

Meeting minutes from the STOA dissemination workshop on June 14th:

Chairman of the workshop Mr. Malcolm Harbour, Member of the European Parliament and Vice President of the STOA Panel in the European Parliament, opened the Disseminations workshop.

Bjørn Bedsted, the project manager from the Danish Board of Technology and representing the ETAG group, introduced the purpose of the project, which is to provide a fresh look at the European patent system and assess whether reform is needed to rebalance the system in order to fulfil its purpose of promoting social and economic welfare. Bjørn Bedsted emphasized that the Working Group express their support for the introduction of a Community Patent and a European Patent Court. The policy options put forward from the Working Group are not an alternative for this ultimate goal. They have been developed to improve the system as it is known today and should the Community Patent be introduced, the Working Group considers that many of the policy options put forward would have an even better effect.

The Working Group members presented the policy options in the report and after that the audience was invited to participate in a discussion focussing on the policy options put forward.

Presentations of the policy options in the report:

The Working Group members presented 5 of the 6 policy options detailed in the report. The policy option on “Facilitating defensive publications” was not presented as it was considered only a minor option compared to the others.

Mr. Peter Lotz, Head of Department of Industrial Economics and Strategy, Copenhagen Business School in Denmark opened the presentation of policy options. The recommendation on “*Insertion of the economic mission of the patent system in the European Patent Convention*” involves the introduction of a preamble into the legislation that states what the purpose of the legislation is, namely: to promote social and economic welfare. Wording for such a preamble was suggested at the workshop, and is as follows: “The granting of patents serves the purpose of enhancing social and economic welfare by means of encouraging inventions and their diffusion. The protection provided by patents should be sufficient to ensure proper incentives to inventors. This should imply that patents should be granted in a proportionate and transparent manner, so as to ensure legal certainty.” The preamble should be placed in the European Patent Convention and if the European Union is able to come forward with a Community Patent that same preamble was proposed to be included in the legislation. The effect of a preamble with regard to for instance, emerging technologies would be to guide legislators and to make the legislator consider whether or not the application of the patent system to an emergent technology makes sense from the point of view of the mission of the patent system.

Mr. Francesco Lissoni, Professor of Applied Economics, University of Brescia, Italy spoke about “*Enhancing governance within the European patent system*”. To meet the challenges that the governance of the European patent system is facing because of the emergence of patent thickets, the increasing number of patent applications and patenting for defensive and strategic reasons, three options were recommended. These were: (i) enhancing the patent awareness within the European Parliament; (ii) establishing a European Parliament Standing Committee on Patents, which should be linked with an External Advisory Body composed by experts, practitioners and stakeholders; and (iii) enhancing patent awareness within the Commission. The Standing Committee suggested would

gather information from the European Patent Office and other sources related to patent claims and report on the standing issues to the Standing Committee. This should serve to strengthen the role and expertise of the European Parliament in patent matters on the implication of competition policies, innovation policy issues and help accommodate the rise of public concern for patent matters.

Mr. Wim Van der Eijk, Principal Director International Legal Affairs and Patent Law, EPO, Munich, Germany presented the policy option about "*Improving quality aspects in regard to patentability standards and patent grant procedures*". A look at EPO workloads over the last decades shows a steep upward movement in the number of filings, in the volume of applications and in the number of claims per application. In order to strengthen the patent system and create stronger patents, it was recommended to look at two aspects: (i) the way in which patent offices apply the given standards for patentability, and (ii) the standards themselves. Looking at the standards concerns the question of what is an invention and when is it valuable to be granted a patent for. The Working Group suggested taking a closer look at the concept of inventive step to see if it is still fulfilling the function it is meant to have and concentrate on the concept of who is a person skilled in the art.

The policy option on "*Dealing with emerging technologies*" was presented by Mr. Jens Schovsbo, Professor, University of Copenhagen, Faculty of Law, Denmark. The patenting of emerging technologies gives rise to special concerns about patent quality in regard to both the patent system and in regard to the individual patent. The quality problem at the system level is about setting the standards for patents and deciding on what is going to be considered patentable subject matter and what is not going to be. At the executive level (i.e. the EPO), the quality problem relating to emerging technologies deals with applications of patent standards in individual cases. The special problems in emerging technologies in this regard are that prior art can be limited and hard to find for an examiner. In order to avoid these sorts of problems, the Working Group suggested to boost the executive level by allocating additional resources to EPO examiners to better assess prior art and avoid too broad patents being granted, and finally, to ensure ongoing deliberations between politicians, experts and stakeholders on what is patentable and what is not.

