



Know IP - Stockholm Network Monthly Bulletin on IPRS

Commentary

Will the EU Fail, Again? Helen Disney & Meir P. Pugatch*

"Innovation .. always has to be close to the market, focused on the market, indeed market driven". This is how Peter Drucker, the great guru of Management and Entrepreneurship studies, summed up the various conditions for innovation.¹

Innovation again seems to be high on the agenda of the European Commission. This September, a new communication was released entitled '*Ten priority actions to achieve a broad-based innovation strategy for the European Union*'.² According to the Commission, the Communication aims to present "a broad based innovation strategy for Europe that translates investments in knowledge into innovative products and services". The Communication proposes a 10 point programme for immediate action to make the business environment more innovation-friendly. Indeed, the Communication covers it all: innovation-friendly education systems, a European Institute of Technology, a single and attractive labour market for researchers, research-industry links, strengthened intellectual property rights protections, an innovation strategy for friendly lead markets and more.

There is no question about the importance of this topic to the EU.

Helen Disney is Director of the Stockholm Network. Dr. Meir Perez Pugatch, Haifa University, heads the Intellectual Property and Competition Programme of the Stockholm Network.

¹. Drucker, P. *Innovation and Entrepreneurship* (HarperBusiness: 1985), p.139

².<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/325&format=HTML&aged=0&language=EN&guiLanguage=en>

After all, innovation was identified as one of the core objectives of the Lisbon Agenda, the aim of which is to make the EU the most competitive bloc by 2010.

The real question is: what is the true value of this Communication in terms of securing results? Or to put it more bluntly, will this Communication be another relic in the history of 'good intentions' that characterises EU policy in this field? The answer, unfortunately, is not a comforting one. All ten strategic points are certainly worthy. Yet, none will be achieved. Like the sad charade of the Lisbon Agenda, this Communication is also doomed to fail and for one major reason: the EU simply does not practice what it preaches.

Why will the EU fail to implement this Communication? The answer requires a much more elaborate discussion, but nevertheless here are some initial thoughts.

The EU will fail, because no matter how accurate and how important these policy prescriptions are, they are still part of the overall misguided and mistaken 'dialogue of the deaf' taking place between the EU authorities and the Member States. Part of the problem lies in the belief that innovation-led strategies envisaged by the European Commission can actually be translated smoothly to the national level. However, the political, social and cultural gaps between the EU authorities and the Member States are still too big to secure any meaningful results in the field of innovation (take the issue of the Community Patent, for example).

The EU will fail also because the European Commission itself is creating, inconsistent and often contradictory policies. For example, action item no. 7 in the Communication calls for the enhancement of IPRs, including "creating more synergies between



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Commission policies in the field of IPR." The question here is which synergies we are talking about: the kind that support IPRs (as proposed by DG Internal Market) or the kind that seek to weaken them (as adopted *de facto* by DG Competition)?

Most importantly, the EU will fail because EU institutions, as well as many national governments, by and large still refuse to recognise their role in supporting innovation in Europe, which is to put in place the right incentives and conditions to help market-driven businesses innovate (and flourish), rather than trying to manage, create and design innovation by themselves.

Alas, we suggest that future innovation-driven frameworks be more precise, as well as more modest. They should map out the market barriers in each sector which prevent businesses from operating and innovating (in some cases the reports are already out there). They also need to identify which barriers are generated by red-tape or by contradictory policies and regulations (e.g. the case of community patents). And they need to assess which barriers can be removed and which cannot.

Far closer collaboration needs to be established between the business community and EU policy-makers. Here, the EU can take some lessons not only from the US, but also from countries such as Singapore and Japan, regarding the way they treat companies when addressing their innovation needs.

Peter Drucker argues that, in this age of the global economy, innovation is ultimately a reflection of market needs (whether such needs are known or unknown). This simple, yet powerful truth should be the basis for any future frameworks in the EU.

Topic of the Month

Turning the EU Competition Authority into a Software Certification Authority? Fredrik Erixon*

Is Dr Neelie Kroes, the EU Commissioner for competition, turning her directorate into a Software Certification Authority? A few weeks ago a cross-party group of members of the European Parliament (MEPs) sent a letter to Dr. Kroes, criticising the Commission for its actions against Microsoft and for putting European competitiveness at risk.

