# What future for the European patent system?
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Opening introduction: Ron Marchant CB

There are reasons to welcome the conference and reasons to regret its necessity.

The conference is to be welcomed because it reinforces the message that Intellectual Property, specifically patents, is an essential component of successful innovation, competitiveness, and economic performance. It also highlights the importance of Europe in today's global market and the importance of a well performing European patent system.

The need for it is perhaps to be regretted because we have been discussing how to improve European patenting ever since member states set up the European Patent Organisation and its executive arm the European Patent Office, around 30 years ago, and most would say we have made little concrete progress. The EPO has now grown to 31 member states and will grow further in the future. That means it now grants 31 patents, more than when it started but still not just one.

The conference addresses key questions. It opens with a discussion of the research behind attempts to demonstrate the cost/benefit balance of the system since; after all, there is no point to the system if the balance isn't positive for society as a whole as well as for innovators. Of course, the cost/benefit balance is affected by a number of issues.

First; the quality of granted patents. The protection granted by a patent needs both to be reliable for the patentee and also not to go beyond the inventive contribution made by the patentee. The ability of the granting authorities to ensure that this is the case is under question, especially in leading edge technologies. The conference therefore looks at mechanisms for drawing in outside knowledge to help the patent examiner.

Second; the context within which patents are granted and used. The balance is not absolute. It is dependent on the perceived needs of the society in which the rights exist. Thus we have differences in approach between the US and Europe and different needs across the globe which are being addressed in Geneva. This conference will also address those issues.

Third; the impact of our institutions. The ability of our institutions to deliver and manage patents in a cost effective, high quality, and timely manner has an enormous bearing on the cost/benefit balance. This is especially so for SMEs which are growing in importance in the European innovation agenda. The European Commission has prepared a communication based on a consultation at the end of last year. This too is covered within the conference. As a reforming CEO of the UK Intellectual Property Office I was often told "if it isn't broke don't fix it": often by those who would oppose any change. Our current system is, unfortunately "broke".

We have only to look at the background. In Europe there is a larger market than the US and Japan (EU population 459m: USA 295m; Japan 127m) with a GDP well in excess of both (EU €41bn; USA €10.1bn; Japan €3.7bn). Europe is not a single country however and there are 23 languages in which to communicate as compared to one each in Japan and US. Europe does not have a patent system to offer European industry accessible protection for this large home market for new products and processes. Home markets provide the springboard for successful exporting, as is clear from both the USA and Japan. However, it must be remembered that improvements in the European patent system will benefit also companies springing from their strong and accessible home markets in Japan and the USA. This point may be obvious but is made to emphasise that a well functioning European patent system is not a sufficient condition for a well functioning European economy. It is, however, I would argue a necessary condition. Europe has to create all the other conditions which support successful innovation. That said, what does Europe have at the moment? It has a system in which to cover half of the EU costs 11 times more than to cover the whole of the US and 13 times more than to cover Japan.

Despite the huge contribution made by the EPO there is a long way to go. Over the past year European leaders have stated in quite bald terms that the current position is unacceptable. Angela Merkel has said that the system must be improved and that it allows too much diversity in this area. Günter Verheugen has said Europeans must cease being short-sighted and self interested. And Tony Blair told scientists in Oxford that it is ridiculous that Europe doesn't have a single patent for Europe, saying this in the context of a major speech on the importance of the effective use of science for the future economy.

Before looking briefly at some issues I reinforce my earlier message about the political context. Europe is not the "United States of Europe"; the extent of pooled competence varies not only in general but also in intellectual property specifically. National governments are held to account by the electorate primarily on their handling of the national economy ("it's the economy – stupid"). No government is going to give up its ability to manage the economy in those circumstances. The more governments see intellectual property as a key tool in the economic toolbox the less inclined they will be to hand over the authority for policy formulation and the means for ensuring "their" industries (and this usually means SMEs) are equipped to use IP effectively. This does not precluded greater standardisation and joint or collective delivery of both rights and enforcement services. The proviso will always be access, predictability, and affordability for local industry and hence the economic wellbeing of citizens.

So; what does mean for the specific issues surrounding patenting in Europe?

Costs always feature large. A large proportion of these are generated by current translation requirements. The London Agreement would have an immediate and substantial impact on cutting translation costs by 30% for an average European patent. We need only France to ratify and the Agreement comes into effect. And still we wait. Perhaps there will be a change following elections. That would be welcomed by European industry. The core issues need unpicking and suggest that the arguments for the need for translations can be overstated. Experience shows that machine translation is sufficient for a skilled reader to understand the technical teaching of a patent specification. The interpretation of claims is, I suggest, different and will always require careful consideration of the language of the original granted document by someone who understands the structure of patent claims and there interpretation within the patent law. Simply translating is unlikely to be accepted as altering the “true” scope of a claim. Most Europeans believe reduction of translation requirements could be made now and so improve the lot of European industry.

