
I. INTRODUCTION

Live in “Golden Age” for IPRs
Patent filings and issuances are skyrocketing
Talk of patent “revolution,” “explosion,”
“frenzy”

“Anything under the sun that is made by
man” is patentable
Courts, Congress, Justice Department — pro
IPRs

Corporations built on patented technologies
Motto: Innovate or perish

Value of IPRs for securing exclusivity —
simply invaluable

Royalties for licensing IPRs in 2002: \$150
billion

Over \$1 billion for some companies

Universities jumped on bandwagon

Getting patents, concluding licenses,
collection royalties

THE AMERICAN PATENT SYSTEM

The Constitution gives Congress the power to promote the progress of the useful arts by securing for inventors the exclusive right to their discoveries for limited times. (U.S. Const. art. I, § 8, cl. 8.)

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“The issue of patents for new discoveries has given a spring to invention beyond my conception.” (Thomas Jefferson)

“The patent system added the fuel of interest to the fire of genius.” — “The introduction of patent and copyright systems is one of the six great steps in the history of liberty.” (Abraham Lincoln)

“The introduction of patent laws is one of the three most important developments in the world’s history.” (Abraham Lincoln)

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“A country without a patent office and good patent laws is just like a crab that can’t travel any way but sideways or backwards.” (Mark Twain)

“The advancement of the arts, from year to year, taxes our credulity and seems to presage the arrival of that period when human improvement must end.” (Henry L. Ellsworth, Commissioner, Patent Office Annual Report for 1843)

“Everything that can be invented has been invented.” (Charles H. Duell, Commissioner of the U.S. Office of Patents urging President McKinley to abolish the Patent Office in 1899.)

The Global Landscape

B. Antipathy, hostility still persists in many countries

“Spreading the gospel” in developing countries:

- Conveying my Credos-Insights-Truisms
- Fending off critical comments and test questions
- Urging a six-phase course of action for implementing effective IP systems

TENETS AND TRUISMS

on

Intellectual Property Rights and Technology Transfer

- The defense of intellectual property rights today is the new frontier as were the human rights yesterday.
- An effective IP system is indispensable to technological development which leads to economic growth and social welfare.
- There is solid correlation between the quantity of investments that can be attracted and the quality of the patent system (Professor Mansfield).
- An IP system should be part of a country's infrastructure from the outset rather than something that one thinks about after reaching a fairly advanced stage of development (Robert Sherwood).
- There are no viable alternatives to the present patent system which is the only system "that is compatible with the system of market economy" (Professor Carlos Fernandez-Novoa).
- An IP system does benefit nationals, not just foreign corporation; after all there is genius and creativity everywhere but they need nurture.
- A patent and other IP are property and are not and cannot be monopolies (a patent does not take from the public and give to the individual; on the contrary, it takes from the individual and gives to the public).
- Subject matter that is viewed as too important to be protected (e.g. pharmaceuticals) is, on the contrary, "too important not to be protected" (Professor Thomas Field).
- Some countries have gold, some have oil — and some have technology and those that have gold and oil do not consider them part of the "common heritage of mankind" and accordingly give them away for free (Naboth Mvere, former Controller of IP, Zimbabwe).

Skeptical Comments and Testy Questions in Developing Countries, e.g. Pakistan

- Copying and imitation are basic human traits and nothing can be done about it (strong Robin Hood syndrome).
- The U.S. left the Japanese alone when they copied U.S. products, but turns on us.
- With the free flow of goods there should be free flow of information and technology as a matter of human rights.
- The degree of respect for intellectual property rights should depend on the degree of economic development.
- A patent system that is rooted in America should not have to be adopted in Pakistan.
- Western intellectual property policies are unfriendly and barren of compassion.
- The U.S. should use more the carrot than the stick.
- Intellectual property rights should be shared, even if, or especially if, they are property.
- If a patent is a contract between an inventor and his government and grants protection in exchange for disclosure, why should a foreign country also grant protection later when there is no *quid pro quo*?

Six-Phase Course Of Action For
Establishing Effective IP Systems:

- modernization and strengthening of national IP legislation;
- installation of an effective IP administration;
- adherence to all relevant and important international IP treaties;
- furtherance of appreciation in all sectors of the importance of IP in economic and cultural development;
- improvement of judicial mechanisms for the enforcement and defense of IPRs;
and
- establishment of regional, centralized IP systems and offices.

The Global Landscape Indonesian View

Especially today one cannot ignore the role that intellectual property plays in international markets, which is becoming increasingly more important.

The future economic development of the country will focus more and more on the industrial sector directed to exports, which obviously will need access to international markets. This access will only be achieved if we participate in mutual agreements in the sector of intellectual property, through the operation of sufficient, efficient and reciprocal legal protection.

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The current situation, where intellectual property has greater value and more importance provides a very different stage from that of the fifties, sixties or even the seventies.

The Global Landscape Sea Change in India in Viewing IPRS

In 1992 at a WIPO IP Education Program at the Delhi University

- There was small attendance—academics
- I was crucified for my pro-patent views

In 2001 at a similar WIPO Program in New Delhi

- I experienced a complete about-face. Now that IP is available in abundance in India.
- IP being taught in “all academic schools” under government sponsorship
- New Chamber of Commerce slogan: “Patent or Perish”
- “IP literacy” and “IP awareness” have become buzzwords
- Efforts to “bring IP from a legalistic ivory tower down to the common man”
- Institutes for IP studies springing up all over

The Global Landscape
Sea Change in India in Viewing IPRS
(cont'd.)

