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Commentary

The Patentability of the CIPIH Report - Helen Disney & Meir P. Pugatch*

Any additional commentary on the recent report of the WHO Committee on Intellectual Property Rights, Innovation and Public Health (CIPIH) risks becoming terribly tiresome. So many words have been written or spoken about the CIPIH report that there is little more that can be said that would provide any meaningful contribution on this highly innovative report.

Or is it - innovative, that is? For our sake the CIPIH report should be innovative, given the huge amount of WHO resources that were allocated over the past three years to its creation. So much time, money, and manpower has been invested in preparing this 228-page report (not to mention generating the political heat surrounding it) that surely (or at least hopefully), the CIPIH report is new, involves an inventive step, and has applicability.

Interestingly, these three very straightforward and trivial criteria are used by another system - the patent system. So, with the risk of boring our readers, let us nevertheless try to apply the three basic patent criteria to the CIPIH report. After all, the scientific and philosophical rationale of doing so is based on the so-called "creative-destruction" theories, which often advocate the use of existing principles built-into contemporary obsolete systems in order to destroy these very systems and to create alternative and more innovative ones.

So obviously the CIPIH report must be

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new, insofar (using the patent language) that no preceding report on the subject has ever been made public, in any way, anywhere in the world, before the date on which the CIPIH report was published?

To the great astonishment (or not) of supporters of the current IP system, the CIPIH report came up with painfully innovative insights, including statements saying that "where most consumers of health products are poor, as are the great majority in developing countries, the monopoly costs associated with patents can limit the affordability of patented health-care products required by poor people in the absence of other measures to reduce prices or increase funding." (p.198). IP supporters were also shocked (or not) to learn that the CIPIH report boldly proposes that "In low income developing countries, they [companies] should avoid filing patents, or enforcing them in ways that might inhibit access" (p. 202).

Putting aside our own methodological critique of the report (including the fact that some of the untested assumptions about the patent system that are mentioned in chapters 1 and 2 become "conclusive" in chapter 5), this critique is hardly new. Ever since the patent system was established, and especially since the late 19th Century, there have been waves of criticism of the system (which usually appear in 50-year cycles), including those expressed in the United Nations Conference on Trade And Development (UNCTAD) reports presented in the 1970s¹.

So if the CIPIH report is not new, it should at least be carrying an

¹. For the different historical waves of the IP debates see: Pugatch, M.P., ed. *The Intellectual Property Debate: Perspectives from Law, Economics and Political Economy* (Cheltenham, UK: Edward Elgar, forthcoming: July 2006)



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inventive message that would help the WHO to better cope with the huge health-related challenges around the globe. Unfortunately, we were not smart enough to identify the "inventive step" embodied in the report.

Admittedly, it may be the case that we are not sufficiently astute to appreciate the ingenuity of proposals such as that "when addressing the health needs of people in developing countries, it is important to seek innovative ways of combating Type I diseases, as well as Type II and Type III diseases" (198).

We may also be biased in thinking that the rather sweeping conclusions against IPRs have nothing to do with health and everything to do with politics, as evident in paragraphs stating that "developed countries and the WTO should take action to ensure compliance with the provisions of Article 66.2 of the TRIPS agreement, and to operationalise the transfer of technology for pharmaceutical production" or that "a public health justification should be required for data protection rules going beyond what is required by the TRIPS agreement" (p.203).

Last but not least, there is the issue of applicability. Any report, and especially one that was commissioned by a presumably non-biased international organisation such as the WHO, should be judged by its usefulness to its stakeholders, in this case the member states. And despite all the political processes that are now taking place in this domain in the WHO assembly, the main question is not whether the CIPIH be formally adopted, but to what extent this report can actually "produce concrete proposals for action by national and international stakeholders", as stated in the terms of reference (p. 2).

We suspect that it can't. We believe that the recommendations expressed

in the CIPIH report represent the weighted ideological perceptions of the various Commission members rather than practical and result-oriented action plans. Moreover, we believe that some of the recommendations are so vague as to be essentially useless. Finally, we also believe that many of the IP-related recommendations are simply wrong.

If the CIPIH report is not a shining success, at least in terms of the above criteria, is there still room for serious institutional self reflection? There is and there should be! But we should not direct our criticism towards the Commission's members. Nor should we judge their views on the IP system. The blame lies with the WHO, which similar to other institutions, WIPO included, chooses to allocate significant resources to deal with quasi-theoretical issues, rather than focusing on its actual mandate - "the attainment by all peoples of the highest possible level of health" (WHO mission statement).