The letter cuts to the core of the seemingly never-ending farce of the EU versus Microsoft and, in particular, the forthcoming release of Vista, the new operating system Microsoft plans to release early next year. In a recent report to the US Securities and Exchange Commission (SEC), Microsoft listed the EU Commission as a "risk factor" and warned that the European competition regulator might twist its arm to retool Vista and possibly delay its release. In a series of letters, the American software company has asked the Commission for its view on Vista's compatibility with EU competition policy, but the Commission has failed to satisfy Microsoft's demand for clarity. In a recent comment, however, a Commission spokesperson rejected calls for such advice and said it is not their task to give the "green light" for the launch of a new product.

That is the right response: a competition policy based on *ex ante* controls of new products would be absurd and tantamount to Soviet-style

* Fredrik Erixon is a Director of the European Centre for International Political Economy (ECIPE), a new Brussels-based think tank, <http://www.ecipe.org/> and author of several books and papers on competition policy.



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bureaucracy. Imagine a regulator inspecting a high-tech product and speculating on every detail of its future competitiveness. How many copies will it sell? Is it technically compatible with other and as-yet-unreleased products made by other firms? Are there any competitors? Will it be a dominant product? Will the manufacturer sell it at an inflated price and effectively siphon off a monopoly rent? Are there any application barriers to entry?

Ideal for former Gosplan bureaucrats, perhaps, but it can hardly be a serious idea for European competition policy. Or is it? Actually, the Commission may end up having to move in this direction; indeed, some would argue it has already started.

In a letter to Microsoft dated March 2006, Commissioner Kroes expressed concerns about Vista and warned Microsoft not to violate European antitrust rules by integrating new products into its new operating system. The concerns particularly regard a new Internet search facility, but the underlying arguments can also be applied to other parts of Vista, such as anti-spyware functionality.

A letter from a regulator explicitly warning a manufacturer about a specific product design is serious business. It is not, as a Commission official rightly remarked, a formal initiation of an antitrust probe, but the writing is nevertheless on the wall. Even more so when the two parties already are involved in a legal conflict over the Commission's 2004 ruling regarding the integration of the Windows Media Player (WMP) into the operating system.

The two cases are similar: they are both about tying one product to another and the extent to which Microsoft can integrate products into its operating system. They should be associated in another way too: ideally, the antitrust charges leading to the

2004 ruling against Microsoft should have given sufficient guidance to Microsoft, and to other concerned manufacturers, on how the Commission is interpreting EC rules relevant to the matter at hand (Article 82 of the EU Treaty), and the substantive grounds (and procedures) for determining if rules have been violated. But it does not.

Whatever one's opinion about Microsoft and its market strategies, the 2004 decision cannot be said to provide sufficient information to get a general idea of substance and procedure for determining violations. In fact, it is difficult to find a solid grounding for the Commission's ruling against Microsoft. In particular, the Commission failed to demonstrate how consumers had suffered from the tying of Windows Media Player to the operating system. Firstly, the Commission did not even determine whether the WMP was the market-dominant product; and, secondly, it never produced any empirical arguments suggesting consumer harm or efficiency losses. It merely concluded that Microsoft dominated the market for operating systems and alleged that it was abusing this dominance by integrating a separate product to the operating system. Although no further proof was provided, wild speculations about potential consumer harm were cast about.

This should not come as surprise; nor is it, as has been suggested, a sign of an over-zealous bureaucracy conducting substandard investigations. The core problem is rather the weak notion of if, how and when product-tying is harmful to consumers and leads to efficiency losses.

Rules against tying are not new, but they increasingly are becoming the main arena for debates, and sometimes legal action and disputes, over alleged uncompetitive or unfair



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business practices. As tying is not by nature harmful to consumers or a violation of competition rules, there is a dearth of clear and concise methods for regulators to determine when violations occur. This causes unpredictability. To be efficient and reasonable, rules governing market behaviour must be simple, transparent, non-discriminatory and inflexible; they should be proscriptive and tell businesses *what not* to do.