- Only skeptical undertones
 - Reservations about pressure coming from developed world and
 - Deep seated belief that knowledge should be free and not monopolized

In 2002 I lectured at such an institute in Mumbai to a receptive audience for two days on patent Management, Patent Licensing, Trade Secrets, Patents/Trade Secret Interface and Reverse Technology Transfer.

For the past 5 years or so Indian students have been our biggest country group of students.

India still pushes the “development agenda” of developing countries at WIPO but no longer asserts that “IP is the common heritage of mankind and should be free.”

The Global Landscape Developments in China

Chinese patent law established in 1983.

(State economies without competition don't need IP systems.)

Many revisions and improvements since then. Another extensive IP (patents and trademarks) reform in 2007.

Chinese IP Office now fourth largest in world.

Rampant piracy and counterfeiting.

3M's respirator mask patents held infringed by Shanghai People's Court — damage award \$31,000.

Pfizer's Viagra protected by Beijing People's Court. Same court stopped a Chinese company from using a trademark nearly identical to the crowned logo of England's Premier League.

“...strong indication that the Chinese government is moving in the right direction in protecting IPRs for all innovations.”

Chinese goal: become innovation society.

III. INTERNATIONAL HARMONIZATION

Steady advance of harmonization of IP systems

Increasing discussion and growing literature on global, universal or world patent

Stepping stones:

extant and pending international and regional treaties:

- **Paris Convention**
- **PCT**
- **TRIPs**
- **Patent Law Treaties**
- **EPC**
- **OAPI/ARIPO**
- **EAPC**
- **NAFTA**

“World Patent”:

Ongoing initiatives: Kyoto Action Plan

Focus on Europe, Japan, USA — >90% of patent activity

Major harmonized features

Other possible vehicles: PCT, EPO

Mossinghoff: will come “sooner rather than later”

Innovation: a Three-step Process

- one day an American firm announces a breakthrough invention;
- next day the Russians claim they made the same discovery twenty years ago; and
- on the third day the Japanese start exporting the new product.

WORLD PATENT

“In the absence of harmonization, we have chaos”, Bruce Lehman

A. Stepping (Mile) Stones

1. International Treaties

- Paris Convention (1884) — WIPO
- Patent Cooperating Treaty (PCT)(1970) — WIPO
- Trade-Related Aspects of IPRs (TRIPS) (1995) — WTO/WIPO
- Patent Law Treaty Proposals (WIPO)

2. Regional Treaties

- European Patent Convention (EPC) (1973)
- European Community Patent Convention (CPC) (when?)
- OAPI (1958), ARIPO (1976) in Africa
- Eurasian Patent Convention (EAPC) (1995)
- North American Free Trade Agreement (NAFTA-Chapter 17) (1994)

B. World Patent System (as per Gerald Mossinghoff — 38 *IDEA* 529 (1998) and J.C. Rasser, Procter & Gamble, IPO Mtg, 4/1/98)

1. Essential Characteristics

- Unitary Patent Grants by Regional Patent Offices
- First-to-file Priority
- Provisional Applications
- One-year Grace Period

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- English Language for Examination and Enforcement
 - Single Electronic Prior Art Database
 - World Patent Court
2. Additional Problem Areas
- Definition of Patentable Subject Matter
 - Definition of Prior Art
 - Claims Interpretation — Peripheral or Central
 - Best Mode Requirement
 - Rule 56 Practice
 - Patent Term Extensions
 - Nature of Post-grant Procedures (Opposition or Re-examination)
 - Doctrine of Equivalents
 - Sanctions for Infringement (also criminal?)
 - Governing Structure of the World Patent System

C. Potential (Intermediate) Alternatives

1. Trilateral Initiatives — on-going — between Europe, Japan, USA — have 90% of world patent activities — “Kyoto Action Plan”: Trilateral Network, Common Searches, Website (1998)
2. European Patent Convention
Ulrich Schatz, EPO: EPC is already existing mechanism for a Global Patent as any country can join EPC.
3. Expanded PCT could be vehicle for Global Patent (Francois Curchod of WIPO, Dieter Hoinkes of USPTO)

4. → “Rapid Patent” Proposal (AIPPI) (for Third World): patent application is filed, published and kept pending for 20 years when it goes abandoned, unless someone had requested examination during pendency. (The ultimate deferred examination system.) Premise: developing countries can’t live up to TRIPS standards.
5. “Reference system” Proposal (Robert Sherwood) (for Third World) — Comparable to former confirmation patent system (PCT taken a step further.) Same premise as under 4. above.

D. Future of World, Global, Universal Patent

Fact we live in a knowledge-based “global village” will require full harmonization — only matter of time — how soon? With TRIPS in place, “sooner rather than later”, per Mossinghoff.

And Lois Boland of USPTO goes as far as to predict:

“At some point in the future, we will have an international patent system that will have characteristics similar to those we find in the copyright area. That is, the right of an inventor will be universally recognized without having to seek patent protection in each of the countries of the world.”

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