



Know IP - Stockholm Network Monthly Bulletin on IPRS

The Stockholm Network launches a new Intellectual Property and Competition Programme

This year, the Stockholm Network is launching its new *Intellectual Property and Competition Programme*. The programme will increase awareness of different themes concerning the protection of intellectual property rights and a more vigorous competition environment in Europe. It will be academically managed by Dr. Meir Perez Pugatch, of the University of Haifa, and a consultant on intellectual property policy and commercialisation of knowledge assets.

Intellectual property is rapidly becoming one of the most important policy-making fields in Europe's knowledge-based economy, as well as globally.

The policy-making of intellectual property rights ultimately deals with very unique commodities – knowledge and information. The design and establishment of different forms of intellectual property (patents, copyrights, trademarks, trade-secrets etc.) have a profound effect on the innovation, competitiveness, market access and investment climates of different countries, including European Union members.

The *Intellectual Property and Competition programme* will approach different aspects of intellectual property-policy making, including fields of trade-policy, industrial policy and business strategies. This will be achieved by engaging in a wide set of activities, such as the organisation of topical workshops and round tables, seminars, media outreach, building IP networks and selected publications.

As part of our activities we also very pleased to flesh out major

developments in the field of intellectual property via our electronic bulletin: **Know Intellectual Property (Know IP)**. This monthly service will be circulated electronically (and later in print) to the benefit of the public, free of charge. It will focus on notable developments in the field of intellectual property taking place both in Europe and outside it.

Finally, the Stockholm Network's *Intellectual Property and Competition programme* by no means operates in a vacuum. Today there are many high-quality intellectual property projects, focusing both on sector-specific issues and themes across the board. We do not intend to compete with such projects but to complement them.

Our contribution - we hope - is to provide a market-oriented perspective on the field of intellectual property. We advocate practical and pragmatic solutions based on attempts to use the existing system rather than replacing it. We believe that by floating out different elements concerning intellectual-property policy-making - including conflicts and controversies - it will be possible to promote market-oriented solutions to current challenges in the field of intellectual property.

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Microsoft and the compulsory licensing of IP

The importance of protecting knowledge and invention is recognised by the intellectual property system. Intellectual property ("IP") rights are potentially powerful exclusive legal rights that are awarded in order to encourage investment in innovation. The risk of funding research into new products is intended to be offset by the rewards that can potentially be earned by means of IP protection and exploitation.

There may be cases in which companies with the power to exercise IP rights may use this power to affect the market in an anti-competitive way. Any such exercise of IP rights may attract the interest of the authorities that are responsible for overseeing the smooth and efficient functioning of markets - in Europe, the European Commission.

Last year, the European Commission concluded a long investigation into the activities of Microsoft Corporation ("Microsoft"). The *Microsoft* case is one of the most striking examples of the tension between two fundamental policy objectives: (1) the effective protection of IP rights and (2) the maintenance of conditions for the functioning of competition in economic markets.

Microsoft had refused to supply important computer interoperability information to its competitors. The Commission charged Microsoft with unfairly leveraging its market power in the computer software market, in contravention of European competition law. However, in its defence, Microsoft claimed that the interoperability information was its own valuable IP, which it was entitled legally to use as it saw fit. Microsoft and its supporters also argued that any decision to force Microsoft to license its IP would have an adverse affect on

the incentives of high-tech companies to innovate in Europe.

There have been very few instances in Europe of a company being ordered by the Commission to provide access to its IP to third parties, because of a breach of competition law. In this case the European Commission went one step further. It made an order that effectively compelled Microsoft to disclose the computer interoperability information to its competitors, even if this meant that Microsoft was forced to license its IP. The Commission wished to ensure that the market for computer software was opened up to others, so as to lessen Microsoft's dominance. To that end, it ordered the compulsory licensing remedy to take effect forthwith, even before Microsoft's appeal from the decision had been heard.

Microsoft asked the Court of First Instance of the European Communities to put this remedy on hold pending their appeal, but in late December 2004, this request was denied by the President of the Court of First Instance. It has just been announced that Microsoft has decided not to appeal this specific aspect of the case. Instead, Microsoft has said that it will be working with the Commission to implement the proposed remedy.

