INTELLECTUAL PROPERTY

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Commentary

Protecting IPRs as a strategic choice for Europe – Dr Meir Pugatch and Helen Disney[1]

The "knowledge economy" is one of those buzzphrases that everyone talks about but no one really seems to understand how to get a grip on.

Consider, for example, the IT sector, which by all accounts provides a robust platform for innovation and economic growth. Here we should ask ourselves whether Europe's policymakers are really doing enough to protect, harness and commercialise the potential that is locked in this sector. Among other things, is Europe creating a suitable environment for the protection of the intellectual property rights (IPRs) that are so pertinent to new innovation?

Not according to a new index which measures the strength of protection of IPRs in the IT sector in different countries, which has been created and recently updated by the Stockholm Network. Our research in fact ranks the EU as a whole at the bottom of the scale, below nation states of the EU and other countries including the United States and Japan (a more detailed explanation is provided later in this issue).

The findings show that, despite the EU's Lisbon Agenda goals, the level of intellectual property protection secured to the IT sector at the EU level is significantly lower than in individual member states such as France and Germany, and 35% below that available in the United States, which tops the table.

Among the EU countries, France leads the list (with a score of 3.67), followed by Sweden (3.39), Germany (3.38), Norway (3.37) and the UK (3.31).

So why does the European Union as a whole perform so poorly and what can be done to improve the policy environment, especially at a time when Europe desperately needs new jobs and innovative industries to revive its flagging economy?

Compared with the results of the last Index, published in 2006, the updated Index does demonstrate an improvement in the strength of IPRs in several countries, particularly with regards to the term of protection and the extent of enforcement. In addition, EU countries such as France, Sweden and the UK have all seen a decline in piracy rates, with France experiencing an especially marked drop and with the outcome of Sweden's recent Pirate Bay trial showing the courts taking a harder line on those who try to flout the law.

Yet overall, the US is still found to be streets ahead of Europe, enjoying the strongest level of IP protection (3.92), while - despite its improved piracy rates - the EU continues to have the weakest (2.55).

Breaking it down, some key policies that are particularly lacking at the EU level include the failure to harmonise the patentability of software-related inventions (today different countries in Europe have different practices in this field, though most countries do allow for this type of activity to take place). Government procurement policies increasingly seek to favour software and standards that are based on open-source, as opposed to software and standards that are based on the projection of IPRs. In recent years, the EU has adopted and shaped policies that seek to establish the supremacy of competition rules over IPR. Europe also has a relatively high level of piracy compared to other countries and markets.

On the first point, the Enlarged Board of Appeal of the European Patent office is now reviewing policies that seek to clarify the conditions for exclusion from patentability of computer programs under Article 52 of the European Patent Convention. While such clarifications are indeed important one needs to be very careful not to "throw out the baby with the bathwater" by creating a situation in which vital technological advances in the computing domain would be excluded from patentability.

The IT sector is not alone, however, with other multi-national industries and indeed a host of small to medium-sized enterprises also experiencing IP challenges in Europe.

Based on our research findings and on the current climate for IP protection in Europe, it would seem that the new set of MEPs and Commission officials arriving in Brussels after this month's elections need to do far more to address Europe's intellectual property environment in order to meet the Lisbon goals. If they don't, Europe will be ill-equipped to attract the types of high-tech businesses likely to signify its best hope of economic growth in the future.

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[1] Dr Meir Perez Pugatch is director of research at the Stockholm Network, and senior lecturer at the University of Haifa. Helen Disney is chief executive and founder of the Stockholm Network. A version of this article was also published by the *EU Observer* (23 April 2009), http://euobserver.com/7/27987.

