

The Consumer Project on Technology's Comments on the Commission's Questionnaire on The Patent System In Europe.

12 April 2006

Introduction

The Consumer Project on Technology¹ (Cptech) welcomes the opportunity to respond to the Commission's Questionnaire on the Patent System in Europe. Our response focuses on the questions concerning the principles and features of the patent system, as without a clear statement of the purpose and objectives of policy in this area, a move to centralize the present system under a community patent regime is in danger of entrenching poor outcomes and missing the opportunity to review the best way to ensure that Europe maximizes its innovation potential.

The consultation presents the following statement regarding the basic principles and features of the patent system:

Consultation Section 1 - Basic principles and features of the patent system

The idea behind the patent system is that it should be used by businesses and research organisations to support innovation, growth and quality of life for the benefit of all in society. Essentially the temporary rights conferred by a patent allow a company a breathing-space in the market to recoup investment in the research and development which led to the patented invention. It also allows research organisations having no exploitation activities to derive benefits from the results of their R&D activities. But for the patent system to be attractive to its users and for the patent system to retain the support of all sections of society it needs to have the following features:

- *clear substantive rules on what can and cannot be covered by patents, balancing the interests of the right holders with the overall objectives of the patent system*
- *transparent, cost effective and accessible processes for obtaining a patent*
- *predictable, rapid and inexpensive resolution of disputes between right holders and other parties*
- *due regard for other public policy interests such as competition (anti-trust), ethics, environment, healthcare, access to information, so as to be effective and credible within society.*

1.1 Do you agree that these are the basic features required of the patent system?

The notion that a basic purpose of the patent system is to allow firms to recoup investments in R&D is probably a candid statement of how the patent system is seen

¹ Cptech is an NGO, with offices in London, Geneva and Washington DC. Currently much of our work concerns intellectual property policy and practices, focusing on access to knowledge, but some of it concerns different approaches to the production of knowledge goods, including for example new business models that support creative individuals and communities. Full details can be found on our website www.cptech.org. We are also a member of the Transatlantic Consumer Dialogue (www.tacd.org) which regularly meets with US and EU officials to discuss IP policy.

by many government officials. It is not, however, a very satisfactory explanation of the patent system for the following reasons.

1. The notion that businesses and research organizations “should” use the patent system to “support innovation, growth and quality of life for the benefit of all in society” makes it sound as if patent owners are interested in the public interest. A better assumption is that most patent owners will use the system in order to derive commercial benefits. If the actions of potential right-owners promote the public interest, the patent system will be working well, wholly independently of the motivations of the right-owners. And, the patent system itself is just one way to achieve these objectives. It would be better to say something like this:

“in areas where it is appropriate and managed properly, if the benefits outweigh the costs and are superior to alternative mechanisms, the patent system can play a positive role in stimulating innovation, and enhancing economic growth and improved quality of life for the benefit of all in society.”

2. The statement about recouping investments does not explain why some investments in R&D would lead to patents, and others would not. Patents are limited to cases of inventions. Investments alone do not necessarily create a right to a patent, and patents are clearly available even for inventions where there is no investment at all. The Commission is saying the main purpose of the patent system is to permit firms to recoup investments, but the patent system neither requires investments, nor guarantees that investments will result in patents, nor guarantee that patents will yield commercial profits. What the patent system does is facilitate commercial reward for invention, and only invention, with a temporary and limited commercial exclusivity during which time the patentee may exploit the invention, or in certain circumstances to be remunerated when others exploit the invention.
3. The awarding of a patent creates private benefits, but is done to promote the public interest. By providing patents, certain types of inventive activity benefit from some exclusive or remunerative rights. This creates private incentives to both invent and exploit new inventions. The rights associated with a patent are not available to parties who invest but do not invent, and the rights only extend to the exploitation of the specifically characteristics of the invention. The system also requires disclosure by the rightsholders in return for exclusivity, in order that society can benefit from new inventions, which is a key part of the public good of the system (although perhaps more useful in some areas of the economy than in others.)
4. The patent system is only used in certain areas of the economy. Some types of inventive activity are not subject to patents, and some types of research and development do not benefit from patent protection. The limited role for the patent system is deliberate, and recognizes the importance of other mechanisms, incentives, rewards, tendencies, and forces in the process of innovation and progress in the arts and sciences.

