

Know IP – The Stockholm Network’s IPR Journal Volume 4: Issue 4 – November 2008

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Commentary

Some declarations just don't make sense – on software and standards – Meir Pugatch and Helen Disney¹

In September this year, the European Parliament considered supporting a written declaration by five of its Members who had asked the Parliament to only use software that is based on open source principles.²

The proposed written declaration (which was originally introduced in May) is based on a few underlying assumptions.³ First, it states that "there are growing disparities in access to information and communication technologies in the European Union", which are "reflected in the establishment of a digital divide" and which "further excludes an already vulnerable population". Second, the declaration argues that these technologies have become "an essential tool" in areas as varied as employment and health. Thirdly, the declaration affirms that "European citizens have the inalienable right freely to access documents and information from the institutions which represent them".

These assumptions are well-founded. Indeed, one can find plenty of data to suggest that there is a gap in the use and access to information and communications technologies (ICT) in Europe. The Stockholm Network's own research suggests that when it comes to Internet usage, broadband penetration and engagement with e-government, the usage and availability of IT technologies across Europe varies quite dramatically. For example, in terms of Internet usage, only five out of nine major EU countries have an average user rate of above 50%, with Sweden having the highest user rate of 75.6%. With regard to broadband penetration rates, the Netherlands and Sweden have 189.4 and 152.6 broadband subscribers per 1,000 inhabitants, respectively, while countries like Spain, Germany and Italy fall well behind with between 80 and 84 subscribers per 1,000 inhabitants.⁴

Solving this technological gap is therefore a worthy and important objective for Europe. So far, so good...

However, the declaration is also troubling, in particular, in the way in which the MEPs propose to solve this problem. The MEPs state that "the use of open source software is one of the most effective ways of reducing this digital divide". The declaration also notes that "this solution (open source), has been established by some Member States in their administrations and delivers significant results". Finally, the declaration "calls on the European Union to take the necessary measures to help finance public research on open source software" and specifically calls for the Parliament "to switch its whole computer network to this type of software".

Before addressing the issue on its merits we would like to note that a statement of this kind ought to be based on evidence. However, since the signatories of the declaration have not provided any empirical data, examples or references to justify this assertion, we have some trouble accepting it as a given fact. Could this assertion be based on the ideological belief or perception that open source software (or, put differently, software that is not protected by IPRs) is more capable of reducing the technological divide among European consumers, than software that is protected by IPRs? The underlying assumption here is that software which is based on IPRs is more 'monopolistic' and therefore will be more difficult to access and use given that the proprietor has the right to control the distribution and price of that software.

However, as far as access is concerned, there is no conflict between software that is protected by a proprietary model (based on the protection of copyrights and patents) and software that is based on an open source model. On the contrary, the evidence shows that use of both of these types of software is complimentary, not contradictory. In 2007 Windows enjoyed a market share of about 94% in the operating system market (followed by Mac and Linux).⁵ However this dominant share (which has remained more or less the same over the years) has not prevented Linux, an open source platform, from enjoying tremendous growth in terms of its users, from 3.5 million users in 1996 to 25 million users in 2006.⁶

In many cases, open-source software also uses proprietary models. For example, MySQL, which

is considered to be one of the more well-known open source applications, has both a public version which is being distributed via a General Public License (GPL),⁷ and a commercial version (MySQL Enterprise) which uses a more standard license that is based on the protection of IPRs.⁸

It is also unfortunate that, as part of the debate about the use of proprietary vs. open source software, there is a tendency to confuse the concepts of 'open standards' and 'open source', and in particular to think that all open standards must by definition be based on open source.

Again this is a mistake, as open standards can be based both on proprietary as well as open-source models.

In the computer and software field one can identify important standards that were created by both voluntary organizations and the collaborative efforts of private companies. For example, the Universal Serial Bus (USB) standard, which today is the most dominant interface standard for different types of hardware (originally developed for computer-related hardware but now also used in other fields, such as cameras, mobile phones and televisions), was developed in 1995 as a result of the joint collaborative efforts of Intel, Microsoft, Philips and US Robotics.⁹ These companies (along with others) subsequently founded a non-for-profit organisation – the USB Implementers Forum – to act as a support organisation and forum for the advancement and adoption of USB technology. De facto standards can also emerge as a form of dominant design. For example, in 1993 Check Point Software Technologies, one of the leaders in the field of Internet security, developed and patented a technology called Stateful Inspection (which was used as the basis for its software Firewall-1), and which went on to become the industry standard for enterprise-class network security solutions.¹⁰

Narrowing the technological gap between the citizens of Europe, as well as increasing their access to information and communication technologies are noble objectives. However, the way to achieve this is certainly not by deciding to impose a moratorium on the use of proprietary-based technologies. Such a decision is akin to a swimmer who decides to improve his swimming record by swimming with only one hand - and not necessarily even the strongest one.

¹ Dr Meir Perez Pugatch is Director of Research at the Stockholm Network, and Senior Lecturer, University of Haifa, Helen Disney is CEO of the Stockholm Network.

