

A Summary of where the European IPR could be improved

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Introduction

In July 2000 we reported to the High Level Expert Group into various intellectual property issues. Little has changed over the last 2 years; indeed it is arguable that at least in some ways the IP world has gone backwards with a failure of will of the member states of the EU to adopt either the community patent or the community IP court. Matters have moved forward in two respects only; there is now a European (Unregistered) Design Regulation (6/2002/EC), and European Database law is now codified through the database directive (96/9/EC) and adopted into law. The comprehensive (and in the view of the English judiciary and bar over indulgent) protection created by the Database directive is an important first, as in this area of protection the EU leads the world. The obvious problem is that if too much is given away, it is almost impossible to retrieve, the classic example being life plus 70 years for commercial software and popular music which can result in a copyright period too long to be commercially sensible.

This report will concentrate on those features of intellectual property law which require review on a pan European basis. They fall into two categories: a first which is substantive law and the second which is procedural law. Both are important for the efficient running of the single market. Both are mired in the very politics which would cause the founding fathers of the EU to shudder in their graves.

The nature of IPR

Intellectual property rights are economic rights. They confer economic benefits on those who hold them. Those benefits should be proportionate to the benefit given to society. Generally the intellectual property system works well and is generally thought in the west to work fairly. It works without too much distortion in ways that most people would regard as fair. However there are a number of issues and these can be looked at as follows.

- Fragmentation.
- Proportionality.
- Exclusion.

Fragmentation

Fragmentation is important for the obvious reason that what is supposed to be a single market in Europe is, in fact, highly fragmented. Until there is a single European intellectual property court there will be no pressure for consolidation. However, if damages awards start getting sensible, as they would if a claimant could sue in one court across the EU, it would be worth suing for money over intellectual property right infringement and coming out with a profit as opposed to an injunction in the local market, and intellectual property rights would be more useful and have greater economic effect. This is highly desirable, as IPR are otherwise expensive to obtain and maintain: the single market requires a single worthwhile remedy to deter infringement. At the moment the advantage is squarely with the infringer in the EU; made worse by the drawing in of the Dutch experiment of using the Kort Gedding summary judgement procedure and the Brussels jurisdiction convention to grant pan-European injunctions in IP cases.

The Urgent Need for the Community Patent and Community IP Court

A further advantage of European wide procedures so that there are European wide rights and therefore European wide remedies will be to deal with the current scandal of delays in the European Patent Office. It will not help issues concerning the granting of a European Patent, but it will certainly help deal with the scandal of oppositions which take forever under the present regime. The reasoning is as follows. A current problem is caused by the delay in dealing with post-grant oppositions to European patents, often after a period to grant which is too long. If there is an opposition pending, a person sued can join that opposition. A number of European countries such as Germany are not willing to allow a Claimant to sue in respect

of infringement of a patent which is under opposition. That means claims for infringement can simply languish forever. That is clearly unacceptable, yet nothing is really done about it. Interestingly, the same problem does not appear to have hit the Community Trade Mark, perhaps because very large infringements of newly established rights are rarer than with patents, which have a very limited life; and often protecting technology with an even more limited life.

What can be done? The answer is a great deal by speeding up grant and opposition requirements of the European Patent Office. However, if we get the Community patent and Community court, it may not be necessary to oppose a patent because, if the Claimant can sue on it, it will follow that anyone threatened can have a European wide revocation action even though the patent is under opposition. On that basis one can be reasonably optimistic that the scandal of oppositions and the fact that they take forever can be circumvented procedurally.

What has caused the delay in the Community Patent and Community Court is some member states taking an *uncommunautaire* and nationalistic view; that their local patent office will have no work, and so a system must be devised to make work for them. Until the politicians in the EU can understand that sometimes it is necessary to replace 15 national bureaucracies with 1 community level bureaucracy, progress will not be made. The failure is of political will, and it is damaging consumers at all levels.

The message to the Commission in relation to intellectual property is that the rights should be formulated on a pan European basis, and that national level rights should be forced to wither and die as quickly as possible.. To what extent and whether there will be any short term or long term improvement remains to be seen. The first stage is undoubtedly to facilitate and that facilitation can only come from a regime which thinks big., and can recognise that there will be winners and losers from a change of regime, and that some of those losers may be judicial or administrative officials who come from unpopular jurisdictions, usually those who treat the law as an academic subject rather than an arm of commerce.

The question of language appears nearer a solution, with an obligation being agreed to translate the claims but not the body of a patent specification; at least until suit is brought.