Mrs. Geertrui Van Overwalle, Professor of IP Law, University of Leuven, Belgium spoke about "*Increasing access to patented inventions*". Patents that crowd the market create a patent thicket that makes it difficult for an inventor to enter the market. In order to overcome a patent thicket, negotiations will have to be started with each and every patent owner in order to obtain a legitimate access to the patents and to obtain the necessary licences. The Working Group suggested two different measures, which would facilitate access to patented technology. One is the license of right, which is a legal mechanism by which a patent holder voluntarily chooses to give general access to anyone willing to pay a certain license. The other possibility suggested is to facilitate access to a web of patents by the establishment of collective rights management models such as patent pools and clearinghouses. The Working Group recommended further investigation of these models, and especially in view of current EU competition law.

Questions raised by the audience and discussed with the Working Group

1. Questions relating to the policy option "*Insertion of the economic mission of the patent system in the European Patent Convention*":

Daniel Alge, Representative of International Federation of Industrial Property Attorneys (FICPI), raised the issue of whether the proposed preamble is introducing a new patentability requirement, which goes beyond the utility or industrial applicability. Also, he asked if the patent applicant has to prove that the invention enhances the social *and* economic welfare and if the suggestion made by the Working Group Working Group is social *or* economic welfare.

The Working Group responded that the preamble should have an effect on how the patent system, overall, is interpreted. This means that the purpose of the patent system expressed in the preamble should be unfolded in the patent law legislation and lead to a settling of the patentability standard. The preamble is not intended to be used on a daily basis as a patentability requirement on the same level as the requirement of novelty and inventive step. It was imperative for the Working Group to state explicitly that the patent system is there to a specific end, which is not only economic welfare but also social welfare. The distinction between social and economic welfare is made because economic welfare may risk being interpreted in a narrow business related sense.

Chris Mercer, President of Professional Representatives before the European Patent Office, pointed to the fact that the Board of Appeal is the main arbiter of what the level of inventive step is and what qualities the skilled person has, and therefore it is very important to be able to influence the Board of Appeal. He asked how this could be done.

The Working Group stated that the preamble should be read by patent users as well as instructing the behaviour of patent practitioners - yet it should also be used by the courts and the Board of Appeal. The preamble is important to all the levels of the patent system that means both at the policy level, the executive level and the legislative level. The Working Group emphasized that it is difficult to address a matter of the office versus the Board of Appeal in regard to the changing of the standards in the EPO. First in the process should be to establish among ourselves as a patent community the standard we would like to have. Then we need to instruct the examiners to change their behaviour in order to comply with this standard. The need to change rules in order to make the Boards of Appeal compliant would be a part of a second phase.

Laurent Ruessmann, Sidley Austin, representing the Association of Competitive Technology, pointed to the consideration of what the rationale for the legal changes are and what impact they may have in regard to Europe not moving in isolation from the rest of the world.

The Working Group agreed with Laurent Ruessmann and underlined that the preamble states the rationales of the patent system and therefore, changes to the patent system should be in line with the purpose established in the preamble.

2. Questions to the policy option “*Enhancing governance within the European patent system*”:

Daniel Alge, Representative of International Federation of Industrial Property Attorneys (FICPI), raised the issue on governance of the European patent system about the involvement of practitioners. The European enterprises, inventors and SME’s are the ones filing patents and creating innovations, yet the policy option focuses on enhancing governance among European Parliamentarians.

The Working Group argued that the proposal on enhancing the governance of the European patent

system and the suggestion to set up the European Parliament Standing Committee on patents serves to establish transparency within the European patent system mainly for politicians and the public at large, including stakeholders. The form of transparency that the report focuses on is based on the recognition that simply making information available does not enable anyone in civil society to see the global picture. The role of the External Advisory Body that was proposed is to systematically gather information on current trends with regard to patenting in the EPO and report on trends within the patent offices. The governance of private companies and stakeholders is therefore introduced with the suggestion on representation in the Advisory Board to the European Parliament and also by the proposal to open up the Standing Advisory Committee at the EPO to other stakeholders and experts besides those that are already there.

Daniel Alge also asked what the political message from the report is and why an overall goal of contributing to the Lisbon agenda was not expressed.

The Working Group stated that the policy options are contributing directly to the Lisbon agenda on European innovation by trying to come up with recommendation as to make a fundamental heart of regulation in Europe working towards the aim of better and more products. That is the fundamental political consideration of the project. The primary objective is to encourage a system that produces good patents and if it is costly to obtain a good patent, so be it. The message from the Working Group was that the cost of obtaining a patent and defending it is not a core issue. Good quality patents aid to improve the economic and social welfare and that therefore, is the core issue.

Benjamin Henrion from FFII Bruxelles, asked what the Working Group thought of the fact that the representatives of the member states at the EPO are seen as representatives of national patent offices and therefore in fact push for more patents because of national interest in renewal fees.

