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International
Milestones for improving the protection of SME innovations

Although there has been substantial progress in harmonising IP regimes both across the world (with the Patent Cooperation Treaty (PCT) (1970), the Agreement on Trade-Related Aspects of IP Rights (1994) and the Singapore Treaty on the Law of Trademarks (2004)) and in Europe (through the European Patent Convention, the Community trademark, the Community design and the EU IP Rights Enforcement Directive (2004/48/EC)), there is still a long way to go. Even once the proposed US patent reform and the long-awaited European patent have come into force, this is still likely to be the case.

The disparity between the 'old world' of Europe with its strict objectivity and the United States with its subjective national approach on the one hand, and the new world of the BRICS states (Brazil, Russia, China, India and South Africa) and Japan and Korea, with their flexible approach to IP rights on the other, presents a major challenge to entrepreneurs and managers: to adjust their strategies quickly in order to participate in the global race for the most innovative and environmentally friendly products and services.

It is pointless to waste effort and money dealing with the existing practical differences between EU member states, which always defend their nationalistic positions while seeming unaware that if their legal and economic frameworks were adjusted to the needs of the entrepreneurs and small and medium-sized enterprises (SMEs) in their countries, they could help Europe and the United States to progress innovatively. The European Commission's main task is not only to attempt to balance the differences between member states with respect to security, bureaucracy and free trade, but also to monitor the performance of issues such as the common currency and economic competiveness, which includes job creation – that is, the stabilisation of the creation and growth of SMEs.

Some of the more innovative states have learned their lesson and have shifted their focus towards the creation of a global IP infrastructure and the sharing of work in order to deal with the huge amount of work resulting from the global increase in patent and other IP rights applications. However, these efforts are not enough to achieve simplified application procedures and cost reductions in this ever-growing area of protection.

Neither open source nor open innovation movements can meet the real needs of globally competitive companies. Rather, the only answer is to implement legal frameworks which enable interested parties, particularly SMEs, to obtain fast and reliable prosecution (eg, by providing enough examiners) and which avoid the bureaucracy that can kill off the entrepreneurial and inventive spirit before the grant of a patent or other IP right.

European officials (eg, examiners, appeal board members and judges) must adjust their daily working routine in order to consider applications subjectively and humanely, rather than narrowly interpreting outdated bureaucratic rules, so that important inventions and innovations can still be protected despite formal deficiencies in applications.

The same is true for managers of major corporations, who must recognise that corporate compliance rules should include not only sustainability and long-term thinking, but also fruitful cooperation with SMEs, rather than subversive attacks against the innovative power of SMEs. This would provide real hope for allied efforts in the globally competitive world of IP rights and would provide new resources through trusted insourcing. This includes fair behaviour; for example, the 'fair, reasonable, and non-discriminatory terms' that are commonly accepted in regard to standards must become equally accepted in regard to joint ventures and research cooperation.

Between 2000 and 2006, major companies (3% of all patent applicants) increased their share of total patent filings from 50% to 60%, while the share of filings attributed to SMEs (the other 97% of all applicants) fell to 40%. These figures prove that SMEs are losing ground in the ability to defend their growing innovative power.

While litigation frameworks in various jurisdictions hinder SMEs through high litigation costs, SMEs stemming from family businesses will continue to die out. For example, in the United States, each party to a patent litigation must bear its own costs, no matter whether the case is successful, so that a US SME must spend between $3 million and $5 million to protect its patent. Without amended rules to allow SMEs to grow, there will be no US economic recovery – this is a view is shared by US Supreme Court judges.

In Europe, some countries still have a strong SME-based economy (eg, Germany, Austria and Denmark). However, in order for the governments of other countries to support or build a strong SME-based economy, which can create stable new jobs, the following goals must be achieved (at minimum):

- the fast and worldwide consideration of prior art;
- reasonably priced official IP fees;
- the fair distribution of financial risks between litigating parties;
- faster IP court proceedings (at both national and European level);
- nullity proceedings with technical experts on appeal;
- the obligatory valuation of IP assets in balance sheets;
- obligatory but simplified proof of use of trademarks;
- harmonised tax preferences on income resulting from IP rights;
- full (European) IP harmonisation, with a combined utility model system;
- international online exchange of prior art during examination;
- (inventors') grace period of 12 months; and
- online access to all published patent documents in English.