² European Parliament, *Written Declaration on the Use of Open Source Software* by Jean Louis Cottigny, Pierre Pribetich, Michel Rocard, Bronisław Geremek and Daniel Cohn-Bendit Lapse date: 25.9.2008, DC\721370EN.doc PE406.962v01-00, <http://www.april.org/files/groupe/institutions/migration-europarl/EN.pdf?q=groupe/institutions/migration-europarl/EN.pdf>,

³ Ibid.

⁴ Stockholm Network. *The Lisbon Agenda Barometer*, 2008, forthcoming.

⁵ The Linux Counter: <http://counter.li.org/>

⁶ XiTi Monitor: <http://www.xitimonitor.com/en-us/internet-users-equipment/operating-systems-august-2008/index-1-2-7-143.html>

⁷ In fact the GPL is also based on a proprietary 'logic' since it is being licensed on the basis of the rights conferred by copyrights, even if these rights are being waived), see <http://www.gnu.org/licenses/gpl.html>

⁸ See MySQL Enterprise license agreement: <http://www.mysql.com/about/legal/mysqlenterpriseagmt.pdf>

⁹ USB Implementers Forum, Inc., <http://www.usb.org/>

¹⁰ Check Point. *Stateful Inspection Technology*, August 2005; protected by U.S. patents number 5,606,668, 606,668, 5,835,726 - System for securing inbound and outbound data packet flow in a computer network, http://www.checkpoint.com/products/downloads/Stateful_Inspection.pdf (Accessed 1 Sept 2008)

Topic of the Month

Top of the league – The challenge of being the best – Paul Healy ¹

The pinnacle of English football, the Premier League, allows its top 20 football clubs to be equal shareholders in a body that is responsible for managing arguably the best league football competition in the world. Live Premier League matches are transmitted to over 600 million homes in 202 different countries², with broadcast rights averaging around £1.1 billion a year.³ Ultimately, the reach and size of the Premier League's brand is colossal, and its progress is exceptional, particularly with respect to how far English football has come since the 1980s. Then, it found itself in a quagmire – riddled with hooliganism, crumbling stadiums and a humiliating five-year ban on English clubs in European competitions. From its creation in 1992, the Premier League has dragged the English game out of this pit, with a radical restructuring focused on marketing the League to a larger domestic, and now global, audience.

Alongside this impressive development, there has also been an increase in significant violations of IPRs, a phenomenon which is becoming commonplace with the advancement of technology. The Premier League's size and influence has made it a victim of its own success when it comes to IPR theft. As the audience of the Premier League grows, so the price of its content increases – and so too does the incentive for IPR violators to steal this content. The nature of IPR infringements faced by the Premier League varies, with content being illicitly obtained through a range of different methods. The Premier League is fighting to tackle infringements in all areas and at its 'IP Theft Roadshow' in March 2008, it identified the major challenges that it faces as well as outlining its strategy for confronting them.⁴

Back of the Internet

One of the major challenges to the Premier League's IPRs has been the increase in content being viewed on the Internet for a low or even no charge. The most prominent examples have been websites such as www.footballon.net and

www.freepremierleague.com, stream live Premier League games from rights-holders such as Sky. In February 2008, a High Court decision granted an injunction against these operators and granted the League substantial damages.⁵ This type of scenario is a clear-cut case of IPR infringement, as operators sell content that is clearly owned by another broadcaster who has paid substantial sums for exclusivity. However, what should have made the decision much easier for the Judge in this case was the fact that these websites were broadcasting games that were prohibited by the Union of European Football Associations (UEFA) 'blocked hours' period, which outlines specific times in which football games are forbidden to be broadcast in order to protect attendances at lower league games (specifically 3pm on Saturdays in England).

A much more subtle and contentious violation of the Premier League's IPRs is the issue of copyright infringement on YouTube.com (now owned by Google). In the case of *The Football Association Premier League Limited et al v YouTube Inc*⁶, the Premier League launched a US class action against the prominent downloading site, alleging extensive copyright infringement on behalf of content creators whose material has been copied without authorisation. The case challenges the concept of 'safe harbour', which details the responsibility of Internet mediators to take down content that infringes copyrights only when the rights-holder has brought it to the mediator's attention, and which is expressed in the Digital Millennium Copyright Act.⁷ The outcome of this case will greatly depend on the ongoing dispute of *Viacom v YouTube*, which challenges similar principles.

It is fitting that Eric Schmidt, the Chairman and Chief Executive of Google, is attributed as saying that "the Internet is the first thing that humanity has built that humanity doesn't understand, the largest experiment in anarchy that we have ever had". Indeed, it is this anarchic nature of the Internet that has attracted so many copyright infringers to its super-highway. However, as technology advances, so too does knowledge about the Internet and how it works, meaning that we are ever closer to understanding what we have created. A promising sign is the fact that particular websites constantly police their

content to ensure that offensive or illegal material is not downloaded.

