



Know IP - Stockholm Network Monthly Bulletin on IPRS

Stockholm Network Workshop on Intellectual Property, Competition and Competitiveness Round Table Session, 3rd March 2005 - Helen Disney, Duncan Curley and Meir P. Pugatch¹

On March 3rd in London the Stockholm Network organised its first roundtable entitled: *Intellectual property competition and competitiveness*. The one day workshop consisted of 30 participants, drawn from a mix of policy makers, academics, industry practitioners, think tanks and consumer groups.

The workshop is part of a series of events aimed at underpinning the different themes of the Stockholm Network's Intellectual Property and Competition programme.

The event was chaired in a joint capacity by **DUNCAN CURLEY**, a partner at McDermott, Will and Emery, and an expert on intellectual property issues, and **Dr. MEIR P PUGATCH**, who heads the Stockholm Network's P Programme. Speakers at the workshop included (in alphabetical order): **Mr. SHAMNAD BASHEER**, associate with the Oxford Intellectual Property Research Centre (OIPRC); **Prof. MICHAEL BLAKENEY**, Director of the Intellectual Property Research Institute, Queen Mary, University of London; **Dr. BRIAN HINDLEY**, Emeritus Reader in Trade Policy Economics at the London School of Economics; **Mr. DOUGLAS LIPPOLDT**, senior trade policy analyst with the OECD and **DR. UMA SUTHERSANEN**, Senior Lecturer, Queen Mary Intellectual Property Research Institute.

At the outset three themes were identified in relation to the broader policy objectives of the Stockholm-

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Network. First, to make the field of IP more mainstream as well as accessible to the general public. It seems that, currently, the field of IP, despite having huge economic, social and political public implications to the public as a whole, is considered esoteric technical and to some extent 'grey'. This gap should be bridged.

Second, to increase the interaction between specialists focusing on different aspects of IPRs. A positive effect of the growing importance and impact of the IP field is professionalism and specialisation. This however also leads to an undesirable detachment between different elements and themes of IP, which are becoming more and more "divorced" from each other. For example, copyright, patent and trademark specialists, as well as those dealing with the legal, economic and political aspects of IPRs, seem to operate in parallel tracks. A more active interaction debate between IP specialists will help us to obtain more comprehensive and up to date information about development in the IP field as a whole.

Finally, and perhaps most importantly, to encourage discussion, as well as debates, on different burning IP issues. However, such discussions should be as informed as possible. We aim neither to idolise IPRs, nor to demonise them. Rather it important to see IPRs as a policy toolbox aimed at achieving two social goals: to provide incentives to innovate and develop new knowledge and informational products in the future; to ensure wide public access to such products in the present. Translating two these social objectives into operational policies is far from an easy task. Hence there is a need to discuss and debate the various issues and elements concerning IP-policy making.

The morning panel - ***Intellectual property, competition and anti-trust***, chaired by Dr. Duncan Curley, focused



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on the tension between the protection of IPRs, on the one hand, and competition-based rules, especially antitrust regulations, on the other hand.

The panelists discussed the extent to which it is necessary to invoke anti-trust regulations to weaken the exclusivity deriving from the protection of IPRs. The speakers considered European practices in this area, as based on Article 82 of the EC Treaty. It was argued that in recent years the European Commission has been following a more active policy, which goes beyond the Magill Principle of 1995 (where it was decided that IPRs were abused in such a way that prevented the introduction of a completely new product to the market). Participants seemed to agree that the European Commission's resolution against Microsoft went beyond the McGill principle, in so far that the IPRs that were overridden protected some of Microsoft's core technologies (so-called interoperability information).

Some speakers expressed the view that the above EU actions seem to be in contradiction to the Lisbon Agenda, which set a goal to make the EU the most competitive block by 2010. Arguably the Lisbon Strategy put a lot of emphasis on the protection and exploitation of IPRs. Other speakers argued that in extreme cases, in which IPRs (mostly patents) block the market in terms of the ability to experiment on new ground-breaking technologies, it may be possible to use anti-trust regulations more effectively than other tools (such as compulsory licenses).

Finally, speakers drew attention to the point that there are many cases in which IPRs induce competition rather than stifling it. It was noted that a clash of interests between different IP holders may occur in cases where the introduction of new proprietary technologies (such as, for example,

new recording and downloading technology) threatens other IP holders who rely on different forms of IPRs, such as copyrights and performers' rights. Here, the panelists argued that decision-makers should be extra cautious in imposing antitrust solutions in cases where new proprietary technologies have the potential to shift the entire social and technological curve.

The afternoon panel - **Intellectual property, innovation, monopoly and competitiveness**, chaired by Dr. Meir P. Pugatch, examined two issues: innovation systems under an IP regime and without it; and the efficiency of the global IP system.

The panel discussed the economics underlying the establishment of IPRs. Specific focus was given to the process of innovation without IPRs. Participants agreed that, although different modes of innovation will continue to take place without any kind of a reward system, it is likely that such innovation will be segmented, secret and undersupplied. To this extent, it was agreed that - from an economic perspective - IPRs provide a powerful incentive for innovation. Here, it was shown that, with regard to innovation measurements, EU patenting activities (particularly in biotech) are behind those of the US and Japan, despite the Lisbon Agenda.