No one really knows what are the cumulative direct and indirect costs associated with the CIPIH project. But we dare assume they may easily reach a 7 figure dollar number (and perhaps even in Euros). The real question is, therefore: could the WHO have conducted this study in a more efficient manner? This is a rhetorical question.

And, just one more thing. Since the CIPIH report suggests that companies should more or less waive their IP rights in developing countries, why not lead the way and delete this useless © symbol from the beginning of the report, as well as the statement: "All rights reserved to World Health Organization". Oops, must have forgotten that IPRs are only allowed to be useful to international organisations, never, of course, to companies.



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Topic of the Month

Reflections on the European Software Patent Debate - Martin Campbell-Kelly*

Software patents have been routinely available in the United States since the early 1980s. Well over 100,000 software patents have been issued and there is no evidence that they have caused innovation to stall or new entrants to be discouraged in significant numbers. In July 2005 the European Parliament voted against software patents by 648 votes to 14, not least as a result of lobbying from the open source software community. What difference will this outcome make to the European software industry?

For several decades software products have been made primarily by the proprietary software industry. Software products are embodied in 'source code' which is subsequently converted to the binary code that only computers understand. But creating software involves much more than writing source code. Source code is the final stage of a process that begins with a specification, and includes the invention of algorithms and methods, programming, testing with users, iterative refinement, 'productising', and marketing.

In order to recover their development costs software firms have three principal means of protecting their intellectual property — trade secrets, copyright, and (in the U.S.) patents.

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The aim of such protections is to prevent the rapid imitation of software products before their development costs have been amortised in sales. None of these three forms of IP protection is a magic bullet, but collectively they make the industry viable.

Trade Secrets

Trade secrecy is the most common form of software protection. Software makers keep their source code secret and supply only binary code to customers. Eventually, most successful software products get imitated, but trade secrecy slows that process down, hopefully long enough for an innovator to recover the initial investment. To clone software from a binary program an imitator has to reverse engineer the product by observing its inputs and outputs and writing a functional equivalent. This is a difficult and expensive task for imitators, but there is also a loss to society. Trade secrets prevent useful techniques entering the public domain so that they constantly have to be reinvented.

Copyright

Copyright applies to both the source code and the binary form of a program. Protecting the binary code is very important for the prevention of piracy by the direct copying of software. But copyright does very little to protect the algorithms and data structures embodied in software.

If a competitor has access to the source code of software product it is possible to discover its inner working and to use that knowledge to develop a clone. In so doing the developer circumvents many of the costly inventive steps and processes by which the original software was created. This is possible because copyright only protects the source code from direct copying; it does not



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protect against the appropriation of the ideas it embodies. For this reason producers almost invariably keep their source code secret, and copyright is mainly used to protect the more expressive parts of a program, such as screen layouts, menu structures, and supporting documentation.

Patents

Software patents should not be considered in isolation, but only as complementary to trade secrets and copyright. A program protected only by trade secrecy is always vulnerable to imitation. Copyright only protects the expression of an invention, not the invention itself.

In the software patent bargain, a novel software invention is disclosed in exchange for a monopoly on that invention for a period of 20 years from filing. Everyone potentially gains from this process. Producers gain more certainty of protection, but for a drastically reduced period of time (trade secrecy lasts forever, while copyright lasts for 70 years after the author's death). Competitors gain because the invention is disclosed and they can choose to invent around it or save development time by licensing the technique; or they may be able to trade their own patented inventions. Society gains because technology enters the public domain more rapidly, generally quickening the pace of innovation.

Does the EP Decision Matter?

Despite the rhetoric generated by the European debate, patents are not a life or death matter for the software industry. The industry is about 50 years old, and for the first 30 years there were no patents. It was only after 20 years of careful deliberation that software patents were allowed in the United States, in 1981. Take up was slow at first, but it accelerated as software firms became more IP savvy

and aware of the benefits. What patents offered was another tool, alongside trade secrets and copyright, to slow down the process of imitation by rivals.

The fact is that Europe does not have a particularly thriving software products industry. It has only one player in the global top 10, and fewer than a dozen in the top 100. Some commentators hope that open-source software will offer another chance for Europe to compete with American software companies. If an embargo on software patents simply means freedom to imitate American products, then this is a very limited vision. Truly innovative European software firms—whether open source or not—have little to fear from patents.