Nevertheless, Microsoft's appeal on the main part of the European Commission's decision continues. The case is significant, because it may provide clearer guidance on the circumstances when competition law can bite on the exercise of IP rights. IP rights-holders, particular those with an interest in computer technology, will be watching carefully when the European Court of Justice rules on Microsoft's appeal in 3-4 years time.

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New report suggests EU-US innovation gap not reduced despite Lisbon Agenda

The European Commission has recently published (January 2005) its annual **European Innovation Scoreboard (EIS) 2004**.

The EIS reports aim to measure and assess the annual progress of innovation in Europe, as part of the Lisbon Strategy. In 2000, the European Council established the strategic goal for the European Union to become the most competitive and dynamic knowledge-based economy in the world by 2010. Innovation was recognised to be at the core of the Lisbon strategy.

The EIS reports measure innovation by looking at 20 indicators, including patents, based on four major categories.

- Human resources for innovation (5 indicators);
- The creation of new knowledge (4 indicators);
- The transmission and application of knowledge (4 indicators); and
- Innovation finance, output and markets (7 indicators).

The EIS 2004 report concludes that the innovation gap between the EU and the US has not been reduced despite the Lisbon Agenda.

Based on a set of comparable data for 12 indicators (including patenting trends), the EIS report finds that the US and Japan are still well ahead of the EU average and the vast majority of Member States. The US leads Europe in nine out of eleven indicators, which are used to compare innovation performance between the two.

The EIS 2004 report suggest that EU's innovation performance has been relatively constant since 1996, whereas the US and Japan have further improved, thus widening the

innovation gap. However, in terms of country-specific measurements, the leading EU economies are ahead of the US for nine out of 12 indicators and ahead of Japan for seven out of 11 indicators. Inside Europe, Sweden and Finland are the most innovative countries, while Germany and Denmark perform well above the EU average.

According to the report the main challenges to be addressed in order to catch up with the US are: weaknesses in patenting, the lower qualification level of the workforce, and lower business R&D.

The gap in the patenting trends, broadly measured as the ratio of the number of patent grants per person, between the EU, the US and Japan is a serious cause of concern (a gap of 50% was identified between the US and the EU). It should be noted, however, some experts criticise measuring patenting as an indicator of innovation and knowledge creation.

Links:

http://trendchart.cordis.lu/scoreboards/scoreboard2004/eis_2004.pdf

Country indicators:

<http://trendchart.cordis.lu/scoreboards/scoreboard2004/EIS%202004%20Annex%20%20Country%20pages.pdf>



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India's new Patent Ordinance

The Patents Amendment (Ordinance), 2004 promulgated by the President of India on 26 December 2004 was the last and final step towards achieving complete TRIPS compliance by India. The main changes brought about by this ordinance are highlighted below:

Product Patents for Pharmaceutical Inventions

In order to spur the growth of a domestic generic pharmaceutical industry, India provided in its 1970 patent regime that applications pertaining to pharmaceutical inventions would merit only 'process patent' protection i.e. only the process of making the drug would be protected and not the drug itself. This section has now been repealed, with the result that like all other inventions, pharmaceutical inventions would also be eligible for product patent protection. This is perhaps the most momentous change brought about by the present ordinance. It is expected that with this change, domestic pharmaceutical companies would invest more money and resources into R&D—rather than restricting themselves to merely producing generic versions of existing drugs.

Patentability of Computer Programmes

While maintaining that a 'computer programme' per se is not patentable, the ordinance provides that when such a programme has some 'technical application to industry or is 'combined with hardware', it becomes patentable. The earlier provision (which merely stated that a 'computer programme per se' was not patentable) was subject to differing interpretations by different examiners. While some patent examiners permitted applications for computer programmes that demonstrated a 'technical effect', others found all such computer programme applications to be non-patentable. It is hoped that with this clarification, the

practice of the patent office in this regard would become consistent and uniform.

Other provisions:

Apart from the two main provisions above, some of the other changes effected by the ordinance are:

- i) Introduction of a mechanism for 'post grant' oppositions i.e. a mechanism to oppose patents within a specified period after the grant. However, the ordinance still retains the earlier pre-grant provisions—though in a considerably more streamlined form.
- ii) While the earlier regime provided that applications claiming the 'new use' of a known substance were not patentable, the present ordinance clarifies this further by adding the word 'mere'—i.e. only the 'mere new use' of a known substance would be prohibited. It is suggested that under this amended provision, some applications claiming 'new use' may be permissible.
- iii) Introduction of section 92A to give effect to the Doha Declaration: This section provides for the issuing of a compulsory licence so as to facilitate the supply of drugs to countries that do not have adequate manufacturing capabilities.