Red cards

An IPR infringement that may be more commonly known is the example of the numerous public houses across the UK which broadcast football matches that are not usually available on regular TV transmissions. These matches are being broadcast using foreign decoder cards that allow access to foreign transmissions of live matches. The cards are regularly imported from countries within the EU, particularly Greece, and allow receivers to broadcast matches in the UK during 'blocked hours', whilst also offering a price that is substantially less than a regular subscription (the price of the decoder card method costs a pub around £800, whereas a BSKYB subscription costs around £6000 a year).

In order to tackle this practice, the Premier League has enlisted the help of Media Protection Services (MPS), a company which investigates foreign satellite screenings on their behalf. As a result, two cases have been taken to the High Court in an attempt to create a precedent that would allow for this practice to be outlawed. Both cases currently face a similar fate – a referral to the European Court of Justice (ECJ). The first case is against Karen Murphy, a pub landlady who was prosecuted for screening Premier League football via a Greek channel named Nova Supersport in her pub in Portsmouth. When she appealed against her conviction, the court ruled that the satellite signal was broadcast from England and that the fee was payable to the domestic transmitter (Sky) and not to Nova Supersport. However, this case has now since been referred to the ECJ.⁸

In the second case, *Football Association Premier League et al v QC Leisure & others*, the defendants were two suppliers of decoder cards. The Premier League argued that the cards enable people to receive programmes when they are not entitled to do so – contrary to the Copyright, Designs and Patents Act. The defendants, on the other hand, argued that certain provisions of EC law, particularly those that guaranteed the free movement of goods and services, allow them to supply the cards unrestricted throughout the EU.

Indeed, the Honourable Mr Justice Kitchin stated that “equipment becomes an ‘illicit device’ upon its manufacture in any Member State of the Community; a device which is not illicit to begin with cannot change its status by reason of the subjective intention of a dealer as to the place where it is to be used. Indeed, a dealer may not even know where an end user intends to use a device which is supplied by a dealer to another dealer or to an end user”. Owing to this conflict and to the fundamental Community argument to which it pertains, the judge also referred the case to the ECJ.⁹

It is now up to the European courts to decide if the practice of redistributing signals that are intended to be sent from England to foreign broadcasters is illegal. The Premier League makes it clear in the terms of its licence agreements that foreign broadcasters should ensure that no device is knowingly authorised or enabled so as to permit anyone to view any such match outside their particular licensed territory. It also claims that the decoder cards supplied to pubs are often sourced through deception. As a result, the victims are often the lower league teams that suffer fewer attendances because certain members of the public would rather crowd secretly in a locked pub to watch a match that is shown only five hours later on the public broadcast service, than experience the pleasures of a game in person.

Scamming the Fans

Aside from these technologically-aided IPR infringements, the Premier League is also threatened by the more common concern of merchandise counterfeiters, who prey on the demand for the Premier League brand and sell inferior and often unsafe products. Merchandise revenues are essential to England's leading football clubs, with commercial revenues representing just under a third of the income of the so-called 'big four' clubs. For Manchester United, for example, this represents £58m a year.¹⁰ The significance is such that the Premier League has established the Anti-Counterfeiting Program (ACP), which assists the police in detecting and prosecuting criminal IPR infringements and which is managed by the IP Crime Unit in Cheshire.

As well as challenging counterfeit merchandise, the Premier League is also working with the police to stop the practice of ticket-touting that forces fans to pay more money for tickets, and threatens to jeopardise crowd safety rules, designed to keep rival fans apart. Match day sales for many clubs represents a large share of their overall income. For Arsenal, for example, these types of sales represent 51% of its total income, which brings in around £91m per year.¹¹ Although the practice of ticket touting is illegal under the Violent Crime Reduction Act, with a fine for anyone caught of up to £5,000, it remains rife.

Both touting tickets and counterfeiting merchandise highlight the extent to which fans can suffer at the hands of IPR violations. In both examples, fans' health and safety are put at risk while IP criminals take advantage of the commitment and passion of honest football fans.

Conclusion

It is easy to be under the illusion that because the Premier League member clubs make large profits they should accept IPR violations. However, to do so would ignore the vast sums of money also being made by the violators. Whilst footballers are famed for earning a handsome wage it should not be forgotten that the salary they receive is linked to the product that they generate, whereas many IP violators are earning income from a product that they had no involvement in making. Premier League clubs are able to spend portions of their revenues on improving their products, on community projects and developing and training young footballers at grass-roots level – unlike IP violators.

As highlighted earlier in this article, IPR infringements often increase as demand for a

product grows and consequently, the costs of those IP violations become greater. The considerable size of the Premier League means that it is now a global brand and, as a result, violation of its IPRs is becoming a global industry. The example of football emphasises the importance of a flexible legal system for protecting IPRs that provides rules and instruments which can be adjusted based on the scale and extent of any violations.

¹ Paul Healy is a Policy Analyst at the Stockholm Network.