Clearly, the set of regulations governing tying does not meet that standard. Rather, these rules are complex and flexible; they are discretionary and transfer the decision of defining the nature and presence of a violation to the regulator. This leaves room for negotiations and political manoeuvres, effectively diluting the principle of universality in the application of rules. There are, of course, limits to the regulators discretionary power, but they fall short of being as distinct as in many other areas. This is a problem; if rules do not give reasonable predictability by clearly outlining the don'ts, then they are on a slippery slope of prescriptive rules outlining the dos.

Microsoft now finds itself in a difficult position. The Commission has issued a warning of tying new products to Vista, but is not keen or in the position to instruct Microsoft on how to avoid new charges. The substantive grounds for the 2004 ruling are diffuse at best and cannot be expected to provide enough information to a firm about to launch a multibillion-dollar product. What is even more troubling, the Commission cannot do anything now to improve the situation. The letter cannot be withdrawn and the 2004 decision cannot be amended.

This highlights the need for an overhaul of EU competition policies purported to bring clarity and transparency to rules governing tying and abuse of a dominant position. The Commission

cannot change the rules, but it can rein itself in and provide to the outside world a cogent interpretation of the rules defining the empirical evidence needed for the Commission to take action.

If that does not happen, and there are no signs that it will, the Commission can only end future uncertainties by acting like an authority, certifying products before they are launched. Inaction doubtless will adversely affect investment and sales in Europe.

Views

What's on the Scientists' Minds? – Rachel Diamant*

The Bayh-Dole Act, passed by the US congress in the 1980s allows universities and non-profit organisations to patent and commercialise inventions arising out of federally funded research, an act which started the transformation of universities from ivory towers to economic engines. Since 1980 there has been a 60% growth in university-industry R&D centres and more than an eight-fold increase in US university technology transfer offices.

At the same time, numerous publications, written mostly by scientists, warned us about the apocalyptic consequences these changes would bring to both science and the universities. They warned us that the traditional role of the university as a truth-seeking fortress of wisdom, freely disseminating knowledge for the benefit of the human race, would cease to exist. What are, then, the major concerns regarding the growing ties between academia and industry? It seems there are three main aspects of concern.

* Rachel Diamant is a PhD candidate at the School of Public Health, University of Haifa



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Concerns over industry-academia ties

Conflict of interests

The most common concern over the links between academia and industry is that scientists' financial interests may create a bias in the papers and review articles they write. In 1986, Richard Davidson of the University of Florida College of Medicine in Gainesville reviewed 107 published clinical trials and found that those sponsored by drug firms were more likely to report favourably on the treatment being tested.¹ Concerns regarding commercial conflicts have been most acute in clinical medicine where human lives may be at stake. Leading multidisciplinary journals such as *Nature* and *Science* have adopted conflict-of-interest policies. At the heart of each policy lies the concept of disclosure: if everyone is made aware of authors' financial interests, the potential for bias can be borne in mind by the reader. But how full that disclosure should be, and how to encourage authors to comply with a stated policy, remain matters for debate.²

Restrictions on the use of research tools and the patent thicket

One problem faced by today's researchers is restricted accessibility to upstream inventions and research tools. Upstream inventions and research tools refer to patents that claim proprietary rights on technologies associated with basic and early stage research, as opposed to patents covering downstream commercial products.

¹. Van Kolschooten F. Conflicts of interest: can you believe what you read? *Nature*, 416, 360-363 (2002)

². Stelfox, H. T., Chua, G., O'Rourke, K. & Detsky, A. S. Conflict of Interest in the Debate over Calcium-Channel Antagonists *N. Engl. J. Med.* 338, 101-106 (1998)

The original intent of the Bayh-Dole Act was to facilitate the practical implementation of the fruits of federally funded research. But by its nature, academic research tends to generate predominantly basic, early stage, upstream inventions. Indeed, many of the most controversial upstream patents have come out of university research. Researchers estimate that 20% of the human genome is patented, and some genes, mainly related to human diseases, are patented as many as 20 times.³ The intellectual property rights for some genes being highly fragmented between many owners, creates the "patent thicket".

One of the primary justifications for patents is that they provide the necessary incentive for the investment required to bring a technology into a commercial product, as in the case of the development of a new molecule into an approved drug. But there is little investment associated with the development of research tools. Claiming rights over a DNA sequence has no additional costs beyond the costs of filing the patent itself. Because research tools are often the product of publicly funded basic research, it can be argued that most of these technologies would have been discovered and disclosed to the public with or without the incentive of a patent.

