

# STANDARDS, IPRs and COMPETITION

*An opportunity to discuss the relationship between standards and IPRs*

EU-China Symposium in Beijing, China, 31 October 2007

## Whose game?

**Standards and their patents at the 21st century's crossroads**

***Presented by Dr Konstantinos Karachalios***

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## ABSTRACT

The EPO is confronted with the patents/standards issue from at least three different perspectives:

- Operational: essentially trying to acquire proper and timely documentation in order to do a good examination job (usually via membership of various SDOs)
- Technological: track technology developments and plan adequate resources (technology watch)
- Political: how to face the inherent tensions between the standards and patents worlds as well as their geopolitical dimensions.

This presentation deals with the efforts and initiatives of the EPO to tackle the overarching political issues, as expressed in particular by the ongoing dialogue with key SDOs as well as by the standards-related aspects of the "Scenarios for the Future" project.

## Introduction

In a recent article in a European newspaper<sup>1</sup> it was stated that the "Western" world has not yet fully grasped the historical importance and dimension of the opening of China and its repositioning on the world scene which started three decades ago and is proceeding at an ever faster rate. However, according to the same article, if these developments and their potential benefits for humanity are misunderstood and misjudged, this may lead to a new protectionism, nationalism and isolationism, and not only in the West.

Intellectual property and industrial standards are not secondary figures in this global game; whether we like it or not, they have already become protagonists. You may know that the German Chancellor, when she was President of the European Union, put forward a proposal for the creation of a new single transatlantic market, including the EU and USA. In an article in the FT entitled "Merkel's transatlantic plan gains ground", it was stated that "The plan, described in a confidential 12-page outline, lists four areas - **intellectual property**, energy and environment, **industry standards** and capital markets - where the US and EU should co-operate more".<sup>2</sup> The US has reacted favourably at the highest level to this plan and in July 2007 the first Transatlantic Economic Council met.<sup>3</sup>

Thus, the organisers of the present Symposium are clearly tackling two of the four top strategic priorities of (not only) the Western world, and they are doing so in the right place and at the right time. I am honoured to be participating in this Symposium and to represent the European Patent Office, an Organisation, I am sure, not unknown to the Chinese IP community. I would therefore like to thank the organisers for inviting the EPO to this important event and for giving me the chance to come for the first time in my life to China, a country and nation which - not only for me as a Greek - is the cradle of one of humanity's most fascinating cultures.

For the Westerners among us the shift in perspective may help better to realise what is taking place before our very eyes. The major geopolitical shifts and convulsions, driven by the relentless will and efforts of hundreds of millions of people, will inevitably change not only the global equilibria and power equations but - in spite of possible revolutionary technical progress - definitely strain the natural resources of our planet and test them to the limit if current consumption patterns are more or less maintained.

In our working domain, technology and its platforms, we deal with a fundamentally different type of resource, knowledge, which in many of its aspects is **potentially** non-exhaustible and non-antagonistic. However, the strains are growing here also. As indicated in our Scenarios Compendium<sup>4</sup>, the very nature and availability of this resource is changing and we speak of the "knowledge paradox": *"If the rules around access, management,*

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<sup>1</sup> "Die beruhigende Nutzlosigkeit der grossen Mauer", NZZ, September 17, 2007  
[http://www.nzz.ch/nachrichten/kultur/aktuell/die\\_beruhigende\\_nutzlosigkeit\\_der\\_grossen\\_mauer\\_1.556363.html](http://www.nzz.ch/nachrichten/kultur/aktuell/die_beruhigende_nutzlosigkeit_der_grossen_mauer_1.556363.html)

<sup>2</sup> "Merkel's transatlantic plan gains ground", FT, January 26, 2007

<http://search.ft.com/ftArticle?queryText=merkel+transatlantic+plan&y=4&aie=true&x=19&id=070126000308>

<sup>3</sup> "Transatlantic talks 'to tackle barriers'", FT, June 27, 2007

<sup>4</sup> Scenarios for the Future, EPO, 2007 (pp. 27-29)

[http://documents.epo.org/projects/babylon/eponet.nsf/0/63A726D28B589B5BC12572DB00597683/\\$File/EPO\\_scenarios\\_bookmarked.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/63A726D28B589B5BC12572DB00597683/$File/EPO_scenarios_bookmarked.pdf)

*production and ownership of knowledge are not chosen properly, more information could even equal less knowledge - and less innovation.*"<sup>5</sup>

## **Stakes for the EPO**

Hold on a moment, some of you may say: what are these EPO scenarios and what gives the EPO the right and what incentive is there for it to participate in this symposium, beyond the fact that it is a member of several SDOs (ETSI, ITU, JPEG, MPEG, Digital Video Broadcasting), driven by its need for proper and timely documentation?

### ***Co-operation with SIPO***

I assume that some of you here know that the EPO is a key co-operation partner of its Chinese counterpart, nowadays named SIPO. You may know that the very close co-operation between the EPO and the Chinese Patent Office started in 1985, the same year the latter was established, accompanied by new patent legislation. Mr Tian Lipu, SIPO Commissioner, was a trainee at the EPO before our main building in Munich was completed. 22 years later, in June 2007, a Strategic Partnership Agreement was signed, marking the transition of this relationship to a new dimension.

However, there are two other pertinent facets of the EPO that you may not yet be aware of.