The fact that the EPO grants 31 patents also impacts on enforcement. Patents must be litigated separately in various countries, the most common being the France, Germany, the Netherlands and the UK. The costs vary significantly and the results can differ. This adds to the burdens on industry and perhaps is a strong barrier to the use of European systems by SMEs. For large industry the cost may be balanced by the fact that in the current system the courts are experts giving a degree of predictability and confidence in bringing cases, plus the benefit of having a chance of retaining rights in some countries. There is also a growing view that holding and enforcing a patent in a key country, such as Germany, can – through the effect of the single market – prevent meaningful incursions in other countries.

To replace this collection of courts with a European jurisdiction has not only complex legal aspects but also some very practical issues. I will not go into detail in this introduction but industry must have confidence in the expertise of the judges – something existing European Courts do not have in relation to patents. This is being reinforced by the recognition that technical expertise is also needed in such a court. In addition, access to the court is important. At least the Court of First Instance has to be reasonably accessible rather than centralised. Satisfying this requirement will require restraint on the part of member states as a “me too” approach from each state would likely defeat the object of the exercise.

In terms of rights delivery, the principle of a central core EPO is now an accepted given of the landscape, and the sterile “centralist-decentralist” debate of the past has been replaced by a partnership approach. Indeed, the debate has proceeded so far that the EPO is looking at ways in which work done in national offices can be used to expedite (and ultimately make less expensive?) the processing at the EPO. For the EPO this allows better use of resources and a much needed improvement in efficiency and timeliness of delivery. Both these also benefit industry of course. For national offices this reduces the rivalry effect. Those offices will now deliver to those requiring national rights only but also open the possibility that this work could assist an SME in moving on to Europe is a more accessible manner. For industry it

would provide a coherent system across Europe rather than one pulling in differing directions. This is an exciting development with much potential for the future landscape of patenting in Europe. Equally the collaboration between offices regarding patent quality is also a stepping stone to greater predictability across Europe and a foundation for the quality regime for a Community Patent.

The Community patent is still a desire of both the Commission and others. Addressing translation and litigation issues within the current European Patent Convention is not the end of the story, though both can provide a bridge to a Community patent. As the consultation process showed there is still a desire to take that further step. There is also concern – perhaps even fear – in some quarters that fixing the EPC will meet all the issues and render the Community patent unnecessary. That could be the case, but not necessarily. We have to ensure that in creating a single Community patent we add value to the existing regime and do not lose sight of the needs of SMEs to be in the system; the needs of larger companies to control costs, maintain quality, and retain confidence; and the needs of governments to be free to take action in relation to the management of patent rights in their country in regard to competition and moral issues.

Lastly there are issues of what might be called “political economy”. A more unitary and coordinated patent delivery and enforcement system in Europe doesn’t of itself deliver its effective use by all levels of business. Even within the apparently technical aspects of patent law there are issues about who wins or loses in the market place. These will remain close to the minds of national governments. Europe needs to create and improve the mechanisms and institutions to open debate and facilitate decision making between members states, the EPO and the EU as a whole. We need a greater clarity of what is appropriate for Europe as a whole (including how better to get to common positions and actions) and what is appropriate for member states to deal with, albeit cooperating with one another as far as possible. This too is beginning; the EU network of national offices is defining its programme and structure and finding ways of acting together. This has to work with the EPO to help European industry make best use of the patents system and understand how it fits within a whole IP portfolio extending well beyond the broad boundaries of European and Community patents.

Intellectual Property remains at the heart of the innovation debate and governments are increasingly focussing their IP expertise whilst creating the coordination with other policy objectives. Member state activity and cooperation isn’t the whole story. Perhaps within the Commission a rethink is needed. The current separation between Directorates General, including Enterprise, Trade, Research, Information Society, and Internal Market reflects a dated view of IP; one that holds that technical aspects are separate from the others. Few governments would subscribe to this. This issue was highlighted by the announcement during the conference of a broader IP communication in the coming months. That communication would cover the whole spectrum of IP and impact on all DGs and perhaps touch on aspects of what is currently regarded as national authority. Whether this broad approach will take us forward or simply dilute our focus on specifics remains to be seen.

That we must do better is clear and accepted by everyone. Doing so will require us to clarify and agree on whose Europe or which Europe is the foundation for this. The conference agenda is highly pertinent to this.

Ron Marchant