The Working Group argued that the EPO first of all is an inter-governmental organisation and in the end controlled and governed by the member states. It is the member states that appoint their representatives to the government body, the Administrative Council. After the patents have been granted they are no longer European but become national and subject to national administration. From a governance point of view, these conflict of interest issues are indeed a problem because of the patent policy being partly national and partly EU based. Therefore, the Working Group is very clear about the premise of the report, which is the support for the introduction of the Community Patent because it would counter the patchwork of competences that exist today.

The Working Group also noted that the EPO granting procedures in the end has to do with the way in which the EPO examiners apply the given standards for patentability, and that it should be enough to instruct examiners to change their behaviour. The Working Group explained that patent examination practice shows that the pressure for having a patent granted comes from the applicant. The EPO therefore has to resist a trend towards granting more and more patents for small innovations. There is a need for a strong granting authority, with expertise and resources to be able to make a stringent examination. Rigorous application of the standards is important for a good quality system and essentially this means enough time for examiners to fully examine the application.

3. Question to the policy option “*Improving quality aspects in regard to patentability standards and patent grant procedures*”.

Gilles Capart, Chairman of Proton Europe and Chairman of the patent policy group of Proton Europe, asked what effect on European competitiveness and the increasing workload at the EPO the setting of patentability standards in Europe is going to have if changes are not made in agreement between the European patent system and the US, China and Japan?

The Working Group agreed that there is an international dimension to patentability standards, strict application and rigid granting procedures. Yet the Working Group argued that we can easily make improvements in these areas on a European level and meanwhile try to persuade our partners in the world to do the same. The Working Group did not agree with the conclusion that we should only make a move when it can be made on a global scale because it would take too long before anything happens. Internationally, Europe already has a spoken reputation for quality and should be in a position to lead the process internationally.

4. Question to the policy option “*Dealing with emerging technologies*”:

Adam Gierek, member of the Socialist Group in the European Parliament, mentioned the question of how to define what should be patentable.

The Working Group replied that it is not the idea of the group that emerging technologies should not be patentable. The Working Group underlined that emerging technologies give rise to special concerns and that these should be dealt with in the system to make sure that the technologies are patented in the right way. Again, attention was called to the preamble, as the effect of a preamble would be to guide legislators and to make sure they consider whether the application of the patent system to an emergent technology makes sense from the point of view of the mission of the patent system.

5. Questions to the policy option “*Increasing access to patented inventions*”:

William Davis, Research and Motion, asked how the issue of competition law in regard to the collective rights management model and patent thickets should be overcome.

The Working Group emphasized that the report did not explore the competition law issues and economic issues involved in collective rights models, yet the Working Group explained that when putting the two bodies of legislation together there is at least four prerequisites to make the mechanism legitimate for both the patent pool and the clearing house model:

1. Valid patents
2. Should contain essential patents. An essential patent is a patent to which access is essential in order to make other products.
3. No exclusive licensees to any third parties.
4. The license should be offered on fair, reasonable and non-discriminatory terms.

On competition issues in relation to patent pools, the Working Group explained that cross licensing across companies in the sectors that are affected by standards is simply the result of complex technologies because many patents are needed to produce an innovative product, and in that case, webs of cross licensing occur anyway. Therefore, it is not in the absence of a patent pool that access

to individual patents would be uncomplicated. Patent pool policy should aim to avoid that the only entrance to the pool is taking another patent since that would just create an incentive to take as many patents as possible. Instead, patent pools should be made more accessible for those who cannot contribute to cross licensing with patents of their own.

The competition regime in the European Union is structured in a way that makes it unclear how to apply the legislation to the new collective rights management models. The regime is constructed in a way that makes it impossible to determine in advance if a patent pool or clearinghouse is legitimate and it has therefore become quite uncertain to start the whole process. This is an example of why it is important to have a governance system that brings together IP and competition issues. The Working Group recommends that further investigation is made as regards competition and the collective rights mechanism.

The Working Group explained that the preamble is there also to open up a dialogue with bodies that are entitled to deal with competition issues or innovation issues at large beyond the patent system. With a statement like the preamble, it is more straightforward to set up a dialogue on whether patent pools are good. The competition faction would have much more incentive to bother with patents if there is a clear connection between the patent system and overall welfare issues.

In relation to compulsory licensing, the Working Group underlined that the report did not tackle this specific question. Instead the report took a broader approach by recommending the introduction of a mission statement in the EPC so that you will always try to weigh up the social and economic welfare benefit. The preamble is the starting point of any deliberations of compulsory licensing and volunteering measures, yet the panel believe that compulsory licenses are only a last resort measure.

Ronald Zink, Microsoft and **Gilles Capart**, Chairman of Proton Europe and Chairman of the patent policy group of Proton Europe, asked what could be done to promote the filing of patents by European universities and SME's; should these groups have special access to the European patent system?

