Search Strategies
- Common Application Format
- Common Access to search and examination results
- Common training policy
- Mutual Machine Translation
- Common Rules for Examination Practice and Quality Control
- Common Statistical Parameter System for Examination

That list is a list of cooperative ventures which, if delivered as outcomes, will enable the IP 5 (and others) to converge in practice, develop together and sustain quality. These are the component parts of a patent system which can truly function globally. They will take investment and time. But they do try to get to the heart of the matter. They are also supportive of the PCT - a clear European objective, shared (for the most part) by users of the system.

But precisely because the 10 projects need time and investment, the Jeju process is inherently at risk. It requires substantive change, for example if we are to move to a hybrid classification system. "Wait and see" will be a seductive invitation. "Wait and see what the effect of the recession is"; "Wait and see what we learn from the PPH"; "Wait and see what the election brings" (whatever election that may be).

Opacity and uncertainty are increasing in a system which is called patent and meant to be open. For many new technologies, its timescales are grotesquely out of scale. That working within the system can be very profitable is clear - but sanctioning the exploitation of opportunities created by patent office failures is not, in my view, a definition of effective regulatory policy making. The outcome may be acceptable, but in that case I think the regulatory framework should reflect the fact.

Question: should we accept that deferred examination is now the process of choice as well as default? One of the big attractions of the PCT is after all that it gives 30 months "do nothing" time.

Without doubt, deferred examination itself does not deal with opacity but it has formal safeguards, absent at the moment, and might be a rational step, along with several others. The formulation we (the European Patent Office) have been running up the flagpole has several elements:

Shine a light
 Raise the bar
 Join up the islands
 Better mousetrap.

Jeju is about joining up the "islands" which are separate patent offices.

"Shine a light" addresses what may be tucked away in the areas of darkness created by huge volumes of unexamined patents. It would involve proactive selection and retrieval to reveal what unlinked though related new developments and technologies may be lurking quietly in the unexamined depths. It is another way to "make patent".

"Raise the bar" is a more familiar term. We use it for one of the domains in the Strategic Renewal process we are engaged in at the EPO. It is deliberately ambiguous. "Raise the bar", where the bar is there, but has somehow sagged - best encapsulated in the rather tart question "Why don't you just apply the EPC?" - i.e. get and keep your patent examining house in order. In that context formal and consistent engagement with quality is essential, not at the level of assertion and anecdote, but enquiry and metrics. That process is now well launched at the EPO.

The second aspect of Raise the bar is "Have we got the threshold right?". Should it be higher for some sorts of technology than others? This is disputed territory. But I strongly believe the question must be addressed. A patent system must be relevant as well as consistent. To put it simply, one question might be "What is obvious to the man skilled in the art in the age of Google?" This audience will have other versions. We may decide we are comfortable that the status quo is fit for purpose. But again, I think we need more than anecdote and assertion.

The "better mousetrap", a phrase chosen because it comes from a remark which encapsulates the value of innovation - a remark incomprehensible to non-English speakers which caused a problem or two at the EPO - refers simply to running the process of examination better - better tools in a word. Here too, Jeju is relevant. It took us ages (and much grief) to shed paper. Technology can now support search processes much more effectively - but we need to make the investment and encourage our examiners to embrace such change too. Our Future Patent Tools project is coming up to its first gateway review next week - we know what we want to do, but need to be sure that we can deliver.

I've touched on ways of improving the functioning of what we've got by structural approximation and minor (i.e. doable) reforms. What else?

Well - I won't bang the drum anymore. Europe is, for reasons which have little to do with IP, not delivering the institutional developments it really needs. But I have to add that in the end politics is about choice. Politicians are elected to make choices. And if they see IP differently, or indifferently, perhaps that is a democratically based outcome. Maddening, sub-optimal, etc. from our view, but we are not the centre of the universe.

And there is the question of money. A bright, interested, well informed academic asked me once, "given volume of use of the patent system why do you want it to be cheaper?" I never have wanted it to be cheaper but the question is directed at several generations of "enlightened" policy makers. Jon Dudas described the USPTO as operating like a "Ponzi Scheme" - before the term leapt to its current prominence. That cannot be comfortable.

The EPO is struggling to make sure it spends no more than it earns, but that is not the driver for change. Rather it is "what signals do you want to send to users and potential users of the system?" My preference would be "pay what it costs", in a world where removal of unnecessary duplication meant that the real cost globally of search and examination could come down. Patent offices should not be cash cows (a traditional function) but nor should they offer subsidies for the filing of applications many of which are of doubtful value. Our refusal rate is ca. 50% now. We lose money by saying 'no'. If we say 'yes' by mistake, then we put into circulation what I can best

describe as a "toxic asset". The FT reported at the end of the year that the recession was promoting the buying and selling of IP ... let's hope it's the non toxic rights which are being traded.

I started by recalling that the "worth" of IP has always been debated, or disputed. I am sure that in the whole, or on the whole, IP including patents, is justifiable as an effective, probably the most effective, way of sustaining innovation, by making it worthwhile to innovate. I also believe that the patent system has a future. I would like that future to be shaped intentionally, not by accident, or inertia, or drift. That means doing the things I have set out here, or at least most of them. It means chasing off the doubters, as the Rider does in the Auden poem I quoted earlier; it means ensuring our vessel is seaworthy in stormy times. And the failure to master workload is, if you like, the first major sign that we may be shipping too much water. We don't have the option of putting into dry dock. We have to make running repairs. But since, despite the passion of some of our critics, I have no sense that worm has devoured our timbers to the point of no return, I advocate staying with the good ship which I will call "PCT".

We will be accompanied by smaller craft - commons, open source, licence of right, perhaps Soft IP; after all patents themselves were once an innovation. We may also find that a couple of supernumeraries become important to keeping us afloat - one is competition policy, the other public opinion. Both may be viewed with distrust, incomprehension or contempt by our expert hands but both, I believe, are interested in keeping the ship soundly afloat, not in causing it to founder.

I would love to end on a note of ringing confidence, but I see enough that is wrong with the functioning of this system to prevent me from doing so. It is not fashionable to quote Kipling, but I will do so - and I stay in touch with the theme of the sea:

"These were the dykes our fathers made
to our great profit and ease
But the peace is gone and the profit is gone,
with the old sure days withdrawn"³

Well, the profit is not gone as yet. And "ease"? But I think the old sure days are withdrawn. Our IP flotilla stands a fair chance. The EPO scenarios offer a prospect of what might come to pass. I think we can sit tight, or we can choose to adapt. I favour the latter.

³ R. Kipling, *The Dykes*