5. The patent system co-exists with a wide range of other public policy instruments, including regulation, government procurement, taxation, public subsidies, and non-patent intellectual property regimes, which also play a role in innovation and progress in the arts and sciences. For policy makers, the patent system does not have the weight of the world on its shoulders -- it is part of a larger eco-system that supports innovation.

1.2 Are there other features that you consider important?

It is extremely costly to manage the patent system, in terms of (1) evaluating pre and post grant disputes over the validity and relevance of patents, (2) negotiating the rights to use patented inventions, and (3) reducing the utilization of patented inventions.

If patents were costless, they would not be controversial. But they do present costs to society, and in some cases, unacceptable costs. These include excessive prices for certain patentable inventions (such as Herceptin, the high priced and often rationed cancer drug, the high priced breast cancer screening tests protected by the BRCA1/BRCA2 patents, and second line AIDS drugs in newer EC Member States), restrictions on the supply or inability to meet the demands of the market (such as Tamiflu), inadequate government stockpiles of important medicines), patent thickets that make it difficult to adopt standards for new technologies in the areas of computing and telecommunication devices, and many other areas.

A good patent system recognizes and addresses the issues of costs and benefits, by limiting the use of the patent system only to those areas where the benefits outweigh the costs, and secondly, by limiting the rights associated with a patent, in order to address well known problems. Of course, this is what we expect out of any other system of government intervention in the economy, such as programmes that address health, safety or environmental protection. But it is sometimes obscured in the areas of patent policy, by the framing of patents as “intellectual property rights,” making it seem as if a patent is something an inventor has a natural right to.

1.3 How can the Community better take into account the broader public interest in developing its policy on patents?

The Community should acknowledge the limited role for patents in the economy, and develop a better understanding how to set appropriate limits. For example, why would the Community extend patents to a field where the benefits outweigh the costs? Is it because no one is counting the costs or the benefits? Are the benefits to be taken on faith only, and the costs to be ignored?

CPTech believes there are several areas where the evidence suggests patents should not be used. These include: (1) business practices, where innovation is extensive without patent protection and there is a bad record of low patent quality in countries that issue such patents, (2) software, where innovation is often threatened by patent protection, innovations are not formally documented in academic or technical literature leading to very low patent quality, where the complex nature of major

software programs makes it essentially impossible to develop new programs that do not infringe patents, and where software benefits from a host of other protections, including copyright, trade secret protection and contracts, (3) certain areas in medicines where the patent system is an unneeded and unwelcome barrier to the use of innovations, such as recommended doses of medicines or surgical procedures on humans, to mention only a few areas.

Secondly, when the patent system is used, there must be a robust and effective mechanism to address abuses, and the public interest in more liberal use of the inventions. The limitations and exceptions to rights must include public authority to authorize both remunerative and non-remuneration non-voluntary uses of inventions, and to place constructive obligations on patent owners.

The Community now benefits from such policies as research exceptions, mandatory compulsory licensing of patents on certain agricultural biotechnology inventions, and a patchwork of national provisions on compulsory licensing or uses of patented inventions by governments. In many respects, state practice in the Community may be thought of as falling into five separate categories:

1. Non-voluntary uses that are permitted without remuneration

These include the research exception, as well as a wide range of exceptions in such areas as personal use, use by pharmacists, certain limited exceptions that apply to commercial shipping and aircraft uses, emerging notions of exceptions for humanitarian use, early working of patents for purposes of complying with regulatory procedures, and other areas.

2. Non-voluntary uses that address abuses of rights.

These tend to be highly contentious and costly to resolve disputes over such issues as excessive pricing, anticompetitive refusals to license, and access to an invention as an essential facility.

3. Non-voluntary uses that specially address follow-on inventions.

The Directive 98/44/EC on the legal protection of biotechnological inventions, creates an obligation for States to provide for mandatory compulsory licenses for follow-on improvement of seeds. Also, many Member States have provisions in national patent laws for granting compulsory licenses in cases where a patented invention is 'dependent' upon another patented invention, a situation addressed in Article 31.L of the TRIPS Agreement. Policies also provide for damages in cases of patent infringement, but not injunctive relief, and also can permit the non-voluntary use of patents, subject to remuneration, in cases where injunctive relief is inappropriate.