Topic of the Month

Barbie goes to war – the billion dollar IP dispute between Barbie and Bratz – Rachel Chu[1]

Barbie dolls hold a special place in the memories of most women. However, for girls aged 18 and under, Mattel's bestseller now has a major rival, the Bratz doll. Family-owned company MGA introduced four versions of the hipper Bratz doll in 2001 and soon began to chip away at the Barbie empire. By 2004, Bratz dolls had snatched a 41.5% share of the UK fashion doll market and were outselling Barbie,[2] and by 2008, MGA was estimated to be making an annual profit of $500 million.[3]

Despite its popularity, for most of its life the Bratz product line has been overshadowed by accusations of copyright and contractual misdemeanours against MGA and the creator of the Bratz dolls, Carter Bryant, a former employee of Mattel. Up until now, it has been business as usual for Bratz. However, a lengthy and highly-charged court case has lately resulted in a series of landmark decisions that now threaten the future of Bratz.

Besides offering a fascinating tale of what happens when you mess with Barbie, the outcome of this dispute highlights two key points regarding IPRs from a practical perspective – transparency of ownership and a balanced approach to the scope of rights.

A trendier model

The Bratz range modernises the elegant Barbie design, which some perceive as outdated. Bryant's blueprints crafted four funky, multi-ethnic dolls to match the contemporary scene.

Following the initial launch in 2001, the product line developed very quickly, expanding to 40 dolls and many spin-off products, including a movie, TV series and video game. Despite Barbie's efforts at new looks – like breaking up with Ken – Bratz's success has continued to grow.

A question of ownership

However, after three years on the market, the question of ownership of the original drawings reared its head definitively. In 2004 Mattel opened a lawsuit against MGA for copyright infringement and breach of contract. Mattel claimed that Bryant had developed the original idea while he was under a contract that entitled it to the rights of his drawings. However, MGA countersued, maintaining that Bryant had come up with the Bratz idea while on leave from Mattel, between 1998 and 1999, and that the design belonged to MGA, since it was there that the Bratz plan was developed and released.

After winding through federal courts for about four years, in July 2008 a California jury determined that Bryant was, in fact, under contract with Mattel at the time he created the initial Bratz drawings and name. Therefore, the jury concluded that the rights to the drawings belong to Mattel, since copyright begins with the date that a work is created.[4] This implied that Bryant broke his contract with Mattel in passing on the designs to MGA and that MGA was liable

for aiding both the breach of contract and IPR infringement. In August, the jury awarded damages of $100 million, with $90 million for breach of contract and $10 for copyright infringement.

The scope of ownership

However, the question remained as to whether the collection of Bratz dolls (and the entire product line) infringed on Mattel's right to the original drawings. In December US District Judge Stephen Larson delivered a permanent injunction on the entire range of Bratz dolls (with the exception of the line of younger versions of the dolls) and ruled out using the Bratz name in the future, although he did grant MGA a stay until mid-February. Furthermore, Larson required that MGA transfer all trademark rights to Mattel and excluded the possibility of a licensing arrangement (whereby MGA would pay royalties to Mattel in return for selling Bratz products). His decision seemed to indicate that in his view the entire product line represented an infringement of Mattel's IPRs and unfair competition.[5]

Despite his decision in December, in the new year Judge Larson agreed to push back the stay for the entirety of 2009 in order to guarantee that retailers purchasing new 2009 lines would be able to market them throughout the year.[6] This represents a step back from his originally hard line position regarding IPR infringement, however, it is not yet clear whether MGA, Mattel or another party will collect the profits gained during this period.[7] In addition, a licensing agreement between Mattel and MGA may now be feasible.

IP lessons

The series of decisions discussed here highlight two dimensions of IPR protection that are important from a functional perspective: transparency of ownership and a proportional approach to the scope of rights.

First, this case demonstrates that it is always important to be explicit about ownership of IPR at the time a creation is conceived. It is crucial for a company to make a formal arrangement that clarifies the owner(s) of various elements of a proprietary work. In this way, companies can avoid aggravating and costly disputes in the future.