² BBC News 'Premier League going global' (07/02/08). See

http://news.bbc.co.uk/sport1/hi/football/eng_prem/7232378.stm (Accessed on 27 August 2008)

³ Jones, D. (ed.) *Deloitte Football Money League* (February 2008) p. 31

⁴ For more information on the IP Theft Roadshow visit:

<http://www.lacors.gov.uk/lacors/NewsArticleDetails.aspx?id=18728> (Accessed on 27 August 2008)

⁵ The Premier League employ IP protection firm NetResult to monitor the internet searching for illegal streamings. For information see <http://www.nr-online.com> (Accessed on 28 August 2008)

⁶ For information see the dedicated website <http://www.youtubeclashaction.com> (Accessed on 28 August 2008)

⁷ For more information on the concept of 'safe harbour', see *Free Use or Fair Use? The Role of Internet Mediators in Protecting Intellectual Property Rights* by David Torstensson et al., Stockholm Network 2008.

⁸ The Publican 'Murphy foreign satellite case heads to Europe' (26/06/08). See

<http://www.thepublican.com/story.asp?storycode=60258> (Accessed on 28 August 2008)

⁹ Times Online 'Judge refers Premier League case to Europe' (24/06/08). See

<http://business.timesonline.co.uk/tol/business/law/article4204119.ece> (Accessed on 28 August 2008)

¹⁰ *Deloitte Football Money League* p. 7

¹¹ *Ibid* p. 10

Experts' Corner

IPRs and SMEs: Does public policy adequately support small firms on IPR matters? – Alfred Radauer¹

Back in late 2006 I was asked to write an article for a previous edition of *Know IP* (Vol. 2, Issue 10) on the usage of intellectual property rights (IPRs) by small and medium-sized enterprises (SMEs).² The article was set against the backdrop of a benchmarking study we were contracted to perform by the European Commission (DG Enterprise and Industry), as part of their PRO Inno European initiative. The work was carried out by the Austrian Institute of SME Research, leading a research consortium of more than 30 institutions in the EU-27, Australia, Canada, the U.S. and Japan. Now, with the study finished, and with us currently carrying out further and more country-specific IPR service analyses in Switzerland and Germany for the respective authorities, it is time to recap the main results of the EU-wide study.

To recall: In 2006, the European Commission decided to create a catalogue of support services offered at the national and regional levels for SMEs in the field of IPRs. The study had been set against the background that there had been a steady rise in the general use and the economic significance of IPRs, yet SMEs – despite being considered the backbone of the European economy – seemed to make, if compared to larger enterprises, rather little use of the IP system. Reasons usually given for such behaviour were the high costs of filing and maintaining IPRs (especially with respect to patents), enforceability issues, the time it takes until rights are granted (once again, especially with patents) and limited understanding on the side of the SMEs of the functioning of the IP system. This situation could thus be considered to constitute a market failure, which would as such, require policy intervention, i.e. the introduction of respective support services.

The core focus of the study was to gauge what support services existed to tackle this issue, and whether they are performing successfully. Over the time frame of 2006-2007, we identified more

than 280 IPR support services (either explicitly directed at SMEs, or implicitly significant for this user group, as evidenced by a larger share of SME users) and subjected more than 70 of them to a thorough benchmarking analysis (which assessed whether the services on offer were run efficiently and whether they had a measureable and desirable impact on the SMEs). Eventually, 15 case studies on different services were conducted with the aim of illustrating 'elements of good practice' for policymakers who may wish to use these as blueprints for setting up IPR support services. Taken together, more than 120 experts (IP professionals, service stakeholders and so on) and around 630 SME users of IPR support services have been interviewed.

The most prominent observations are:

- The performance of the present IPR support system is highly ambiguous. Despite a large number of identified services, relatively few services can be described as high performers. Some 'islands' of well-designed programmes do exist, but the majority of measures do not seem to have a strong track record.
- There is thus little evidence to support a big issue of 'best practices' or 'good practices'. At the same time, however, there is ample evidence for compiling 'elements of good practice', understood as elements in the design or execution of those services whose characteristics and qualities are 'generic', implying that their adoption runs a high probability of success. Accordingly, there is a set of elements of good practice where each of the elements can be found somewhere 'out there', however, not the set as a whole. Issues often arise with respect to proper resources endowment, visibility of the services to SMEs, and the coverage of different IPRs and informal IP protection tools.
- Successful services are usually not focused on patents alone, but cover a broad range of formal IPRs and informal IP protection practices. They focus very much on IP management issues, rather than on only increasing, for example, the number of patent filings by SMEs; they try to integrate IPR issues into overall innovation management. This broader approach – the rationale of which I have

extensively elaborated on in the 2006 *Know IP* article – is, however, only sufficiently considered in the design of a small number of services.