Secrecy in biological research

Some critics, such as Steven Rosenberg, argue that secrecy regarding scientific methods and results has become a common and accepted practice.⁴ The increasing reluctance of scientists to share information in order to protect future

³. Chris Holman, Clearing a path through the patent thicket. *Cell*, 125, 629-633 (2006)

⁴. Rosenberg S. A. Secrecy in medical research. *N. Engl. J. Med.* 334, 392-394 (1996)



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patent rights compromises the ability to make progress in medical research. Science is a network of ideas. Biological mechanisms and pathways are extremely complex; therefore progress is facilitated through the sharing of knowledge. A breakthrough in the understanding of a biological mechanism occurs when a scientist hears a lecture in a conference and realises a missing link in his work, often from a seemingly unrelated topic; or gets new ideas from a lunch conversation, or a poster session. But when scientists hold information due to possible future commercial value or due to secrecy obligation to a commercial company that finances their research, then medical progress is slowly compromised.

Valid concerns...

Concerns that the culture of secrecy is affecting good science are indeed valid. But the question is to what extent? Does the price exceed the benefit of academia-industry relationship?

The benefit of academia-industry cooperation is obvious, and is easy to quantify. Academia-industry partnerships have proven to be the source of numerous biological and technological advancements and have brought on new life-saving drugs and technologies to the market.

The damage on the other hand is immeasurable. How do you quantify what is not generated? Ideas not created? Collaborations not formed? Scientific projects abandoned over restricted access to research tools?

Without a doubt, the relationship between industry and academia affects both university and industry research. This is not necessarily a bad thing, but perhaps even the opposite. Much research has been conducted regarding the question of who really

contributes to funds and/or who can take intellectual credit for the making of high impact innovative drugs.¹ Chin-Dusting summarises the major findings in this question. Tracing back the origins of 32 major innovative drugs, the contribution of industry (53%) and non-industry (47%) are roughly equal.² Reichert and Milne demonstrate in their analysis of 21 impact drugs that the process "still starts with good science and ends with good medicine".³ Therefore, good science, from Academia, and good medicine, from the Industry, seem to be the right combination and formula to bring in new treatments to the market. That is, of course, as long as "good science" and "good medicine" are maintained and nurtured.

Good science is the key concept.

It is not always necessary to put a price tag on the problem in order to address it seriously. Some critiques, such as Levine and Boldrin, conclude that "it would be best to eliminate patents and copyright altogether".⁴ This is a radical view. It is also wrong

As in all good marriages, the answer lies in establishing good balance. Using the right policy tools can encourage both independent basic science (mainly in the upstream research), and a fruitful cooperation between academia and industry.

1. Maxwell, R.A. & Eckhardt, S.B. *Drug Discovery: A Casebook and Analysis* (Humana, New Jersey, 1990);

2. Maxwell, R.A. & Eckhardt, S.B. *Drug Discovery: A Casebook and Analysis* (Humana, New Jersey, 1990)

3. Reichert, J. M. & Milne, C. P. Public and private sector contributions to the discovery and development of 'impact' drugs. *Am. J. Ther.* 9, 543-55 (2002)

4. Boldrin, M. & Levine, D.K. The economics of ideas and intellectual property. *Proc. Natl Acad. Sci. USA* 102, 1252-1256 (2005)



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News Flashes

Top Stories in the World of IP and Competition

1) The *Financial Times* reports that the European Commission is preparing another high-profile anti-trust case. The company facing Commission scrutiny this time is Intel, the world's largest microchip manufacturer. Similar to Microsoft, Intel is accused of breaching Article 82 of the EC Treaty, which deals with abuses of a dominant position.

To read more go to *The Financial Times*, www.ft.com

2) Negotiators at WIPO are said to have reached a tentative agreement on the future of the controversial Development Agenda, originally proposed in 2004 by the so-called Friends of Development, which included Brazil and other leading developing countries. The tentative agreement was reached at the annual WIPO Assembly in Geneva.

To read more go to *IP-Watch*: www.ip-watch.org

3) In a move aimed at countering the increasing problem of pirated software, Microsoft announced last week that it would include new anti-piracy measures on its Vista operating system. A spokesperson for Microsoft said that users of unauthorised software would automatically lose features of the new operating system and eventually be able to use the machines only for Internet searches.