Second, the Barbie/Bratz case also raises the dilemma of determining exactly where the boundary of ownership lies. On the one hand, rights holders need to be able to profit from their proprietary idea and the future expression. On the other hand, though, others who have invested in developing the original work need to be able to profit at some point. Therefore, the scope of IPR protection should not only take into account IPRs, but should also consider innovation that follows on from the original expression. In other words, the scope of protection should strike a balance between facilitating rights holders to enjoy the benefits of protection as well as allowing other players to compete with them.

Striking a balance

Until the future of the Bratz line is resolved, Barbie and Bratz continue to be at war. Ideally, all parties involved will arrive at a pragmatic arrangement in which the integrity of Mattel's IPRs are fully upheld (by giving it the recompense and profits it is due) while not throwing away a commercial venture that is in high demand, particularly in an economic climate when such ventures are fewer and farther between.

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[1] Rachel Chu is a researcher at the Stockholm Network.

[2] "Bratz topple Barbie from top spot", BBC News (9 September 2004). http://news.bbc.co.uk/1/hi/business/3640958.stm (Accessed 14 May 2009)

[3] "Barbie firm wins Bratz court case", BBC News (18 July 2009) http://news.bbc.co.uk/1/hi/business/7513087.stm (Accessed 14 May 2009)

[4] *Character Merchandising*, WIPO, Geneva (December 1994) p.24 http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/wo_inf_108.pdf (Accessed 14 May 2009)

[5] "Mattel to seek injunction after $100 million award", *Managing IP* (3 September 2008) http://www.managingip.com/Article.aspx?ArticleID=2005250 (Accessed 14 May 2009)

[6] "Bratz dolls given sales reprieve", BBC News (8 January 2009) http://news.bbc.co.uk/1/hi/business/7817170.stm (Accessed 14 May 2009)

[7] Ibid.

Experts' Corner

Patents and Energy – generating results or generating controversy? – Dr Konstantinos Karachalios[1]

Environmentally Sound Technologies (ESTs), in particular in the field of energy generation through renewable sources, have brought the environmentalists' corner to the political centre stage. The race for ESTs has intensified in the context of the raging financial and economic crisis. Indeed, Jacques Attali, author and president of PlaNet Finance, has highlighted that many countries view green tech investments as the key to overcoming the crisis and even emerging as a leader.[2]

The Obama Administration apparently understands the changing tide. As part of the 2010 federal budget, President Obama targeted unprecedented investment in the development of new energy technologies as a key channel for delivering jobs and savings, as well as for facilitating energy independence and a cleaner planet.[3]

The cost of carbon abatement

However, expectations for a successful outcome at the pivotal UN Climate Change Conference in December 2009 in Copenhagen are muted. Tensions are rising around the technology gap and the conditions under which such technologies may be made available. Chinese Premier Wen Jiabao was asked in an interview with the *Financial Times* (FT)[4] if China is ready to sign a treaty to cap carbon emissions. He responded by saying it would be difficult for China to accept quantified emissions reduction quotas at the Copenhagen conference, since the country is "still at an early stage of development", indicating that China should be allowed to exploit its period of industrialisation.

Signs from India and Russia are not very encouraging either. According to businessGreen.com, Indian officials have already indicated that they are unlikely to agree to the mandatory emissions cap set in Copenhagen.[5] Similarly, Russian Prime Minister Vladimir Putin took an ambiguous position on climate change in his keynote address at the Davos forum.

Some results, but still controversy

So, the scene is being set for hard bargaining, if not for confrontation. From the perspective of the IP system, IPRs could realistically find themselves on the negotiation table, not only on the good side of the equation, but also on the side of dispute. There is no statistical graph necessary to understand that this technology race is paralleled by a very intensive patenting race. As a recent study[6] commissioned by the EC[7] shows, patent intensity in ESTs is rapidly rising not only in the usual "triadic block" (US, EU, Japan), but also in emerging economies. The study also points out that perhaps more important than the rapid increase in registered patents in emerging economies is the rapid rise in local ownership of these patents, since about a third of patents registered in these countries are locally owned. Although the analysis is carried out at a relatively general and aggregate level (by energy sectors and country), the authors conclude that competition exists both within and between carbon abatement technologies, implying that IPRs on their own are not what make technology too expensive to access for least developed countries.