- A large share of services is offered by national patent offices, which are trying to become fully-fledged service providers for SMEs. This has problematic consequences, as patent offices are often not known to SMEs as primary service providers, and as such, IP support is thus often provided by organisations different to those which usually extend support in more general innovation matters (e.g. technology development agencies). There is a clear need to foster cooperation and activities between IPR institutions (like patent offices and patent information centres) and other actors in the innovation support system (most prominently, the already-mentioned technology development agencies). Otherwise, these two worlds (patent offices on one side, agencies on the other) form separate universes of their own. Moreover, it is the agencies who should act as entry points to the IPR system, not only because they possess considerable contact databases of SMEs, but they are also likely to understand the business context of firms better than patent offices (again due to experience) and may take a more neutral stance towards various methods of protection and/or appropriate IP.

- There is a large bottleneck in the availability of a sufficient number of qualified staff to operate IPR support services. The complexity of the subject of IPRs calls ideally for the availability of staff with combined technical, legal and business know-how (especially within the specific industries the individually supported SMEs are operating in), and it is particularly this business aspect that seems to be frequently missing in the respective job market segments. There is thus a clear need to increase the supply of qualified IPR experts beyond that of the number of already-available patent attorneys (who are trained mainly in the legal and technical sides of IPRs). Frequently, the lack of respective

educational offerings at technical universities (as early as undergraduate courses) and business schools has been mentioned as limiting factors in this context in the interviews.

There are also a range of other issues that need to be addressed, such as the interaction between public and private IPR service providers (there should not be displacement effects of well-functioning private market actors by public offerings), the frequent lack of an evaluation culture for many services and further individual success factors for generic types of IPR services (such as for patent database search services), which are discussed further in the study. However, all in all, and despite some shining examples, one can clearly conclude that considerable challenges lie ahead for those policymakers and institutions who wish to implement a successful system of IPR support services for SMEs. Currently, public policy does not adequately support SMEs on IPR matters. This must be resolved as it is likely that such an effective and efficient support system is needed in the modern economic environment.

The study *Benchmarking National and Regional Support Services for SMEs in the Field of Intellectual and Industrial Property* can be downloaded free-of-charge at the website of PRO INNO Europe, under the publications section (INNO Appraisal heading): www.proinno-europe.eu. Printed copies may be ordered, as long as they are still in stock, from the Austrian Institute for SME Research (office@kmuforschung.ac.at)

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² Please see: <http://www.stockholm-network.org/downloads/publications/d41d8cd9-Know-IP%20vol.2%20issue%2010%20-%20November%2006.pdf>

Views

China & the Olympics: Was it gold for IPRs? – Sloane Ebersole¹

In March 2008, six months before the start of the Beijing Olympics, it emerged that a number of computer games on the official Olympics website were in fact illegal copies of existing games. According to the game developer Cadin Batrack, one game in particular, *Fuwa Fight the Winter Clouds*, appeared to be nearly identical to his own *Snow Day*. The only discernible difference appeared to be the graphics.² Moreover, Batrack claimed that two other games on the site also appeared to be copies of games made by another developer.³ While *Fuwa Fight the Winter Clouds* was later taken off the site,⁴ the damage to China's reputation had been done.

This incident is illustrative of the concern and criticism that have surrounded China over the past few years – its lack of intellectual property (IP) protection is a sore point with its trading partners in the developed economies. For example, in 2003 an astounding 95% of films available for purchase in China were pirated.⁵

With the build-up to the Beijing Olympics, the pressure on China to clean up its act had been increasing, and not only with respect to IP. Only in June 2008, for example, when a Chinese official made some comments about Tibet, did the International Olympic Committee (IOC) issue a rare rebuke against China, accusing it of politicising the Olympics.⁶ This is the sort of incident that the Chinese were desperate to avoid – they wanted the Beijing Olympic Games to be nothing but perfect (and impressive they were), and this included ensuring the protection of Olympics-related IP.

According to the State Intellectual Property Office for the People's Republic of China (SIPO), there are four main categories for Olympics-related IP. The first category includes the main international Olympics symbols such as the five Olympic rings, the Olympic emblem and the Olympic anthem (which only the IOC is allowed to use). The second category involves the rights to the processes of conducting the Olympics, ranging from bidding rights to rights for hosting

the Olympics. The third category is the rights of the National Olympic Committees, which include their names and symbols. IOC rules stipulate how these symbols can be used. Finally, the fourth category is for other organisations that have obtained rights.⁷

What makes the Olympics-related IP special is that it involves “both the traditional IPR types, copyright, industrial property, trade secret and technology know-how, and the emerging ones, domain name and database”.⁸ If China could show that it were capable and willing to protect Olympics-related IP, it would act as a sign that China has the ability to follow through in other areas, such as the Trade Related Intellectual Property (TRIPS) agreement, and enforcing other international norms.