The panelists also discussed the social costs associated with the monopoly derived from IPRs, most notably the issue of pricing. It was agreed that with the increase in capital and time needed for the creation of new products and technologies, the issue of access and pricing becomes more complex, particularly when there are other factors that significantly affect these dimensions. It was also noted that the monopoly associated with IPRs does not necessarily generate a



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monopoly in the market (sometimes actually the opposite).

With regard to the effective use of the IP system internationally, the panelists argued that developing countries today have shifted their focus from the principle question of "should we adhere to international IP rules" to "how should we benefit from these rules". However it was also noted that the ongoing politicisation of the WTO agreement on trade-related aspects of IPRs (TRIPs) has led the major developed countries, particularly the US – to seek other tracks – such as the bilateral track - to negotiate on various aspect of IPRs.

Finally, a recent OECD study (see below) suggests, that, overall, developing countries that strengthened their IP regimes have benefited from increased inflows of foreign direct investment, mostly in the form of licensing. However, participants also noted that not enough financial and technical aid is given to developing countries and LDCs to cope with the significant immediate costs associated with the establishment of fully operational national IP systems (such as the establishment of a patent office).

At the end of the workshop it was agreed that the Stockholm Network will in future also focus on some drill-down activities and will organise IP-specific events, on such areas as pharmaceutical IPRs, software IPRs, trademark-economics and branding and geographical indications (GIs).

Proceedings and presentations of the workshop are available upon request from Anne Jensen anne@stockholm-network.org

International Licensing and the Strengthening of Intellectual Property Rights in Developing Countries – Douglas Lippoldt*

A new OECD study provides support for the proposition that the strengthening of intellectual property rights (IPRs) - as measured by a variety of indicators - has had a net positive effect on technology transfer via international licensing during the 1990s.² The authors base their conclusions on analysis of two datasets covering licensing activity by U.S. multinational firms and international licensing alliances between firms in developing and developed nations.

The study points to patent rights and effective enforcement, in particular, as important factors that can help enable firms in developing nations to access and exploit technologies and know-how through licensing agreements with parties in developed nations. Generally, where developing countries have moved to address weaknesses in these two IPR areas in recent years, they have tended to experience enhanced access to technology through licensing.

Stronger patent rights are found to increase licensing relative to foreign direct investment (FDI) in developed regions and at the same time to increase FDI relative to licensing in developing regions. The reason may

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². Park W., Lippoldt, D. *International Licensing and the Strengthening of Intellectual Property Rights in Developing Countries*, OECD Trade Policy Working Paper No. 10, (December: 2004: http://www.oecd.org/LongAbstract/0,2546,en_2649_33705_34325529_119684_1_1_1,00.html)



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be that a critical level of patent protection is needed before firms have an incentive to relinquish direct control and engage in licensing (as opposed to FDI). The less developed economies tend to have weaker initial IPRs when they launch reforms. Therefore, even after the first stages of IPR reform they may not yet extend sufficient IPR protection so as to encourage licensing.

Copyrights and trademark rights can also influence technology transfer via licensing, but exercise comparatively weak influences once patent protection is controlled for in the analysis. This may be due to the fact that most license fees are derived from licensing industrial processes.

The effects of IPRs on international licensing vary by industry group as well. Patent rights are found to be relatively influential for licensing in the services, electrical and electronic, and transportation industries, but tend to be much less influential in the machinery and wholesale trade industries. Copyrights are important for the licensing of books, trademarks, franchising, and broadcasting. Enforcement effectiveness is especially important in the chemicals, electrical and electronic, and services industries.

Patent reform is found to contribute positively to international licensing alliances between developed nation licensor firms and developing nation licensee firms. Though the late 1990s were a period of decline in global licensing deals via joint ventures and strategic alliances, overall those developing nations that reformed their patent regimes the most enjoyed the greatest increases in licensing agreements with developed nations (or in some cases witnessed the smallest declines in licensing deals).

The general policy implication of this study for developing economies is that IPR reform should be one part of a

general strategy for promoting economic development -- along with other complementary policy reforms.

The importance of design protection in improving the competitiveness of European Industry - Dr. Inmaculada González³

Considering intellectual property rights as essential elements for opening up and consolidating markets has become a pillar of company commercial policy.

Today, any company knows that a solid portfolio of strategically managed intellectual property rights is essential to improve its market position. It is beyond doubt that investing in innovation, in a rational and well-planned manner, is always profitable: in addition to the well-known tax advantages available under the majority of national laws, home-grown technological development clearly means less dependency on foreign technology, which reinforces a company's position on the market in question.

Nonetheless, in the past few years, investment in technological innovation has been strategically combined with investment in creativity. This means that companies compete to offer consumers high technology products that incorporate technical innovations to improve their functionality or applications.