However, given continuing uncertainty and the very high stakes, it is not certain that the protagonists of the new big game of the 21st

century will be convinced. An article in the FT, published several weeks after the study had been finished, asserts that mistrust is strong between rich and poor countries with regards to trade in environmental goods and services. The article points not to traditional trade barriers, such as import tariffs, as a key barrier to such international commerce, but rather to suspicion over the protection of IPRs. As an example, the article notes that European companies specialising in areas such as wind power have been highly reluctant to license their technologies to manufacturing plants in China, even though it could greatly reduce costs, because they are concerned that the intellectual property will be stolen.[8]

Surveying the international patent landscape

Thus, it seems that this controversy will continue at least until the UN climate change conference in Copenhagen and probably beyond it. So, there is a need to contain prevailing uncertainties and avoid discussions based on general convictions rather than facts and data. Therefore, it will be necessary to establish neutral and inter-regional "tracks" with high analytical capacities, to analyse in depth the situation and provide more detailed data, covering both the supply (producers of innovative ESTs) and demand (developing and emerging countries) side.

In my personal opinion, this poses a major and urgent challenge for multi-stakeholder cooperation on a cross-border, cross-sector level. There is no single organisation which can carry out this task alone and time is pressing. For this reason, the European Patent Office (EPO) was approached by the United Nations Environment Programme (UNEP) and the Geneva-based International Centre for Trade and Sustainable Development (ICTSD), to start a joint project with following objectives:

- Advance the understanding of the role of patents and related forms of intellectual property protection in promoting access to ESTs, and thus provide useful input into ongoing discussions on technology transfer in the context of the UN Framework Convention on Climate Change (UNFCCC);
- Provide a time series analysis of the impact of patents on access to ESTs in selected technological fields;
- Develop a methodology for the time series analysis of the impact of patents in the development and dissemination of ESTs; and
- Feed into ongoing international discussions and initiatives on ESTs.

Specifically, a detailed patent analysis of the identified energy generation technologies, including the apparatus (e.g. for wind energy this would include wind turbines, support structure, etc.) and in selected cases at component level (e.g. blades, gear) will be carried out. Studying the resulting patent landscape, critical fields will be identified and selected for further investigation regarding licensing conditions.

The project outputs will be disseminated at several levels (selected governments, intergovernmental and broader public). Based on the findings, specific policy proposals may be then elaborated to address the particular identified challenges. Hopefully, this kind of analysis and collaboration can help improve the effectiveness of IPRs in facilitating the development and uptake of ESTs in established and emerging economies alike.

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[1] Dr. Konstantinos Karachalios is a scenarios analyst at the European Patent Office.
[2] Attali, Jacques, "We're heading toward a global Weimar", *Wall Street Journal* (12 February 2009) http://online.wsj.com/article/SB123440150404975395.html (Accessed 14 May 2009)
[3] President's Message in *A New Era of Responsibility – Renewing America's Promise*, Office of Management and Budget (26 February 2009) http://www.whitehouse.gov/omb/assets/fy2010_new_era/President%27s_Message1.pdf (Accessed 14 May 2009)
[4] *Financial Times* (2 Februrary 2009) http://www.ft.com/cms/s/0/795d2bca-f0fe-11dd-8790-0000779fd2ac.html (Accessed 14 May 2009)
[5] "China lowers expectations of Copenhagen deal", *BusinessGreen* (3 February 2009) http://www.businessgreen.com/business-green/news/2235598/china-lowers-ex (Accessed 14 May 2009)
[6] *Are IPR a barrier to the transfer of climate change technology?*, Copenhagen Economics A/S and the IPR Company APS (19 January 2009)

http://trade.ec.europa.eu/doclib/docs/2009/february/tradoc_142371.pdf (Accessed 14 May 2009)
[7] *Are IPR a barrier to the transfer of climate change technology?*, Copenhagen Economics A/S and the IPR Company APS (19 January 2009) http://trade.ec.europa.eu/doclib/docs/2009/february/tradoc_142371.pdf (Accessed 14 May 2009)