China did appear to be taking serious steps towards protecting Olympics-related IP, as well as IPRs in general. On 5 June 2008, for example, the State Council released its Compendium of China National Intellectual Property Rights Strategy in which China promised to increase its level of IP use and protection by 2020.⁹

The Chinese government has also been bringing charges of copyright infringement against more people, especially with respect to Olympics merchandise. For example, the Chinese government seized over 500 trunks with the mascots for the 2008 Olympics and the Olympic emblem.¹⁰ It even brought charges against a restaurant for having napkins that bore 'Wish the 2008 Beijing Olympics success' on them, as this had not been approved by the Chinese organising committee.¹¹ These are indeed encouraging developments, especially for a country that is not exactly known for being tough on IP infringement. The Assistant Director-General of the World Intellectual Property Organization (WIPO), Wang Bin Ying, even stated that China's IP protection in preparation for the Olympics was largely very effective and that China may even be a good role model for other countries that will host the Olympics in the future.¹²

When considering China's recent history with the international community there are other considerations to bear in mind. For example, although China signed the TRIPS agreement in

1994,¹³ it is still being criticised for failing to adequately enforce it. It would also seem that it only started to enforce IP laws after it won the bid for the 2008 Olympics. Is China's recent effort to promote IPRs a permanent change of direction, or does China have no intention of further improvements now that the Olympics are over?

It remains to be seen if China is indeed going to become an IP-based nation. What the Olympics has shown, however, is that China certainly has the *ability* to strictly enforce international IP norms. What is less certain is the direction that China will take in the future, both in IP and across the board.

¹ Sloane Ebersole is a former intern at the Stockholm Network.

² Thompson, M. 'New Beijing Summer Olympic Event: Software Piracy'. *Ars Technica: the art of technology* 12, (March 2008).

See: <http://arstechnica.com/news.ars/post/20080312-new-beijing-summer-olympics-event-software-piracy.html> (accessed 31 July 2008)

³ Ibid.

⁴ Ibid.

⁵ McConnell, P. W. 'Battling pirates in China: The effective role for the U.S. in fighting film piracy in China'. *Gonzaga Journal of International Law*.

See: <http://www.gonzagajil.org/content/view/177/26/> (accessed 31 July 2008)

⁶ Associated Press. *China rebuked by Olympic Committee*. (26 June 2008)

See:

<http://edition.cnn.com/2008/WORLD/asiapcf/06/26/olympics.politics.ap/> (accessed 31 July 2008)

⁷ SIPO. *What are Olympic IPRs?* (10 April 2008) See: http://www.sipo.gov.cn/sipo_English/specialtopic/IPManual/200804/t20080410_372603.htm (accessed 31 July 2008)

⁸ Ibid.

⁹ Intellectual Property Protection in China. *Compendium of China National Intellectual Property Strategy issued*. (12 June 2008)

See:

http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=214475&col_no=929&dir=200806 (accessed 31 July 2008)

¹⁰ SIPO. *Newsletters Regarding IPR*. (16 June 2008).

See:

http://www.sipo.gov.cn/sipo_English/news/iprspecial/200806/t20080616_406756.htm (accessed 31 July 2008)

¹¹ Yuankai, T. "Symbol of Protection". *Beijingreview.com* (18 January 2007).

See: http://www.bjreview.com.cn/olympic/txt/2007-01/16/content_52873.htm (accessed 29 July 2008)

¹² 'WIPO official: China's Olympic IPR protection is efficient.' *China Intellectual Property Lawyer* (17 June 2008).

<http://www.ciplawyer.com/en/article.asp?articleid=843> (accessed 31 July 2008)

¹³ World Trade Organisation. *Agreement on Trade-Related Aspects of Intellectual Property Rights*

See:

http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm (accessed 31 July 2008)

Event

Evidence-Based Policy in the Field of Intellectual Property Rights: Using Cutting-Edge Research to Improve Intellectual Property Policymaking – Stockholm Network Workshop

On 22 September 2008 the Stockholm Network hosted a one-day workshop in Paris, France entitled *Evidence-Based Policy in the Field of Intellectual Property Rights: Using Cutting-Edge Research to Improve Intellectual Property Policymaking*. The workshop brought together policymakers, academics and Stockholm Network

researchers to discuss some of the burning issues facing the IP community. The following is an outline of the workshop and the presentations and papers given.

Helen Disney, CEO of the Stockholm Network, and Douglas Lippoldt, Acting Head of Division, Trade and Agriculture Directorate, OECD opened the workshop, outlining the objectives of the IP Academy, most notably to raise awareness and to increase the knowledge and understanding of policymakers about different IP issues, as well as to contribute to an informed decision-making process regarding specific IP-related policies. Helen Disney also noted that the IP Academy begun as a joint initiative between the Stockholm

Network and MSD Israel and is now being expanded to the European arena.

Mr Lippoldt explained why the OECD attached considerable importance to the issue of IPRs both in terms of the research that is being conducted by the OECD staff and with regard to the implications of IP policies to the global economy, not least in the context of OECD countries.

