

One Right System for IP – Vision Impossible?

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The Role and responsibility of the IP Community in a politicised world

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Who is the IP Community?

- Academics who devote their research to IP Law
- The AIPPI representing the profession
- The IP right holders
- The representatives of states taking part in discussions at WIPO or WTO, or
- The WHO
- The UNESCO
- The UNCTAD
- The FAO
- The OECD
- The G8 Group
- The G77 Group
- The B+ Group
- The many NGOs that participate in IP discussions...

All of these, and many more claim to have a say in present IP matters

This makes the system and its developments more complicated than in the 20th century. But it also means that IP is continuously redefined, depending on who is talking.

So, do we really know what we/they are talking about and how it will be understood?

In addition:

**There is always someone else to
blame when things go wrong!**

There is a lot of pressure on present IP Law

- Political,
- Economical,
- Social,
- Environmental,
- Technological,
- Ethical
- And there is the historic tradition.
- Nevertheless, it seems that those traditionally have paid much attention and devotion to the matter have fairly little to say.
- **The trade-related dimension** seems to have given free room for all types of political jockeying and power plays – and maybe also for some rethinking.

The Developments that cause uncertainties

- From specialised area to an important factor of economic growth
- From propriété intellectuelle to IP
- From poems and steam engines to databases and stem cells
- From national to regional
- From WIPO to WTO
- From globalisation to fragmentation
- From legal technical solutions to world politics

From specialised area to a protection of investment and an instrument of economic growth

- Intellectual assets in companies have grown from 40 to 75 per cent or more in a few decades.
- In the information society there is a great awareness of the value of IP - “the single most important element for... future growth and development, the ideas and innovations of American citizens and companies.”
- Intensive lobbying for more and longer protection tends to result in a doubtful of benefit – at least to society as a whole.
- When economic growth comes in the first instance, the original objectives and the balances of the system are pressed back, including the qualifications of the objects of protection and cultural importance.

From propriété intellectuelle to IP

- The USA and the English language has dominated the world since the II World War
- "Intellectual Property", or IP, has become a worldwide notion.
- This definition of the right as such is somewhat strange outside the Anglo-American sphere, but is now also found in the EC Charter of human rights, Article 17.2.
- "Property" – *no trespassing* – is however leading to the wrong associations, especially if non-IP people are involved.
- The leading thought was otherwise precisely that intellectual property is different to ownership of land, i.e. no absolute property, something to share.
- The property approach can be especially unsuitable today, when the handling of IP really requires judgment and a flexible approach.
- IP rights should be respected but not suffocating.

From poems and steam engines to databases and stem cells

- It is not always so easy to adapt to technological changes
- Limitations and exceptions do not remain the same in a mechanical world as in a digital or biotechnological.
- Still, as changes of the law are difficult to achieve, especially on a worldwide basis the new phenomena are squeezed in as if they were the same and strains the law.
- Global harmonisation leads to co-ordination at the lowest common denominator.
- As a result more is protected under IP law – or is at least claimed to be so.

From national to regional and global – a cumbersome road

- In Europe, after 50 years, we have something that could be called an EC IP Law, although patents are still missing.
- In addition, it is not so easy to get everybody on board in time, including the citizens. Certain implementations have been burdensome, and consumers seem reluctant to stricter rules on private copying.
- But is it a real harmonisation? Think of **threshold for copyright**, or availability of **patents to stem cells**.
- On the global level things seem even more complicated.

From WIPO to WTO

- By the TRIPS Agreement a new situation developed. Political decisions on IP matters were after over 100 years basically moved from WIPO to WTO.
- That nothing happened in WIPO because of conflicts between North and South was one of the main reasons.
- But the same conflicts were transposed to and increased in the WTO – now in the whole area of international trade negotiations.
- Majority votes did not bring the solution.
- From 2001 at the Doha Ministerial Conference developing countries have formed their positions, which has affected both work in WIPO and WTO.
- Since 23 July 2006 there is a stand still in WTO, even if the work on revision of the stipulated provisions have continued informally.