At the same time, companies also compete to offer the most attractive, stylish, comfortable, even "cool" products, products that grab the consumer not only due to their

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technical characteristics and the quality of their components, but also, or even above all, because they are attractive. Industrial products are given a new and individual appearance providing added value in the market compared with competing products, which are similar or equivalent from a technical point of view.

In an advanced society like the European one, the consumer increasingly values the creative aspects or the appearance of product – their design – in addition to or even above, considerations of a technical nature. In reality, this new design “boom” is not so different from what previously occurred in Europe with the Bauhaus school, especially during the “Gropius era”.

It is not a question of reinventing anything, but rather of adapting the needs of current European industry to the reality of a market that is increasingly globalised and competitive.

With this objective in mind, the Community legislator has initiated a series of legislative actions to promote the competitiveness of European industry in the face of the advance of foreign industries like the Chinese, capable of producing similar products for half the price.

On the one hand, a Directive was approved in 1998 to harmonise the different legal systems for industrial design protection. On the other hand, an exclusive community right has been created, which is valid throughout the European Union, following the approval of a Regulation in 2002 (applications for protection have been officially presented since 1 April 2003).

The Community legislator has opted to tackle the industrial design, giving priority above other copyright or patent law considerations, due to the influence of design on the current

market (the “design approach”). As a result, a design capable of protection is defined fairly broadly, to include visible, external configurations of industrial products, and also other characteristics such as textures, colours, materials, and internal forms, which are only visible once the object has been dismantled.

In addition, the figure of the “unregistered Community design” was introduced, to respond to the need for quick and cheap protection for so-called “seasonal articles”, particularly in the fashion sectors, such as footwear, textiles, jewellery, etc.

In conclusion, it cannot be doubted that today the EU benefits from a complete and highly modern industrial design protection system.

Nonetheless, for this protection system to be really effective and fulfill its objective of promoting investment in creativity and, ultimately, the competitiveness of European industry, adequate mechanisms must be in place to effectively enforce these exclusive rights.

The Community legislator is aware of this, resulting in the recent approval of Directive 2004/48/EC on intellectual property right enforcement and the adoption of the new strategy for the Enforcement of Intellectual Property Rights in Third Countries, dated October 2004. It is to be hoped that this will contribute to strengthening the competitiveness of European industry, and will protect its creations from piracy.



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Surge in bilateral regional free trade agreements in the area of geographical indications (GIs) leaves developing countries caught between contradictory obligations - Christoph Spennemann*

Geographical indications (GIs) are a tool for promoting products such as wines, spirits, foods and handicrafts that derive their quality, reputation or other typical characteristics from their geographical origin.

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) obligates all Members to provide minimum standards of GIs protection. According to TRIPS rules, the owner of a GI may prevent third parties from using a protected indication for goods not originating in the indicated area, provided such use misleads the public as to the geographical origin of those goods, or constitutes an act of unfair competition.

The latter requirements are waived under TRIPS in the cases of GIs for wines or spirits, which enjoy a higher level of protection than other GIs. Owners of wines or spirits GIs may prevent third parties from using a protected indication for wines or spirits not originating in the indicated area, even where the consumer is not misled as to the true origin of such product.

As an example, 'Bordeaux' may only be used by wine producers in the Bordeaux region of France. An indication such as 'Bordeaux, produced in the UK' would not be in line with TRIPS. However, the

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Agreement provides a number of exceptions to this rule.

As opposed to other areas of IP protection, the EU and the USA do not share the same approach with respect to GIs protection.

While GIs have a long tradition of use and protection in continental Europe, they used to be mostly unknown in other countries, in particular those of common law tradition. The EU's domestic system of GIs protection is in many respects more developed and farther reaching than the TRIPS minimum standards, relying on special GI rules as a distinctive category of intellectual property.

The US domestic system, on the other hand, protects GIs through ordinary trademark law. Both the EU and the USA have recently made efforts to spread their respective domestic systems among developing country trading partners by means of bilateral or regional agreements. The rules on GIs in these agreements reflect the divergent economic interests of the EU and the USA.

While the EU considers GIs as a tool to maintain its level of agricultural exports in times of increased subsidies reduction, the US interest focuses on increased market access for agricultural products and GI protection is seen as a potential 'protectionist' barrier to such goods. For the developing country counterparts to the U.S. and EU free trade agreements, this difference in approach could entail considerable confusion of obligations and difficulties in implementation.

For instance, the bilateral agreements between the EU and Chile and Mexico, respectively, prohibit the registration of trademarks for wines that are similar to or contain a protected European GI. On the other hand, the bilateral agreements



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between the USA and Chile and Morocco, respectively, contain provisions that in the case of conflicting GIs and trademarks, obligate the parties to refuse protection of the similar GI.

In other words, a country party to bilateral agreements with both the USA and the EU might find itself caught between opposing obligations in the case of a conflicting European GI and a US trademark that is similar to or incorporates that European GI.

This incoherence in bilateral approaches thus has an effect opposite to the objective of the multilateral trading system, i.e. the increase of free trade through common and transparent rules.

For developing countries, before signing on to such agreements, it is important to be clear about their implications and whether these correspond to their long-term policy interests.