The keynote presentation was given by Dr Meir Pugatch, Stockholm Network Director of Research. He explored how, and indeed whether, policymaking in the field of IPRs could to a greater degree be based on evidence. He focused on the extent to which policymakers and stakeholders have really debated how research-based evidence can be used in the field of IPRs, given the challenges of globalisation and the increasing complexity and importance of the IP field to the modern economy. As an example of a guide to evidence-based policymaking, the presentation referred to a 2006 report by the House of Commons Science and Technology Committee, *Scientific Advice, Risk and Evidence Based Policy Making*.

The second presentation was given by Douglas Lippoldt of the OECD and concerned the changing nature of OECD economies, and in particular, the changing nature of economic growth. He noted that the OECD is researching the role of IPRs as part of the OECD's Growth Project which has identified information, human capital, innovation and entrepreneurship as being an essential part of the growth process of modern economies. Mr Lippoldt has examined the relationship between levels of IPR protection and economic activity through rates of Foreign Direct Investment (FDI). His study concluded that IPRs play a key role in the ability of rights-holders to capitalise on their innovation and that there was a positive relationship between IPRs, FDI, trade, R&D and innovation.

Dominic Guellec, Principal Administrator, Economic Analysis and Statistics Division, Directorate of Science, Technology and Industry (DSTI), OECD, gave the day's third presentation. Mr Guellec's project seeks to better understand what actually happens to knowledge assets that are being protected by IPRs, i.e. to what extent they are being used in the market and specifically

the extent to which collaboration and transfer of technology is being secured by the IP system. In order to understand this issue, his research focused on licensing activities specifically via a survey of licensing activity in Europe and Japan. He found that the value of cross-border royalty and license receipts has grown tremendously over the past two decades and that activities that are based on the licensing-out of proprietary technologies were widespread both in Europe and Japan.

Finally, Dr Christina Sampogna, Administrator, Biotechnology Division, DSTI, OECD focused on the extent to which collaborative mechanisms for managing IPRs may be used in the field of biotechnology. The presentation explored numerous ways in which IPR collaborations can take place, including patent pools, IP pools, IP sharing agreements, and IP clearinghouses and exchanges. In her conclusions Dr Sampogna found that while varied, collaboration in IPR management faces a number of challenges. A few examples include: collaborations are not standards driven and core IPRs may have already been licensed exclusively. The OECD will be holding a workshop on these and related issues in London in the spring of 2009.

The final part of the day's proceedings was a panel discussion of the issues addressed in the preceding presentations. Led by Dr Pugatch and conducted under Chatham House rules, it was made up of the following workshop delegates and presenters: Mario Cervantes, Principal Administrator, Innovation and Technology Policy, OECD; Denis Dambois, Administrator, Public Procurement and Intellectual Property Unit, DG Trade, European Commission; Mr. Boris Azais, Director, Centre for European Government Affairs, MSD (Europe); Dr Yoav Shechter, External Affairs Director, MSD Israel; and Dr Christina Sampogna, Administrator, Biotechnology Division, DSTI, OECD.

The panel focused on the key question of whether and how the policy-making of IPRs can be based on a more structured, evidence-based process. While all the speakers identified the fact that the political dimension has an overwhelming dominance on the policy outcomes in the field of IPRs (as indeed in other areas) there was wide-

ranging agreement on the need to amplify the role and contribution of evidence-based practices in the field of IPRs.

Three points were emphasised.

First – the need to have more cutting edge research, as well as the need to flesh out existing research, that can provide us with empirical answers to existing questions in the field of IPRs.

Second – to make the evidence-based dimension more inclusive in the IP policymaking process, i.e. to ensure that such research and findings are not being overlooked or ignored by decisions makers.

Finally – there is a greater need for transparency and collaboration between different institutions and decision-making bodies when working on policies that affect the IP system.

New publications

Courting Confusion? Where is Canada's Intellectual Property Policy Heading? – by David Torstensson and Dr Meir Pugatch

David Torstensson and Dr Meir Pugatch discuss and analyse the pharmaceutical IP environment in Canada. The paper describes the changes that led Canada – which until the 1990s was an 'outlier' among developed countries in terms of the level of protection provided to pharmaceutical IPRs – to go ahead and strengthen its pharmaceutical IP environment, making it much more aligned with the environments of other developed countries such as the US, the EU Member States and Japan.

Still, the paper suggests that this shift has not yet been completed and that Canada is still undergoing some significant internal debates about the future of its pharmaceutical IP landscape, not least in the context of its judicial system.

To download the publication, please visit:

<http://tinyurl.com/5qgmfa>

If It Ain't Broke, Don't Fix It – A Discussion Paper on the benefits of the Voluntary Market-Driven Approach to Innovation - by Dr Meir Pugatch

In this paper the Stockholm Network's Director of Research, Dr Meir Pugatch, explores the

nature, process and characteristics of technological innovation. Using real world examples from different sectors of the economy the paper analyses the close relationship and synergies which take place between innovation and the creation and uses of knowledge, as well as the role that IPRs play in this process.

The paper also looks at the broader theoretical issue of market-driven innovation versus practices based on central planning and compulsory use of knowledge (such as via compulsory licenses).

