

a EPO SCENARIOS

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What would you describe as a historic defining incident or event in terms of patents - one that has been influential in shaping the way they are perceived and managed?

I would first mention the Paris Convention for the Protection of Industrial Property, which was adopted in 1883. It was two pages long: simple, clear and good for the period. One of the main reasons for adopting such a treaty was to protect the inventors who disclosed their inventions at the Universal Exhibitions.

The Patent Cooperation Treaty (PCT), which was adopted in 1970, is certainly the second important development in the field of international patenting. It was the first attempt to solve the international filing aspect of patenting. However, it became extremely cumbersome and complicated. I must recognise that the recent reform concerning the designation fees was a positive move. It still remains that for independent inventors, two important aspects still require consideration: reduce the costs and simplify the formalities.

The European patent system was also an improvement, but unfortunately the single Community patent has been a failure. UNICE, representing all industry, blocked the Community patent. It preferred "no solution" to what it called a "bad solution".

Another difficulty with the patent system is that too much importance is given to national patent offices. If one takes any country, a national ministry (education, health, transport, etc.) has to deal with residents, they are the users. Patent offices are different; in most countries they mainly deal with foreign applications. The mentality in the patent offices is influenced by the fact that their users are mainly foreigners, not nationals or residents. There is therefore no emphasis on promoting inventive activity at the national level. The system does not support local innovation.

What do you think are the key factors that will influence the way the patent system might unfold over the next twenty years?

Today, the EPO has limited the users of the patent system to two main groups: (i) industry, represented by UNICE, and (ii) the practitioners, represented by the patent attorneys and lawyers. Industry is of course a user, not so patent attorneys. SACEPO (the Standing Advisory Committee before the EPO) comprises some 50 people, half from industry, half patent lawyers, with only three persons representing other viewpoints: one representative from IFIA (International Federation of Inventors' Associations), one from the Max Plank Institute and another from the industrial property institute in France. There is currently a misrepresentation of what should be called the basic users, a fundamental difference in outlook with our view.

We believe that the basic users can be defined as those groups who are inventing, not their intermediaries. There are three or four groups, namely:

- independent inventors, including micro and small innovative enterprises
- medium-sized enterprises
- big industry, including multinational corporations
- universities and research centres.

In order to achieve a system that meets its goals more effectively, the user groups need to be redefined. At present the EPO is hearing the voice of only patent attorneys and big industry, which gives it a narrow perspective. The EPO is not listening to the views of inventors, but to those who look at drafting details, at exceptions to the rules, etc., rather than at the very basic nature of the rules, at policy, economic development and financial issues. Independent inventors could agree with big industry if they were left alone to speak to each other, but this is not possible under the current structure of SACEPO, where no possibility for dialogue and negotiation exists. In WIPO there is a slightly different system, but it also suffers from a situation where generally the views of some of the main people behind the patent system are put aside. Micro and small industry is in fact not represented before the EPO or WIPO.

I must stress that independent inventors constitute a large percentage of users: at least 30% of national patent filings in European countries. In Norway this percentage reaches 52%, in Ireland 43%. The EPO, as such, does not give figures for the percentage of applications from European independent inventors, compared to the total number of European applications. In the United States, American independent inventors represent some 27% of the total filings by US residents. Research centres make up approximately 1 to 2% of patent filings. In Europe, the European Commission defines industry by the number of employees, namely: micro (1-9), small (11-49), medium (50-299) and big (300+). If these groups were all represented in SACEPO, there would be different viewpoints.

On another subject, we strongly advocate having special fees for independent inventors and some of the other groups, such as the micro enterprises at least. We are in favour of a 50% reduction in fees, not only of filing fees, but also of search fees. Fees could be subject to compromise: what is important is what these individuals and companies put in as 'up-front' costs. If afterwards an invention is successful, they will have enough money to pay renewal fees. We do not think that it is necessary to use the American notion of small entities to whom a 50% reduction could be offered. The European Commission has its definition of micro, small and medium-sized enterprises. The US definition is too large, including enterprises up to 500 employees. In fact, we believe that Europe should adopt the Canadian system which limits the 50% reduction to what the European Commission defines as micro and small enterprises (i.e. 49 employees or fewer). Also, we would not include other conditions such as turnover, because application of the system would then become too complicated. I, on behalf of IFIA, have asked both the EPO and WIPO to assess what the financial implications of such a proposal would be, but they did not want to consider our suggestion. The patent offices (at the world, regional and national levels) think that they will be ruined if they adopt such a reduction, because they live from earnings from filing fees, but we think that they will not. It is a question of compromise, of balancing the different interests, including the financial implications for the patent offices. The message for the EPO is: Reduce fees and apply fewer formalities.