Conclusion

The changes brought about by the ordinance mark a watershed in Indian patent law history. However, it should be noted that this ordinance is a temporary legislative measure and will cease to operate at the expiration of six weeks from the reassembly of the Parliament. It remains to be seen whether this much publicised and politicised legal instrument will be ratified by the Parliament in its current form.

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European Commission's new strategy for the enforcement of intellectual property rights in third countries

The European Commission has adopted a new strategy for the Enforcement of Intellectual Property Rights in Third Countries. The Strategy was first introduced in June 2004 and officially announced in October 2004 by the former Trade Commissioner, Pascal Lamy.

The Strategy aim to more vigorously protect the interest of European rights holders in third countries. It proposes to identify priority countries where enforcement actions should be concentrated. The strategy also emphasises the need to provide technical assistance to third countries fighting counterfeiting.

According to the new Strategy, the European Commission will not hesitate to trigger all bilateral and multilateral sanction mechanisms against any country involved in systematic violations. *Inter alia*, the European Commission proposes to make a more active use of the EC's Trade Barriers Regulation (TBR) mechanism in cases where the IP interests of European right holders are compromised:

No rule can be really effective without the threat of a sanction. Countries where IP violations are systematic could be publicly identified. As a last resort, consideration should be given to resorting to dispute settlement mechanisms provided for in multilateral and bilateral agreements. The existing Trade Barriers Regulation (TBR) mechanism could be a starting-point. TBR is a legal instrument that gives the right to Community enterprises and industries to lodge a complaint, which obliges the Commission to investigate and evaluate whether there is evidence of violation of international

trade rules resulting in adverse trade effects. The result is that the procedure will lead to either a mutually agreed solution to the problem or recourse to dispute settlement.¹

Key elements of the Strategy (as extracted from the Commission's announcement of 10 October 2004) include:

Identifying priority countries: EU action will focus on the most problematic countries in terms of IPR violations. These countries will be identified according to a regular survey to be conducted by the Commission among all stakeholders.

Awareness raising - promote initiatives to raise public awareness about the impact of counterfeiting (loss of foreign investment and technology transfer, risks to health, link with organised crime, etc.) and make available to the public and to the authorities of third countries concerned a "Guidebook on Enforcement of Intellectual Property Rights".

Political dialogue, incentives and technical co-operation: ensuring that technical assistance provided to third countries focuses on IPR enforcement, especially in priority countries; exchanging ideas and information with other key providers of technical co-operation, like the World Intellectual Property Organisation (WIPO), the US or Japan, with the aim of avoiding

¹. *Strategy for the Enforcement of Intellectual Property Rights in Third Countries*, p. 11; Legislation concerning the Trade Barriers Regulation can be found in: *Council Regulation (EC) No 3286/94 of 22 December 1994*: laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the WTO www.europa.eu.int/comm/trade/issues/respectrules/tbr/legis/adgreg06a.htm



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duplication of efforts and sharing of best-practices.

IPR mechanisms in multilateral (including TRIPs), bi-regional and bilateral agreements: raising enforcement concerns in the framework of these agreements more systematically; consulting trading partners with the aim of launching an initiative in the WTO TRIPs Council, sounding the alert on the growing dimension of the problem, identifying the causes and proposing solutions and strengthening IPR enforcement clauses in bilateral agreements.

Dispute settlement - sanctions: recall the possibility that rights-holders have to make use of the Trade Barriers Regulation or of bilateral agreements, in cases of evidence of violations of TRIPs; in addition to the WTO dispute settlement, recall the possibility to use dispute settlement mechanisms included in bilateral agreements in case of non-compliance with the required standards of IPR protection.

Creation of public-private partnerships: supporting/participating in local IP networks established in relevant third countries; using mechanisms already put in place by Commission services (IPR Help Desk and Innovation Relay Centres) to exchange information with right-holders and associations; build on the co-operation with companies and associations that are very active in the fight against piracy/counterfeiting."

The full version of the new Enforcement Strategy can be found at:
http://europa.eu.int/comm/trade/issu es/sectoral/intell_property/pr010704_en.htm