It finds that, on the whole, the current market-driven innovation model is far from being 'broken'. On the contrary, innovation is flourishing. From innovations that are based on collaborations, convergence, strategic alliances and standard-setting through to more traditional in-house R&D, the market today is more innovative than ever.

Nevertheless, the paper notes that, recently, some policy-making bodies in Europe and at the global level have embraced the notion that the innovation model needs 'fixing'. This belief has been expressed at various levels; from cases involving individual companies or sectors, to policy strategies that aim to provide global solutions.

The paper concludes that policy-makers should exercise caution when considering pursuing compulsory, non-market driven models of innovation. Specifically, when advocating an innovation process that is guided, and to some extent directed, by a top-down approach which

relies on the compulsory use and transfer of knowledge, policy-makers must ask themselves one simple question: is this decision based on an understanding of the realities that govern the innovation process, or is it based on a vision of how the world should look and consequently of how innovation should take place?

To download the publication, please visit:

<http://tinyurl.com/5dtarv>

News Flashes

Top Stories in the World of IP and Competition

UK Signals Tough Stance on Online Copyright

The UK Intellectual Property Office (UK IPO) has recommended matching penalties for online and physical copyright infringement. Such a move could lead to courts increasing the maximum fine for online infringement from £5,000 to £50,000, the maximum levied at physical infringement.

The recommendation is part of a UK IPO consultation concerning Recommendation 36 of the *Gowers Review*, which examined penalties for copyright offences. The review called for increasing the penalties for online infringement: “The intention and impact of physical and online infringement are the same. Crimes committed in the online and physical world should not be subject to different sentences”.

<http://tinyurl.com/6hzq9l>

Bang on

World-famous European fine foods, entitled to the protection of geographic indications, ranging from foie gras to Parma ham could soon be welcoming a new member to their elite group – the great British banger. The British Government has asked Brussels to give legal protection to the traditional Cumberland sausage, meaning only local makers of the coiled banger would have the right to use the name. The special European status – which has generated legendary fights

over other foods – would bolster Britain’s modest roster of 37 legally protected foods. The bid follows a 12-week consultation by the Department for the Environment, Food and Rural Affairs (Defra) on whether the sausages merit their proposed elevation.

<http://tinyurl.com/6jcw7l>

Biotech companies hit by patent ruling

Biotechnology companies that have staked lucrative claims to parts of the human genetic sequence were dealt a blow by the UK High Court in a decision that may set a higher threshold for intellectual property protection. In the mid-1990s, Human Genome Sciences (HGS) applied for a patent on a disease-linked protein called ‘neutrokine-alpha’, without specifying its function, the conditions it caused or the diseases it might treat. In the first UK case to examine how bio-informatics affects patentability, Mr Justice Kitchin invalidated HGS’s UK patent on ‘neutrokine-alpha’, ruling the company had failed to identify any practical use when its application had been filed. His ruling is a blow to HGS (which has been working on a ‘neutrokine-alpha’ antibody to treat arthritis and lupus), and a boost to Eli Lilly (which is also developing an antibody to ‘neutrokine-alpha’).

<http://tinyurl.com/5p2wh9>

ECJ’s parallel trade ruling

Pharmaceutical companies will have to tread very carefully if they try to limit supplies to low-cost markets in Europe in order to prevent their

drugs being exported on to higher-cost countries. The European Court of Justice said that if a dominant company refused to meet 'ordinary' orders for medicinal products in order to stop 'parallel exports', it would be breaching EU competition law.

<http://tinyurl.com/6kmwfz>

US Congress hastens through flurry of IP legislation before departure

In the waning days of this congressional session in the United States, US lawmakers are passing a flurry of intellectual property-related bills.

One of the bills awaiting President Bush's signature would create a position of a top intellectual property official in the White House. Another bill would add protection to works whose rights owners are unknown, and a further bill would extend negotiations on Internet radio royalties.

The first bill, S 3325, the Prioritizing Resources and Organization for Intellectual Property (PRO-IP) Act of 2008, passed the Senate Friday and the House of Representatives on Sunday.

Under the bill, sponsored by Senator Patrick Leahy, a Vermont Democrat, copyright registration would not be a prerequisite to a criminal action, and a civil infringement action could be brought regardless of errors in registration unless those errors were made knowingly.

<http://tinyurl.com/3twsm7>

POs to share work files

The world's five largest patent offices – Europe, Korea, China, Japan and America – have signed up to a plan to cut waiting times for patent applications by increasing work sharing. Following the meeting in Korea, the offices produced a shared vision aiming to: (1) eliminate unnecessary duplication of work, (2) enhance patent examination efficiency, and (3) guarantee the stability of international patent rights.

Officials highlighted figures showing that every year up to 250,000 patent applications are being filed at two or more of the five offices. This leads to redundant searches and examination work, as well as slowing down the processing of applications. In an effort to solve this problem each office will begin work on two projects designed to standardise procedures. The results from these ten projects will hopefully benefit all five patent offices.

<http://tinyurl.com/6cnx5l>