[8] "Mistrust between nations hits green trade", *Financial Times* (5 March 2009) http://www.ft.com/cms/s/0/3a8fdebc-09a7-11de-add8-0000779fd2ac,dwp_uuid=728a07a0-53bc-11db-8a2a-0000779e2340.html (Accessed 14 May 2009)

Views

Beyond Pirate Bay – Rachel Chu[1]

On hearing the 17 April decision of a Swedish district court against the founders of the file-sharing website, Pirate Bay, creative industries breathed a sigh of relief. At first glance, the ruling sets a legal precedent against online file-sharing of illegal content. However, this relief is likely to be short-lived – the digital age makes it unlikely that the Pirate Bay verdict will be the windfall to copyright enforcement that content creators are hoping for.

The case underlines the debate about the future of content and copyright in the era of the internet. The outcome of the case as well as its limitations sheds light on the challenges and opportunities creative industries and policymakers now face.

The case

The Pirate Bay site operates by hosting "torrent" links to TV, film and music files held on its users' computers. Although it does not actually host or store files itself, the court ruled that the site breaks copyright law because it facilitates the sharing of proprietary files that are, in many cases, obtained illegally. The four men responsible for the Pirate Bay site were sentenced to one year in prison and ordered to pay damages to the tune of £2.4 million, which will compensate various music and media companies, including Sony BMG, Universal, EMI, Warner, MGM and 20th Century Fox.

However, it is uncertain the extent to which the ruling will impact on illegal file-sharing. First, the verdict may have lost some credibility after the presiding judge was found to be a member of the Swedish Copyright Association and on the board of the Swedish Association for the Protection of Industrial Property.

Even if the decision is upheld, the sentence can be viewed as more of a hard slap on the hand rather than a true deterrent against illegal file-sharing. This is because it merely targets the "infrastructure" of the file-sharing operation and only one of many applications. It will probably affect few people beyond the Pirate Bay owners themselves.

A social contract

The likely limited impact of the Pirate Bay outcome highlights the challenges of copyright enforcement and of pinpointing infringement in the digital age. Creative industries, internet-related firms and policymakers all face mostly unchartered territory when it comes to ensuring copyright protection online.

In exploring new modes of protecting copyright, maintaining the implicit contract that creators have with society – whereby creators offer their creation for society to enjoy and in return, society compensates them – becomes all the more important. Without such an agreement, creators do not have the capacity, and perhaps not the incentive, to make their creation available to society. The central problem with illegal file-sharing is not that it is illicit in itself, but that it discourages the release of creative content to society. Therefore, the key is to ensure that rights holders are compensated for their works.

Various policies are under experiment throughout Europe, including those that seek to enforce traditional modes of copyright

agreements by targeting other components of the online piracy "pipeline", as well as those that explore new models of agreement with rights holders.

The enforcement approach

Within the former group of policies is an approach which targets end-users – the so-called "three strikes" approach – of which France is probably the most well-known proponent. The three-strikes, or Hadopi Bill, which will penalise alleged copyright infringers by disconnecting them from the internet after three misdemeanours, has now been fully approved by the French Parliament.[2] However, the Hadopi Bill's supporters are not finding similar enthusiasm for the policy outside of France – the European Parliament (EP) has rejected including it in the telecoms package currently under negotiation, due to its perceived violation of consumers' rights to access the internet. Instead, the EP has agreed to an amendment that would require a court ruling before a connection could be cut.[3] It is not clear what the fate of the French bill would be, given this amendment, but it is apparent that barring internet access as a penalty for online piracy entails a fierce and, as yet unresolved, debate.