Views

Bigger Than Jesus and the Holy Grail- Anne Jensen*

At a first glance the so-called Apple vs. Apple and the Dan Brown cases might look quite similar. They both involve high-profile parties and both cases have managed to catch the public eye, which is indeed unusual when it comes to disputes over intellectual property rights. If you take a closer look, however, the cases address two very different aspects of IPRs.

The Apple vs. Apple case, which was settled last week in favour of the defendants, was a trademark issue, if not a standard breach-of-contract issue. The Dan Brown case on the other hand, which was also recently settled in favour of the defendants, was based on alleged copyright infringement.

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The legal battle between the Beatles' record label Apple Corp and Apple Computer started almost 24 years ago when George Harrison allegedly came across an advertisement for Apple Computer. Concerned that the computer company was using the trademark of Apple Corp, the Beatles' lawyers approached Apple Computer. After much discussion, the two parties reached an agreement in 1981, where it was decided that they would share the apple logo. Apple Computer would only use the trademark in the computer industry, and Apple Corp would continue using the logo for music and entertainment purposes only.

This deal seemed very clear and straightforward in 1981, but it didn't take long before the boundaries between the computer business and the entertainment business got increasingly blurred. By the mid- 1980s Apple Computer had developed computers with sound capabilities, and despite the company's failure to renegotiate the 1981 deal with Apple Corp, it went ahead in 1988 and launched the Musical Digital Interface (Midi), which makes computer users able to create, edit and record music. This move was seen to be a clear breach of the 1981 deal between the parties and Apple Computer was taken to court by Apple Corp on the basis of trademark infringement. Despite what was at stake for the two companies, they managed after two years to reach yet another agreement. Although the details of the agreement are unknown, rumours say Apple Computer paid Apple Corp a £16.3 million settlement.

For more than a decade both parties were happy with the situation, but in 2003 Apple Computer launched iTunes and the legal battle was resurrected. Apple Corp wanted London's High Court to award damages and to stop its rival from using the apple logo in its music business. Instead, Mr Justice

Mann ruled last week that iTunes was "a form of electronic shop" and not involved in creating music. "I think that the use of the apple logo is a fair and reasonable use of the mark in connection with the service, which does not go further and unfairly or unreasonably suggest an additional association with the creative works themselves", he added.

In the case concerning alleged copyright infringement by the highly successful author of *The Da Vinci Code*, Dan Brown, and his UK publisher Random House, the London High Court ruled last month that the author had not breached the copyright of *The Holy Blood and the Holy Grail*. The authors of this 'non-fiction' book claimed that Dan Brown's blockbuster "appropriated the architecture of their work", by making the alleged survival of Jesus Christ and Mary Magdalene's bloodline the central issue of the novel.

The basic principle of copyright law is the protection of artistic expression rather than ideas. This means that, in the case against Random House and Dan Brown, the plaintiffs had to prove that the way the idea was expressed was being copyrighted. According to David Hooper, a copyright lawyer "the only hope for the plaintiffs in the Da Vinci case would have been to produce a detailed schedule showing on which pages of Dan Brown's book their ideas, language and structure had been plagiarised".² The authors, whose case has been described as "weak" ever since they first put forward their allegations, didn't succeed in this, and the case was dismissed by Justice Peter Smith. "It (the case) was an artificial creation for the purposes of the litigation working back from the Da Vinci Code" he said in his ruling.

²

<http://news.bbc.co.uk/1/hi/entertainment/4886234.stm>



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Both cases illustrate that the anti-intellectual property camp is wrong when arguing that creativity, innovation and the dissemination of knowledge are being stifled due to increasingly strict IP-regimes. Rather, by ruling in favour of the defendants in these high-profile cases the Justices have sent out a strong signal to society that unfounded allegations of IP infringement will be unsuccessful and expensive for the plaintiffs.

One important question is whether the outcomes would have been different had the cases been tried in the USA? The USA enforces intellectual property more strictly than any other country, and their courts are known to almost automatically order injunctions when IP infringement can be proven. This would probably not have made any difference to the Dan Brown case, where the plaintiffs never really succeeded in proving that any copyright infringement had taken place. In the Apple vs. Apple case, on the other hand, where Apple Computer were sued for moving their business into the entertainment field, the ruling may well have been in favour of the Beatles' old record company, had the case been heard in the USA.

