

The patent system needs to be reformed, leading economist tells the LES

At the LES International meeting held in Paris at the end of March, delegates heard an influential economist explain why he thought the patent system needed reforming. His presentation, however, provided many more questions than answers

It does not get much more beautiful than Paris in the springtime when the sun shines out of a clear blue sky. And the weather was perfect when more than 500 delegates assembled in the French capital for the annual LES International conference held at the end of March.

Apart from the location, what drew delegates was the high level of speakers that had been put together, as well as the fact that intellectual property commercialisation, and licensing in particular, is taking up an increasing amount of the workload of lawyers working both in-house and in private practice.

The most controversial presentation of the conference was given by François Lévêque, Professor of Law and Economics at the Ecole des Mines de Paris. Speaking in a debate entitled "IP Protection: Have We Gone Too

Far?", Lévêque argued that the international patent system, as it currently exists, had done just that by protecting the interests of rights owners to the detriment of innovation. What made his views particularly pertinent is his role as an adviser not only to the French government and the OECD but also to the European Commission.

Central to Lévêque's thesis was the growth in patenting activity since the beginning of the 1990s. He cited the statistic that there are now over 1,000 applications submitted to the USPTO every day. Yet, he went on, there is little evidence to show that such figures reflect an increase in innovation. "There is no doubt we are seeing more spent on R&D, and no doubt that there are more patents as a result. But has this meant more innovation? Economists are sceptical," he said.

Citing work undertaken at

Carnegie Mellon University in the US during the mid-1990s, Lévêque claimed that there was a strong case for saying that, far from encouraging companies to innovate, patents were often comparatively irrelevant. As part of its study, the Carnegie team asked R&D managers at manufacturing companies in the US to identify what they considered to be important factors in getting innovative products and processes to market ahead of competitors (see Table 1). The fact that patents came out behind lead time and secrecy, for example, indicated that in many industries they were not a necessary part of the innovation process, Lévêque claimed. However, what they did do was act as a disincentive for others to get involved in a market (see Table 2).

Lévêque's conclusion was, he admitted, counter-intuitive: the modern patent system actually discourages many companies from innovating. Those applying for patents now seek many more of them per commercialisable product or process than ever before, so putting a strong ring of protection around the central invention. This has the effect of deterring others, especially small companies, from working around the same area – the cost of potential litigation being a huge factor in this. Without protection, smaller companies are vulnerable to bigger companies appropriating their work – yet the cost and time it takes to get a patent from the

USPTO, the EPO or the JPO continue to rise. What's more, there is also growing evidence of collaborative behaviour among big patent owners who, Lévêque claimed, often use lawsuits, and the settlement negotiations that they usually lead to, as tools for partitioning markets to the detriment of others looking to get into them. "In many instances we are seeing that small companies are effectively being prevented from entering certain sectors which is leading to the vertical disintegration of knowledge-based industries," he said. To improve matters, concluded Lévêque, it is time to reform patent law and policy. But this should be done in a way that will improve them, not abolish them. "It is about fine-tuning to make the system better," he said.

Of course, what Lévêque had to say was thought-provoking. And few doubt that the patent system needs to be made quicker and, in Europe at least, significantly cheaper. However, what Lévêque was primarily addressing was not the patent system but the behaviour of patent owners. It is not the right itself that causes the problem but what people do with that right. The Carnegie Mellon work is interesting but it does raise a number of questions. For example, why speak just to R&D managers? Would the answers have been the same if finance directors or corporate legal teams had been consulted? Would their responses be less valid than those coming from the labs?

It is difficult to imagine that, despite the importance of other factors such as complementary manufacturing, companies would be happy to spend millions in researching and then developing a product or process only to enjoy a commercial advantage for as long as it took rivals to put in place their own manufacturing capacity. It is also worrying that an adviser to national governments and the European

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Table 1 - Effectiveness of appropriability mechanisms for product and process innovations*

	Product	Process
Lead time	53%	38%
Secrecy	51%	51%
Complementary manufacturing	46%	43%
Patent	35%	23%

Table 2 - Reasons to patent*

	Product	Process
Prevent others	82%	64%
Prevent suits	59%	47%
Use in negotiations	48%	37%

*Question asked of R&D managers in the US manufacturing sector in 1994

Source Carnegie Mellon University

Patent reform

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Commission cites data that is 10 years old. Those involved in intellectual property commercialisation will tell you that things were very different a decade ago and knowledge of the potential in IP rights was far less widespread than it is now. It is a fair bet that if the Carnegie Mellon team went back to those R&D managers now they would be telling a very different story.

Lévêque also acknowledged that the research found that isolating responses from the life sciences industries showed that the importance of patents to innovation was much higher. Which begs the question, does the patent system just need reforming for all those industries

outside life sciences? And, if so, how is that going to work?

The difficulty of what you replace the current system with would be immense. When asked, Lévêque replied that he had been impressed by the recommendations made in the Federal Trade Commission report on anti-trust and intellectual property in October 2003. Yet, for many, this report showed exactly why it is so important for competition and antitrust experts not to immerse themselves in intellectual property without closely collaborating with those who have long experience of working with patents in industry and the law.

In the report the FTC identified 10 areas where it felt action should be taken to improve the patent system in the US and to

make it more pro-competitive. Some of these – such as calling for better funding for the US Patent and Trademark Office; the publication of all patent applications 18 months after filing; and stronger tests for enhanced damages in cases of wilful infringement – were broadly popular. Others, far less so. In particular, the idea that it should be made much easier to invalidate a patent post-grant by reducing the current requirement that there be clear and convincing evidence of non-validity to a standard based on the preponderance of evidence. While many IP owners would welcome the chance to determine the validity of patents without having to spend millions of dollars in litigation, the thought of them being struck down on a far lower burden of proof would be hard to stomach to say the least.

For such reasons, it is to be hoped that if a decision to

restructure patent systems across the world is ever taken, it is done following exhaustive enquiry involving not just competition and anti-trust experts but also high-level figures from industry and intellectual property law. Of course, it is all too tempting to see IP as an evil monopoly that needs taming for the good of both companies and consumers. But before we begin to destroy a system that has helped bring about breathtaking advances in all industrial sectors over the last 50 years, and which employs millions of people around the world, as well as sustaining any number of national economies, we need to get a bit more sophisticated than that.

It would be very dangerous to rework everything on the basis that economists thought there may be more innovation if this was done. What would happen if they were wrong?