4. Non-voluntary uses that address public interests uses.

These are areas where it is not necessary to prove an abuse of rights, only that the non-voluntary use will provide net benefits to society. This includes, for example,

some parts of the French and Belgium ex-officio licenses on certain health care technologies, or the US compulsory licenses for patents on civilian nuclear energy or clean air technologies.

5. Non-voluntary uses by or for governments.

Nearly every country reserves for the state the right to use or authorize the use of patents for government purposes.

The Commission should look at developing new approaches to ensure greater public benefits, whilst rewarding inventors. . For example: Remunerative versus exclusive rights. Increasingly, experts are considering more formally the benefits in certain areas of treating patents as a right to remuneration, rather than a right to exclude. This is already the case for certain agricultural biotechnology inventions, through the Community's mandatory compulsory licensing provisions in the Biotechnology Directive.

The patent system would work better in some areas if it were managed as a liability rule, rather than as an exclusive right. This is because of the importance of follow-on research, and the problems presented by patent thickets. The major barrier for greater adoption of liability rules (a right to use, subject to remuneration) for patents concerns how to determine valuation of the patent. However, there are areas where this can be a manageable problem. By looking, for example, at market outcomes from patent pools in areas of standards, such as the patents on consumer electronics technologies, it seems clear that single digit royalties payable to patent pools are considered reasonable. Bargaining could be reduced by simply providing a compulsory license on a pool of patents that was capped at a reasonable figure, such as 1,2,4 or 6 percent of sales of the devices or services, depending upon standard practices in the relevant industry.

Some researchers think this concept could also be extended into areas of research tools for new medicines, where the use of any tool would be authorized in return for a reasonable reach-through royalty against the new product.

In any of these cases, parties could voluntarily negotiate lower royalties, much like the case today involving negotiations over the use of copyrighted songs that are subject to statutory licensing.

In addition, The Commission should consider the following issues.

Patent policy should enable and not undermine the development of standards that promote investment and development of new knowledge goods. Standards involve particular technical approaches to important problems, including methods that can be patented. The efficient development of technical standards requires disclosure of relevant patents, and global norms for patentability that eschew trivial extensions of technological know-how in areas that create unwarranted encroachments on the public domain. Failures to require disclosure of relevant patents, or adoption of low standards of inventive step will increase transaction costs and raise private incentives to block new standards.

Global negotiations on patent norms should seek outcomes that promote global welfare, rather than short-term competitive advantage. New patent norms are durable. If some governments create low standards of inventive step in order to protect domestic industries or engage in rent seeking activities, other governments will likely follow-suit, as a defensive measure. This is particularly harmful when the low standard of inventive step is associated with strong levels of exclusive rights. The long run equilibrium of such policies will be unwarranted encroachments on the public domain, higher transaction costs for technological innovation, and difficult to curb anticompetitive behavior. Countries that may believe they benefit from such policies in the short run are unlikely to have a permanent benefit, as other countries respond with defensive measures, leading to even greater declines in global welfare. Global norms for inventive step and the rights of patent owners can be either too high or too low. There do not exist sufficient global mechanisms to address the growing problem of low standards for patentability. The Commission should pursue this issue in discussions at the World Intellectual Property Organisation.

WTO Opt-Out decision. The European Commission made a serious mistake when it proposed that no EU Member State would ever use the 30 August 2003 WTO Decision as an importer of generic medicines, including remarkably even cases of national emergencies. This decision is not grounded upon any responsible analysis of the interests of EU Member States, and it does not recognize the mounting evidence that EU Member States will need to address cases of public interest or abuses of patent rights in situations where importing medicines from either non-Member States or even between Member States is appropriate.

Further Information

Cptech would be happy to provide additional information. Please contact in the first instance Michelle Childs, Head of European Affairs, Consumer Project on Technology, 24 Highbury Crescent, London N5 1RX , e-mail michelle.childs@cptech.org