Controversies

Pirates in Sweden - Waldemar Ingdahl*

The creation of the Pirate Party (Piratpartiet) in Sweden has struck a powerful cord in the European debate on intellectual property. Even though the party founded this January is still small in size, it has rapidly become a fixture of the Swedish debate. The party promises to strengthen Swedish privacy protection, weaken copyright

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laws, abolish the EU Data Retention Directive and roll back government surveillance legislation.

It is no coincidence that the Pirate Party was started in Sweden. The easiest to use and most (in)famous source of pirated films, music, computer games, software and media is a Swedish site called The Pirate Bay. This site provides torrent files - merely pointers to sources of data, which do not themselves contain any copyrighted materials - which is a disputed practice, although currently legal in Sweden. This technique enabled the Pirate Bay to withstand the Motion Picture Association of America's (MPAA) crackdown on torrent hubs in 2004, and it also sparked off the creation of a network of file-sharing supporters called the Pirate Bureau (Piratbyrå), which unites people from both left and right of the political spectrum in criticism of intellectual property.

It is from this environment of highly-connected citizens, (as many as 10 per cent of Sweden's population participated in file sharing in the last quarter of 2005) that the Pirate Party was formed. From their initial position of abolishing all protection for patents and creative work, they have now modified their opinion and argue that IP protection should last for only 5 years. For anyone who understands the importance of IP protection, 5 years of protection would present dire problems for any capital intensive business.

The popularity of the Pirate Party shows that there has been a shift in the Swedish debate on intellectual property rights. Previously, the debate was conducted on two very different levels: a legal-political level and a technical level. On the political level companies and governments dominated the discussions and instituted legislation without much involvement from other parties. On the



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technical level on the other hand, the easy dissemination of content and the complexity of the Internet made it very difficult to uphold and enforce the laws. The result of these two parallel debates was the forming of a huge rift and an unfortunate imbalance between law and actual practice. In reality, legal and technical issues are intimately connected, and the key to successful policies is to use the expertise of both sides, especially as it is relatively easy to get technically inexperienced lawyers and legally inexperienced technicians to agree on issues they would never have considered if they had not collaborated. The problem for the content industry and for those understanding the value of IP is that the common ground for the two parties was anti-IP sentiments.

Unfortunately, movements like the Pirate Party do not have to win elections to influence the political debate. For them it is enough to be the driving force in the debate and to propose solutions to the issues. It is therefore of great importance to rekindle the debate about IP by communicating the values of the market economy, entrepreneurship and private property and to explain how it benefits society as a whole.

News and Events

Intellectual Property Rights, Competition Rules & Article 82: Is there a Sensible Middle Ground?

On the 27th June 2006 the Stockholm Network and the Ludwig von Mises Institute Europe will be hosting an **Amigo Society Debate** at Hotel Amigo, Brussels, on the topic of intellectual property rights (IPRs) and competition rules in Europe.

Chaired by Dr Meir Perez Pugatch, Head of the Stockholm Network Intellectual Property and Competition Programme, the central theme of the

debate is **Intellectual Property Rights, Competition Rules & Article 82: Is there a Sensible Middle Ground?**

There is an inherent tension between supporting intellectual property rights on the one hand and using anti-trust rules on the other hand.

Since government authorities are alert to market monopolies, and in many cases justifiably so, they put in place legal and regulatory mechanisms aimed at increasing competition in the market.

However, while antitrust mechanisms may well be appropriate for combating anti-competitive and monopolistic practices in general, the use of these tools in the case of proprietary knowledge-based products is highly complex.

At this provocative Amigo Society debate, tough questions will be asked: Are IPRs superior to competition rules or vice versa? Do IPRs allow the abuse of market position in Europe? Has the European Commission departed from the Magill Principle, and if so why? Should Article 82 be revised? And most importantly, is there a golden path for reconciling the tension between IPRs and competition rules?

To give attendees an introduction to the topic and the controversies, **Dr Duncan Curley**, Partner, McDermott Will & Emery, will address the policy tension between IPRs and competition rules.

Manuel Campolini, Partner, Janson-Baugniet will then talk about the policy tension between IPRs and competition rules in the pharmaceutical and biomedical sectors.

If you would like to attend this debate, Please RSVP to Anne Jensen anne@stockholm-network.org. Places are limited.