In Germany, 'hidden champion' SMEs can overcome pressures from competitors, major corporations, labour unions, finance authorities and bureaucracy by employing highly motivated inventors and consultants to make the most of Germany's well-established and highly developed IP system. This has led to 80% of European IP litigations being handled in Germany. Unfortunately, many SMEs have now given up the race to secure innovative results even though the combination of patents, utility models, designs and trademarks could have been a healthy basis for a more competitive edge.

Germany is still the only remaining country where a patent examination can be postponed for up to seven years, which allows applicants to speed up or delay the patent examination procedure depending on research and development (R&D) results and the marketing progress of the product at issue.

A European-wide utility model may be branched off from or combined with a pending unified European patent, a PCT application designating the European Union or an application in a European patent member country. This allows SMEs from all over Europe to develop their competitive skills and thereby contribute to new European-wide cooperation and job creation, while simultaneously defending against non-EU counterfeits. A maximum patent duration of 10 years, as in Germany, could help to cover the core duration of patents.

The efforts of the European Commission in creating the Community trademark, the Community design and the IP Rights Enforcement Directive have resulted in major success, and have thus made a huge contribution to keeping European companies in the global race. In addition, for 40 years the European Commission has pushed for the European patent and the European Patent Court against nationalistic egotism, particularly from those EU member states which are unable to balance their own economic systems and which, as a result, expect other states to subsidise their spending deficits.

Fortunately, 25 of the 27 EU member states have now finally agreed on enforced cooperation for the single European patent and the European Patent Court (Italy and Spain are the two dissenting countries). The European Patent Court would be a major achievement and would allow for unified case law across Europe, issued by highly trained judges and technical experts.

It is vital for competition between different courts to be maintained, at least at first instance. For example, in recent cases, before granting a preliminary injunction the Dusseldorf court has requested second patentability tests for patents which have successfully survived opposition or nullity proceedings. Luckily, this undermining of the work of patent examiners and patent attorneys has not been followed by the Munich or Mannheim courts (Dusseldorf, Munich and Mannheim are the three most important German patent courts).

A user-friendly language regime (with an application filed in the applicant's native language, followed by a sworn English translation within 12 months), supported financially by the European Commission in regard to the translation costs, could:

- broaden the knowledge base of SMEs in regard to emerging technologies and markets across Europe;

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- help to build a broader base of technical information on the Internet; and
- result in more IP experts by training them using different national patent translations.

European SMEs still suffer from a number of disadvantages when it comes to protecting and defending their IP rights, including the following:

- SMEs have inadequate financial resources to protect their ideas while also defending themselves against rivals which are ignorant of their IP rights.
- SMEs do not receive enough financial support from their governments for R&D.
- SMEs are still not allowed properly to value their IP rights in their balance sheets. This is likely to make them targets of unfriendly takeovers, rather than improving their capital basis.
- SMEs do not receive fee reductions at the European Patent Office (EPO) and most national offices (with the exception of France, plus the United States and Canada).
- SMEs experience specific disadvantages with the fee structure of the EPO and some national offices (eg, claim fees).
- SMEs cannot sell and lease back their IP rights into countries or states where royalty income is tax free (eg, Delaware and Utah in the United States).
- Only in the United Kingdom (and Denmark, to some extent) can SMEs deduct 200% of R&D expenses from their income tax to improve their financial basis for further R&D spending.
- SMEs do not enjoy a six or 12-month grace period in Europe for patent applications.
- SMEs do not receive language support for the different European languages, while SMEs in most of the major countries outside Europe have the advantage of using a single language.
- SMEs do not have the staff resources for IP litigation and forum shopping.

It is time for a new European IP policy which compensates for some or all of these disadvantages. Other countries have made moves towards this – for example, the Chinese government supports its applicants in foreign PCT filings and in the following national phase.

It is, of course, necessary to avoid duplication in the international patent system, where the know-how of examiners is used repeatedly in searches. The introduction of a patent prosecution highway will make sense only when all the countries involved have a deferred request for examination, so that within a period of, say, five years, there would be adequate time to await the outcome of a patent examination in one country before starting examination in another country. Finally, a Community trade secret – which is not even under consideration – could help to restrict the unintended flow of know-how from one competitor to another, even in cases where IP rights may not be appropriate. If this were combined with a one-year grace period for inventors, SMEs would be able to be far more open when cooperating with other companies and innovators.

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