Things will not change if the decision-makers remain the same. Representation is really the key! Until there is a drastic change in the system, which depends on governments in the final instance, there will always be unfairness and discrimination against those who

can least afford the costs involved in the international patent system. For example, big industry usually uses the PCT, which gives them 30 months before entering the national phase. Most independent inventors cannot afford the up-front costs of the PCT, so they use the Paris Convention route, which gives them only 12 months to make their decision as to the foreign countries in which they can file their patent application. This is an unfair situation, which can be seen as a kind of social discrimination, based on ability to pay. We all know that it is not rare for communities and governments to establish a system that tries to support disadvantaged groups (e.g. the unemployed or the elderly). If the USA and some 20 other countries have established special fee reductions for certain groups of applicants, regardless of their nationality and country of residence, why could the European countries not do the same? The patent system in this sense is discriminating, because individual inventors or small companies have to spend all their money to use the PCT or the European system, otherwise they have to decide not to file at all, or to file only in very few countries, thus limiting the territorial protection of their invention. Developing countries have obtained a 75% fee reduction under the PCT system. But there is nothing similar for independent inventors, regardless of their nationality. A patent is a big investment for such inventors. This problem has a human rights aspect.

Usually, most patent offices are not interested in the social and societal influences of their activities; they focus 100% on the system alone. They are staffed by insular people who live in the world of patents, not that of inventions, not to speak of inventors. We consider that there are social values that have to be taken into consideration, and where necessary respected. Discussions related to drugs and health have started recently in patent forums, but not really on social and environmental problems or human rights.

In terms of patents, what do you think are the most significant challenges to the formulation or enactment of policy?

There is a widespread lack of understanding of the patent system. There is also a disconnection between patents and innovation. The support of the EPO to innovation consists in granting patents and developing a patent information system, but there is no department for nurturing and supporting innovation. In contrast, the European Commission tries to support and promote innovation. WIPO could also promote innovation, but it has only one or two minor departments for this specific purpose. Wider perception about the system could change if it were no longer perceived as elitist. The trend is to create a closed shop, with the objective of making it as complicated as possible. The patent system could become more attractive to political decision-makers if it gave more attention to inventors. At present there is a lack of political will to resolve the problems within the system. However, the current President of the EPO, Professor Pompidou, is himself an inventor - ethics is his topic, so he and others like him could bring in the necessary broader perspective.

The basis of the international patent system lies with three patent offices, the USPTO, the JPO and the EPO, which process 85% of patent filings. This is the group that can modify the system. The disconnection of patents and innovation today can only be solved by looking at inventors, but there is no lobby of individual inventors. Many of today's big companies were developed from the ideas of individual inventors (for example, Melitta, Siemens, Bill Gates) - not attorneys. By excluding the voice of the independent inventors, we hinder future economic development.

We would like to see a Community patent soon and a world patent eventually. There is already a simple and cheap copyright system, so there is no reason why there cannot be

something similar for patents. If all airline pilots can adopt English as a common language, if national driving licences and university degrees can be internationally recognised, there can and has to be a worldwide patent system. There is no reason why we cannot find a solution for the patent system. As representative of inventors, I say nothing is impossible, and if you mix with people like inventors, there are solutions for everything!

Finally, enforcement is a big problem for the independent inventor, as he does not have the means to afford watchdogs in foreign countries. Furthermore, in countries where there are enforcement mechanisms in place, it is difficult to discover who is stealing an invention. If an inventor has to litigate, it is better for him not to start, as it is so expensive.

If I had a crystal ball and you were able to ask one question about the future, what would your question be?

When will individual inventors be recognised, heard and listened to, as they represent a big percentage of inventors?

Some inventors believe that the EPO and WIPO should help them with the commercialisation of their inventions, but this is not the job of these organisations. What we have done in my organisation, IFIA, is to establish a database for inventions as a first step to publicising them. This virtual exhibition of inventions is a big asset for any inventor.¹

If there were three people whose opinion you could ask on the subject, who would they be?

- A European organisation representing SMEs
- My predecessor, a Swiss inventor and patent attorney, a humanist, Clarence Feldmann

¹ For details refer to www.1000inventions.com