Conflicts merge within different fora

- In WIPO the negotiations on a Substantive Patent Law Treaty have been blocked.
- One key issue seems to be the mentioning of geographical origin of genetic resources in patent applications, *cf.* the preamble of the Biotech directive and Article 27.3.b) TRIPS with the "biotech exception".
- The proposal by developing countries of a new Article 29*bis* would mean such an obligation with the invalidation as effect of non-compliance.
- Here we can see an example of the politics and bargaining in the field:
 - EU supports the mentioning, but is against invalidation;
 - The USA and Japan mean that so-called biopiracy can be defeated by other means.
 - Discussions now focus around a "package solution" with EU's support in exchange for extension of GI protection – which the USA is against.

Possible openings?

- The Committee on Development (CDIP) and Intellectual Property may be ground-breaking.
- Patent negotiations may start again.
- WIPO has got a new Director General, Francis Gurry.
- The B+ group has not been able to find a mutual solution, which would give them possibility to speed up things on their own.
- **BUT**
Activities such as ACTA, the proposed prolongation of neighbouring rights to 95 years (also in Europe) are less encouraging.

Patent offices cannot cope – could they co-operate?

- The urge to patent more is part of national policies, as this presumably will boost innovation and economy (?).
 - More than 5 million patents are in force in the world. In 2006 the number of PCT patents granted worldwide grown by 18% .
 - WIPO recently reported that international (PCT) filings have seen continuous growth with 6,4% yearly over the previous 10 years with growth rates from north east Asia representing over a quarter.
- Meanwhile, patent offices have tremendous backlogs.
- How can the efficiency of the big patent offices in world be and double work be avoided?
- **Co-operation requires harmonisation.**
- In Europe, it has been mentioned that national offices could become satellites. But this risks to dilute national patent skills in certain fields
- An other remedy is to raise fees to discourage applicants (?)...

From globalisation to fragmentation

- When IP issues are discussed exclusively among industrialised countries - in OECD, the B+-group or as presently ACTA by the USA, EU and Japan - it calls for attention.
- A similar case is Friends of Development.
- The risk of fragmentation and polarisation is obvious.
- **BUT it could of course also lead (back) to a situation where national interests are better acknowledged and give room for more flexibility.**

There are some true institutional problems:

- A true globalisation requires efficient institutions, but WTO seems already after 10 years somewhat wearied (GATT with a face lift).
- The fast technological developments have generally speeded up changes and developments in the world – and supported the already economically strong.
- Politicians plan with provisional Utopian schemes and positioning.

Further problems at national and regional levels

- The balancing of different interests have not been too easy in the digitised world with data- and biotechnological revolutions.
- Knowledge and information based industries have a (too) strong hold of access to knowledge and communication thanks to their IP.
- No wonder this is seen as a threat and a bar by potential users, irrespective where.
- Furthermore, the question of life and death should not be in the hands of a single patent owner...and “patent on life” conflicts with many peoples’ ethical views.

From technical legal solutions to world politics

- Intellectual property requirements under TRIPS may seem inflexible from the perspective of the least developed countries.
- But it is also obvious that under the open conflicts on IP between developing and developed countries, dissatisfaction **with other issues than IP** are hidden.
- Expectations of market access through the WTO-cooperation have not been fulfilled.
- But even more dissatisfaction concerns influence and **world power**; this should not only be USA-EU matter, while the developing world has little say.
- It will be very interesting to see what happens when **China** and not least **India** start using their powers as (emerging) big world economies.

Indeed, modern IP faces a lot of problems, conflicts and challenges – which we are here to solve.

So, the question is:

How could the academic IP society contribute to a better IP world?

Academia's strengths and weaknesses

On the positive side:

- A certain “objectivity”.
- An honesty in searching for the truth.
- A developed specialized knowledge.

On the negative side:

- Lack of resources.
- Lack of “marketing” (popular scientific articles)
- Often internal contacts more than external (IP remains among IP specialists – and who else would understand...).
- Developed specialised knowledge; and seldom bringing cross-disciplinary approaches (which is more interesting to politicians).
- Limited co-operation in research...

Could we get rid of some of the short sighted politicising of IP?

**It seems high time for an IP
Climate Panel**

Perhaps by trying the UN Climate Change Panel as a prototype, researchers might play a new role. This might influence IP decisions on the national, regional and global levels to a higher degree be based on research.