The Working Group replied that many concerns about the contribution of European universities to patenting in Europe are based on incorrect data. Compared to universities in the US, universities in Europe do not contribute to patented inventions that much less (in proportionate terms) to the overall number of patents taken by nations and industries. The difference is that European universities do not hold these patents themselves. In many cases, the ownership of the inventions resulting from research done in universities goes to industrial sponsors that intervene at some point in the research projects. When academic patenting is measured in terms of the origin of the invention, i.e. who is the inventor and not who owns the invention, then it becomes clear that the percentage of academic inventions it is not that low compared to the total number of inventions. The reasons for that would be that legislation over academic inventions has been historically different from one country to another within Europe, and that European universities are much less aggressive when it comes to enforcing their sanctions to disclose the invention to the central office. Creating special incentives for universities to patent involves the risk of more litigation over who owns the patent. Also, many patents owned by universities in Europe are co-owned by the universities and businesses. There would be no big advantage to universities in lowering fees over these co-owned patents because the co-owners are in many cases big companies.

On the question of access for SME's, the Working Group argued that it is an issue outside the frame of the patent system. The report has dealt with the patent system as such and the policy options put forward should automatically benefit SME's. Whether there is reason to encourage SME's, universities and others to take out more patents is a separate issue. If we want SME's to take out more patents, it should be achieved by separate policy initiatives and possibly subsidies for SME's. The Working Group does not believe this to be a core issue of the workings of the patent system.

European competitiveness:

The question about European competitiveness was mentioned several times at the workshop.

Laurent Ruessmann raised the question about European competitiveness and asked if the focus shouldn't really be on cost and quality.

The Working Group responded that a patent system with easily obtainable patents and low costs is not necessarily a competitive advantage. The Working Group agreed that unnecessary costs should of course be eliminated but making the system cheap or cheaper for users should not be the primary goal. The primary goal of the patent system is to produce good quality patents and if it takes more examiners to decide whether a patent should be granted, it is reasonable to make it more costly. The cost issue is secondary. Furthermore, the Working Group argued that the European Parliament should only be concerned with the overall cost of the system. In addition to this, Chris Mercer, President of the Institute of Professional Representatives before the European Patent Office, pointed out that making the application much cheaper for a European patent could be counterproductive, because more people possibly would apply for a patent, thus increasing the problems associated with the rising number of patent applications. The Working Group agreed, and added that low costs and more easily obtainable patents would lead to an increase in the number of patents and this may lead to more and costly litigation with the result that the overall cost of the system goes up. Focusing too much attention on the cost of obtaining patent grants may thus be misleading.

Final recommendations from the Working Group to the members of the European Parliament:

Following the discussion between the audience and the Working Group, Mr. Malcolm Harbour offered the members of the Working Group one minute to make their final recommendations.

The Working Group pointed at four very important issues:

1. The Working Group strongly recommended the European Parliament to put an effort into the insertion of a preamble in the EPC and a future Community Patent. The preamble is very important because it clearly sets the perspective through which the patent system will be looked at when developing policies on patent issues. The adoption of a preamble would also introduce a dialogue about the competition issues in relation to collective rights management models and in specific emerging technologies. With regard to emerging technologies, the preamble would guide the decision on whether the adoption of a specific technology within the European patent system is suitable from the point of view of the purpose of the patent system.
2. The Working Group called for more political leadership and expressed their wish for the European Parliament to recognise the importance of the patent system. The patent system is an

essential policy tool in modern society and the European Parliament should pay attention to the need for a fact based and open discussion about the system. The European Parliament should also consider the group's proposal to introduce a Standing Committee on patents issues and an External Advisory Body linked to such a committee.

3. The Working Group encouraged the European Parliament to deal in more detail with issues of access to knowledge. The European Parliament could do so by further exploring the collective rights management models and by making the competition law framework more flexible in order to promote and enhance those models. From both a civil society and users' point of view, this is of great importance.

4. European universities: The European Parliament should be aware that special incentives for universities to patent more may carry the risk of increased litigation over who owns the patents. Many patents are co-owned by the universities and the business community, and thus lowering fees for these co-owned patents would not be an advantage to the universities because the co-owners often in fact are big companies.

Members of the European Parliament present at the workshop:

Mr. Jorgo Chatzimarkakis, member of the Group of the Alliance Liberals and Democrats for Europe (Germany), Mr. Adam Gierek, member of the Socialist Group in the European Parliament (Poland) and the chairman Mr. Malcolm Harbour, member of the Group of the European People's Party (Christian Democrats) and European Democrats.

Unfortunately Mr. Philip Busquin, President of the STOA Panel and initiator of the project was not able to attend the dissemination workshop. Member of the Working Group Mr. Robin Cowan, professor of Economics at Université Louis Pasteur and the project rapporteur Mr. Matthew Elsmore, Assistant professor from Aarhus Business School-University of Aarhus were also unable to attend.