Creative industries are also pushing for a similar graduated penalty in the UK, and are calling for the onus of policing to be put on internet service providers (ISPs). However, ISPs and consumers have labelled this as a "disproportionate response", and the government has said it is leery of disconnecting users' service.[4] ISPs have pointed to new licensing models as a legal alternative to illicit file-sharing.

In Ireland, a slightly less invasive approach is being taken, via the private sector. A major ISP, Eircon, has agreed to block user access to a list of websites that are allegedly facilitating online piracy (for more details, see the news story on p.11). However, since the blocked websites are arbitrarily chosen by media companies, it is not clear how popular the approach will prove to be.

Overall, the policies currently underway across Europe do not seem, at this stage, to provide any greater clarity on how to evaluate and curtail online piracy. However, they do highlight how great a challenge we face in reconciling enforcement of copyright with the digital age.

The remuneration approach

Perhaps more successful than the enforcement approach is the one taken by record companies, which together with entrepreneurs are also experimenting with innovative alternatives that try to find middle ground between illegal access to content and traditional modes of access.

New licensing models and other agreements with rights holders that allow files to be shared legally and compensate creators are garnering huge interest in Europe and worldwide. Music applications like Spotify and Last FM are examples of innovative agreements with rights holders. These sites operate based on remunerating content creators via advertisements and/or a small user fee.

There seems to be hope for developing models like these further. Recent surveys conducted in several European countries, including the UK, France and Sweden, indicate that the majority of young people are willing to pay a monthly fee (i.e. £10) in order to share and download files legally.[5]

"We can do it!"

The digital age creates an unprecedented set of new challenges with regards to the enforcement of IPRs. We should not wave a white flag to piracy, but rather continue pro-actively experimenting with various policies, including some of the ones discussed here. Whatever the policy mix, the outcome should be that sufficient incentive is maintained for future creativity. Otherwise we risk hindering or even halting the rich culture that characterises modern society.

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[1] Rachel Chu is a researcher at the Stockholm Network.

[2] "French net piracy bill signed off", BBC News (13 May 2009) http://news.bbc.co.uk/1/hi/technology/8046564.stm (Accessed 14 May 2009)

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[4] "Net firms reject 'policing role'", BBC News (12 May 2009), http://news.bbc.co.uk/1/hi/technology/8046028.stm (Accessed 14 May 2009)
[5] For more information, see *Music Experience and Behaviour in Young People – Main Findings and Conclusions*, University of Hertfordshire and British Music Rights (Spring 2008) http://www.ukmusic.org/cms/uploads/files/UoH%20Reseach%202008.pdf; *Pirates, file-sharers and music users: A survey of the conditions for new music services on the Internet*, Swedish Performing Rights Society (February 2009) http://www.stim.se/stim/prod/stimv4eng.nsf/Productions/B5CA55F631B0F152C125759E0030BD74/$File/pirates_filesharers_music_users.pdf; and Thoumyre, Lionel, "Pour une légalisation des échanges non commerciaux de contenus culturels sur internet rémunérant les ayants droit" in *Livre Blanc sur le peer-to-peer*, AFUL (October 2005) p. 54 http://www.legalis.net/pdf/P2P%20livre%20blanc.pdf. (All accessed 14 May 2009)

New Research by the Stockholm Network

The Intellectual Property Index for the Information Technology Sector, Updated for 2008-2009

The Stockholm Network has updated for 2008-2009 its index of the national IP protection provided to the high-tech sector (first created in 2006).

The Index positions countries' intellectual property environments relevant to the IT industry on a mathematical scale of 0 to 4. The Index factors in 14 IT-related intellectual property components, including the term of exclusivity, scope and coverage of essential components, strength of exclusivity and enforcement.

Once again, the findings show that, despite the EU's Lisbon Agenda goals, the level of intellectual property protection secured to IT companies at the EU level (2.55) remain significantly lower than in individual member states such as France and Germany, and 35% below that available in the United States (3.92), which tops the table.