What else should the EU do to protect IPR

The question is asked whether the EU needs to do more to protect new technologies. Except for the needs expressed above, I do not detect much pressure for change or for new rights.

Domain Law - Domain name law will need codification.

Business Ideas - There will need to be some regime to protect business ideas. Why should a novel insurance policy not have protection? But there is not universal acclaim for such protection. The media are well protected. Copyright gives long protection. Some would say over-long. Disney and Warner Brothers were the biggest beneficiary of the extension of term of copyright. But extending patents to include business methods is not the answer, as it takes too long to get a patent, and the effect is not technical. Yet *some* protection is desirable.

Pharma and Agchem- Data Protection The Commission should look again at data protection in medicine and agchem, which is 6-10 years, and may or may not extend beyond patent expiry, and which a shoddily drafted piece of legislation, and is full of holes. The distortions in the pharma market make a mockery of IP rights in that area. The US system of data sharing is fairer.

Format and Personality Rights - It is possible that the law will evolve to include format rights and personality rights. I am not advocating either. But these areas need study. Format rights will protect game-shows and other media programs in a more general way than copyright, which depends on copying the detail and not merely the idea, and format rights could be useful for dealing with business methods. A registration system akin to designs, where validity is really determined in litigation rather than on application (patents and trademarks) could be an answer.

Personality rights are all over the place, and are needed. The basic problem is that if you are famous, others should not be able to trade off your fame for commercial purposes. Trademark law helps, but only if you trade. It excludes politicians (even in the US) and royalty (Princess Diana). Is this appropriate?

Intangibles

Intangible goods include assets such as software, databases, insurance policies, banking instruments, brands, trademarks, licences, standards and rights over scientific discoveries.

These divide into two general areas; tangible intangibles and intangible intangibles. Software, databases, insurance policies and banking instruments are tangible intangibles. They are products. They have a technical effect. They are recordable. They are deliverable. They can be bought and sold.

Brands, trademarks, inventions and discoveries are intangible intangibles. They support products. They protect products and services. They enable a developer to avoid competition or they enable the developer to stay ahead of the competition.

The critical difference is that intangible intangibles are licensable as such. A licence is a permission to do what would otherwise be prohibited. So they may generate revenue without a product or service attached. That is the truly intangible.

Wealth creators create IPR. This IPR can be subdivided into things you can touch and feel and things you need permission to touch and feel.

Database rights are very important. They enable the targeting of the consumer, and we are all consumers. Even the buyer of nuclear power station or an aero engine is a consumer of sorts. The better the targeted information the more likely a product is to be well designed and the more likely a sale is to be made and mistakes avoided. Market research is well known. Massive computers can take it to the next level and database industries are the next generation (e.g. electricity charging, road usage rights etc.). The European Commission has started down this path by protecting database rights.

Proportionality

This subject can be dealt with simply. With respect to each IPR, is the process of obtaining it proportional to the benefit it confers, and is the cost of enforcing it proportional to the benefit it confers? Except in the proposed community court, this latter is not an EU issue at all; it depends how well the national courts function, both as regards speed and expense. The English Court come out well in speed and poorly in expense; the Italians are the opposite. The cost of obtaining IPR is reasonable to the benefit it incurs in all respects except for patents, which are too slow and expensive to obtain.

As regards benefit, most rights, except trademark rights do not go on forever, and there is no reason to object to a trademark's longevity, as it is a certificate of origin. Some patent rights are too short, and the SPC system was brought in to deal with this. Some copyright (e.g. software and some entertainment) is too long at life plus 70 years. The Commission might usefully look at this.

Exclusion

This raises a number of issues. The first is complete exclusion from the IPR process. Issues here include business methods, format rights and personality rights.

Exclusion is also exclusion from the process because of cost. Patents are the worst offenders.

Exclusion is also exclusion from the process because of the cost of or time to enforcement. This is a limited problem. It is a problem of high cost in the UK, and a time problem in Italy, Belgium and some other countries. There is also an exclusion problem in Germany, where there is no way of breaking open a secret process alleged to be infringed by a patent, and the protection conferred by way of injunction is very limited.

It, therefore, follows that the Commission, or the Council of Ministers could require member states to reform their domestic litigation procedures to set certain minimum standards, by way of harmonisation, such as time to trial, availability of remedies where disclosure is needed, and to deal with the local cost issues. This will disappear if all litigation of IP rights granted pursuant to a Community Directive could be litigated in the Community IP court of first instance. If the draft proposed procedure for dealing with patent litigation is a model, it will out-compete almost all national judicial systems. Exclusion for reason of expense or delay should be extinguished.