To read more go to *The Financial Times*, www.ft.com

4) The World Health Organisation is planning to hold a public consultation in November on the relationship between public health and intellectual property rights. A spokesperson for the

WHO said the consultation would involve the general public, NGOs, academics and experts, and the topic in focus would be how research could be directed more to the development of medicines that affect poor countries.

To read more go to *IP-Watch*, www.ip-watch.org

5) A new three-year deal was reached last week between the British record industry trade body (BPI) and the MCPS-PRS Alliance that represents songwriters, composers and publishers only hours before the case was due to go to a copyright tribunal hearing. The case relates to MCPS-PRS Alliance's wish to rewrite their royalty deals with record companies to better reflect the changing digital environment.

To read more go to *The Guardian*, www.guardian.co.uk

Upcoming Events

Joint WIPO and Stockholm Network Seminar - IPRs, SMEs and Health-related Public Private Partnerships – Climbing Up the Value Chain, 25 October 2006, WIPO Headquarters, Geneva

On 25 October 2006 the WIPO Division on Small and Medium-sized Enterprises and the Stockholm Network Intellectual Property & Competition Programme will be hosting a seminar on the topic of IPRs, SMEs and public private partnerships at the WIPO Headquarters in Geneva.

Chaired by Guriqbal Singh Jaiya, Director of the WIPO SME Division and Dr Meir Perez Pugatch, Head of the Stockholm Network IP & Competition Programme and Senior Lecturer at Haifa University, the central theme of the seminar is: IPRs, SMEs and Health-Related Public Private Partnerships.



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The seminar will focus on the methods by which IPRs can be used by different SMEs - such as university tech-transfer bodies, research hospitals and spin-off companies - to form partnerships with larger companies in the biomedical field and develop new treatments and new medical technologies. The seminar will also study national and international policies which can encourage the use of IPRs in private-public collaborations.

For the full programme go to:
http://www.wipo.int/sme/en/documents/pdf/stockholm_network_program.pdf

Speakers include:

Guriqbal Singh Jaiya, Director, SME Division, WIPO

Dr Cathy Garner, Chief Executive Officer, Manchester Knowledge Capital, UK

Dr Meir Perez Pugatch, Head of the SN IP and Competition Programme and Senior Lecturer at Haifa University, Israel

Dr Nikolaus Thumm, Senior Economic Counsellor, Swiss Federal Institute of Intellectual Property

Dr Itzhak Zaidise, Acting Director, Sheba Medical Centre, Israel

Helen Disney, Director, Stockholm Network, UK

Caroline Schwab, Program Officer, SME Division, WIPO

To RSVP please e-mail Anne Jensen
anne@stockholm-network.org

'Measure IT and Innovate' - Launching the Stockholm Network's Intellectual Property Index for the information technology sector, 14 November 2005, Renaissance Hotel, Brussels, 12:00-15:00

What is the level of IP protection available to IT companies in different countries? Can IP components relevant to the IT sector be identified? Can they be quantified and measured? Most importantly, can we really compare the level of IP protection provided to the IT industry in different countries?

Which of these countries has a stronger IP-IT environment? The US, the UK, Germany, France, Sweden, Norway, Brazil, Japan, or maybe Singapore?

The Stockholm Network, in association with *Managing Intellectual Property* and *The Progress & Freedom Foundation*, has developed a new and innovative statistical index aimed at measuring the strength of IP rights in the IT sector in different countries.

At this event, we will launch the IP-IT Index for the first time and present its rationale, methodology and specific components, as well as the scores of some of the leading markets.

Speakers include:

Prof. Martin Campbell-Kelly, Dept of Computer Science, University of Warwick

Helen Disney, Director, Stockholm Network

Anne Jensen, Project Manager, Stockholm Network IP & Competition Programme

Dr Thomas M. Lenard, Senior Vice President for Research, The Progress & Freedom Foundation

James Nurton, Editor, MIP Magazine

Meir Perez Pugatch, University of Haifa & Head of the Stockholm Network IP & Competition Programme (Chair)

To RSVP please e-mail Anne Jensen
anne@stockholm-network.org