Among the EU countries, France leads the list (with a score of 3.67), followed by Sweden (3.39), Germany (3.38), Norway (3.37) and the UK (3.31).

The study found that IT-related IP policies that are particularly lacking at the EU level include:

- Failure to harmonise the patentability of computer-implemented inventions;
- Parallel importation of knowledge-intensive products;
- Preference towards open-standards that are based on open-source An approach that seeks to establish the supremacy of competition rules over IPRs; and
- A relatively high level of piracy.

As a result of its findings, the Stockholm Network calls for the EU to do more to address its intellectual property environment in order to meet the Lisbon Agenda goals.

For more information and to see all of the scores, please download the report:

http://tiny.cc/KQEuR

New Publications

The Process of Intellectual Property Policy-Making in the 21st Century – Shifting from a General Welfare Model to a Multi-Dimensional One – by Dr Meir Pugatch

In this article which appeared in the May 2009 issue of the *European Intellectual Property Review*, the Stockholm Network's Director of Research, Dr Meir Pugatch, explores the various dimensions and processes which influence the formulation of intellectual property (IP) policy-making, taking into account the complex and multi-faceted nature of this field.

The author analyses some of the developments and trends characterising contemporary processes of IP policy-making. Specifically, he discusses the range of inputs directed towards decisions-makers responsible for the formation of IP policies; the decentralisation of the formulation and execution of IP policies; and the influence of global processes, at the expense of "national sovereignty", in making decisions regarding IP policies.

He identifies three major dimensions affecting the process of IP policy-making: social (general welfare), industrial and global.

The social dimension focuses on the net advantages and disadvantages to society from IP policy-making in a particular field. It involves elements such as: the prevention of free-riding; absence of discrimination; educating society towards honouring IPRs; enforcement and operational efficiency; public access to proprietary technologies and products; and prevention of abuse of IPRs.

The industrial dimension examines the manner in which it is possible to maximise the inputs and outputs aimed at creating and exploiting IP assets. In the area of inputs, emphasis is placed on IP creation, i.e. on tracking the existing potential in a particular country in order to translate it to an economic and commercial level. The volume, typology and characteristics of IP assets are important components here. In the area of outputs, emphasis is placed on IP exploitation, i.e. the national ability to commercially exploit the IP assets created by a particular country. The key components identified are: the balance of trade arising from the exploitation of IP assets, the ability to translate IP-related assets into viable products in the market and the effectiveness of enforcement of IPRs in order to maximise the benefits to the economy from IP-related assets.

The global dimension places IP policy-making in an international comparative context, using the state as the basic unit of comparison. The formulation of IP policies in the global context could focus on: the extent to which these policies improve or detract from the competitive advantage of that particular country; the impact of these policies on foreign direct investment and technology transfer in that country; the effect of linking trade policy in the IP field with trade policy in other areas on the economy in that country; and the extent to which the IP policy of a particular country is exposed to negative reactions on the part of trading partners.

Finally, in light of the challenges posed in each dimension, Dr Pugatch provides suggestions as to how a more efficient and more informed IP policy-making process could take place.

News Flashes

Top Stories in the World of IP and Competition

Steps toward a community patent

The European IP Summit, which took place in December 2008, made major strides in the establishment of a Europe-wide Community Patent. The summit established a consensus among experts and business owners - 82% of IP practitioners voted in favour of the rapid implementation of a European Community patent. According to a new study, filing a patent that is valid across Europe reportedly takes twice as long and costs almost five times more than in the US. Businesses are looking to the Swedish presidency in the second half of 2009 to work out the linguistic technicalities currently preventing agreement among Member States for the single Community patent.

http://tiny.cc/UsZEm
http://tinyurl.com/qknyyp

European Commission v. Microsoft, Intel

The European Commission filed a second suit against Microsoft in January, stating that the tying of its web browser, Internet Explorer, to the Windows operating system allegedly violates the EU's anti-trust regime. The Commission released a statement saying that Windows gives the American giant an artificial distribution advantage, which harms competition between web browsers, undermines product innovation and ultimately reduces consumer choice. The Internet Explorer hearing is still underway, with the Commission awaiting a statement of objection from Microsoft. The lawsuit comes just months after the latest of several fines placed Microsoft by the Commission for non-compliance with a 2004 ruling to unbundle its media player from Windows.

In a separate move, the Commission has fined computer chipmaker Intel a record €1.06bn for anti-competitive practices, more than double the fine originally levied on Microsoft in 2004. The Commission found that between 2002 and 2007 Intel had offered several personal computer makers, including Acer, Dell, HP, Lenovo and NEC, hidden rebates if they used Intel chips. It also found that Intel influenced Europe's biggest consumer electronics retailer, Media Markt, to only sell computers containing Intel chips. The fine was welcomed by Advanced Micro Devices, another major chips manufacturer, who filed multiple complaints against Intel between 2000 and 2006.

http://tinyurl.com/pzcoyg
http://tinyurl.com/ohuw3m
http://tinyurl.com/ojx7ak

WTO vs. China

The World Trade Organization (WTO) ruled against China on 20 March 2009, on parts of a dispute brought by the U.S. over copyright infringement. The WTO found that China is in violation of copyright protection for films, music and books that had not been approved for legitimate sale and public auction of counterfeit goods. However, the panel did find the Chinese government has improved its criminal prosecution on copyright pirates. Both parties did not appeal against the decision and Chinese government has promised to strengthen intellectual property rights and promote cooperation of trade relations.

http://tinyurl.com/okw9xb

GSK announces it will begin patent pool

Taking an unprecedented and controversial move, the drug giant GlaxoSmithKline announced in February that it will open up access to its own and other participating companies' patents and trade secrets for the sake of improving treatment in the developing world. GSK plans to place over 500 of its granted patents and over 300 pending applications that are relevant to finding therapies for neglected diseases in a pool, so that they can be explored by other researchers. Furthermore, beginning in April 2009, it plans to cut the price of around 110 pharmaceutical products by an average of 45% in the least developed countries.

Pharmaceutical companies have shown mixed responses to GSK's new venture and it remains to be seen how much intra-industry cooperation the venture will generate.

http://tinyurl.com/oqc2ze

Spanish court cracks down on the commercial aspect of online file-sharing

A criminal court in Spain took a landmark decision on commercial peer-to-peer (P2P) file sharing in early April 2009. Twenty-two year old Adrian Gomez Llorente, who incorporated advertising on his file-sharing site, infopsp.com, was found guilty of making a profit from protected files. The decision was not against P2P in itself, since non-commercial sharing of copyrighted files is legal in Spain and supported by case law. Rather, the decision targeted profiting from file-sharing sites, which is illegal.
This decision is the first in Spain to deal with commercial file-sharing, and although it arguably did not elicit major repercussions there – Llorente only received a six-month jail sentence and €4,900 fine – it could have more potent and widespread implications if it were to impact larger file-sharing lawsuits, like the current PirateBay case.

http://tinyurl.com/r8k5dn
http://tinyurl.com/qgyo5o

Pirates at bay?

The Pirate Bay case, which began in mid-February, has finally reached a verdict, finding the four men behind the website guilty of copyright infringement. The operators of the vastly popular website, which connected millions of users to external websites where they could illegally download music, movies and software, were found to be profiting from advertisements on the site, therefore breaking Swedish copyright laws. The four men have been sentenced to a year in prison and ordered to pay 2.4 million pounds in damages.

However, the case is not over – the four defendants have already announced that they will appeal the ruling, a process which could take as long as two years. And last week, their lawyers announced they may even seek a mistrial, after it emerged that the judge who presided over the trial is also a board member of the Swedish Association for the Protection of Industrial Property (SFIR), a group which lobbies for the extension of patent law and copyrights. He has denied that his link to the group was an undue influence on his decision.

http://tinyurl.com/pan48q
http://tinyurl.com/qqwqqo