### ***Dialogue initiative with SDOs***

Firstly, more than a year ago the EPO started an initiative for a dialogue between SDOs and patent offices. Our interest was not of an academic nature but was driven by the perception of an urgent need for IPR policies to allow patents and standards to follow complimentary trajectories, and thus for closer structural dialogue between these two closely interrelated worlds. This should eventually lead to more concrete steps, such as better documentation for search purposes, but also to the crystallisation of adequate strategies to be implemented at the level of both SDOs and patent offices.

In a first workshop in September 2006 we invited selected SDOs, with which we had already established some links, with the aim of structuring the open dialogue already taking place between the EPO and key standardisation bodies. Our approach as an implementing institution was pragmatic and can be expressed by the question "what can be done to improve the situation without questioning the fundamentals?"

For this reason we chose an informal format for the meeting, which resulted in a lively and, at least at the beginning, also somewhat confrontational debate. However, the fact that the discussion was open and practice-oriented, rather than ideologically driven, contributed to a better mutual understanding and to formulation of some practical suggestions. In particular, it appeared that there is much room for improvement through closer co-operation between the patent and the standards bodies.

The consequent pursuit of these purposes took us in July 2007 to the Pacific region, when we participated (as the only patent office) as "active observer" at the 12th Global Standards Collaboration meeting at Kobe, Japan<sup>6</sup>.

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<sup>5</sup> Idem, p. 29

## **Scenarios project**

The other non-obvious, I would even dare to say 'inventive', action concerns the Scenarios project I mentioned earlier which was publicly launched in April 2007, in the presence of the German Chancellor and the then President of the EU, Angela Merkel. We are experiencing an increasing interest both in the publication itself and in the applied methodology, from governmental agencies, the European Commission, NGOs, academic and political think tanks and foundations, business associations, etc. all over the world.

Paradoxically, being de jure a non-political animal proved to be the EPO's strength in carrying out a very genuine political project of global dimensions. Admittedly, the EPO is potentially in a unique position to focus on the 'big picture', as it is a regional self-funded body not under the control of a national government, unlike almost every other IP public authority. But in order to be able to do so, we had to resist the temptation to follow a "business-as-usual" institutional logic or to produce EPO-centred visions of the future, or instructions for actions. For this reason, and in the course of a two-year project, the EPO interviewed around 150 key players from all over the world - including critics - from the fields of science, business, politics, ethics, economics and law, seeking their opinions on how intellectual property and patenting might evolve over the next fifteen to twenty years<sup>7</sup>.

Our scenarios - relevant and plausible stories about the future - were developed in a series of workshops. They set up a framework allowing disparate groups to see the world of IPR across multiple dimensions and within the wider context, thereby enabling the system to respond better to the issues of balance between business, society, state interests and technology that lie at its core. In addition, the driving force approach that we chose offers a tool with which to examine possible discontinuities, caused by the dynamics of powerful underground but relentless drivers of change, and to draw new landscapes resulting from such tectonic shifts.

Within the context of such complexity and upheaval, the ability to reflexively navigate and adapt will be critical. From this standpoint in 2007, the world of patenting and IP could evolve in several directions. We have investigated four of them, depending on how the chosen driving forces play out.

## **The four Scenarios for the Future**

Ladies and Gentlemen, now fasten your seat belts! We shall take off for some trips into the future, towards 2025!

We change nothing in the current parameters, just press the fast-forward button. Our first landing point is a place where the **Market Rules**, *a world where business is the dominant driver*.

It is a story of the consolidation of a system so successful that it is collapsing under its own weight. New forms of subject-matter – inevitably including further types of services –

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<sup>6</sup> See conclusions in [portal.etsi.org/docbox/Workshop/GSC12/GSC12\\_IPR/gsc12\\_ipr\\_15r1%20Report%20of%20GSC-12%20IPR%20WG%20.ppt](http://portal.etsi.org/docbox/Workshop/GSC12/GSC12_IPR/gsc12_ipr_15r1%20Report%20of%20GSC-12%20IPR%20WG%20.ppt)

<sup>7</sup> See <http://www.epo.org/focus/patent-system/scenarios-for-the-future/interviews.html> and <http://www.epo.org/focus/patent-system/scenarios-for-the-future/detailed.html>

become patentable and more players enter the system. The balance of power is held by multinational corporations with the resources to build powerful patent portfolios, enforce their rights in an increasingly litigious world and drive the patent agenda. A key goal is the growth of shareholder value. Patents are widely used as a financial tool to achieve that end. In the face of ever-increasing volumes of patent applications, various forms of rationalisation of the system occur and it moves to mutual recognition of harmonised patent rights. The market decides the fate of the system, with minor regulation of visible excesses. Patent trolling, anti-competitive behaviour and standards issues all come under scrutiny.

How would the tandem standards/patents look in this environment? It is no surprise to see the **big companies, also from Asia, dominate** and the setting of standards will remain a battleground between these powerful players. They seek worldwide harmonisation/rationalisation, also in the field of industrial standards but only as a natural business self-interest - it remains a game to be played by the private sector. New players (such as trolls) see an opportunity to identify valuable nuggets or blocking rights, or even see it as a game they can influence to further their own ends by building up their own portfolios - the big boys may not have it all their own way as division leaves gaps.

Now we shall return to our time machine, turn down the TNC button and leave the glare and glitter of the business world, where IP is simply a tool for accumulating wealth for anonymous shareholders. Instead, we allow for open conflict in the face of changing geopolitical balances and competing ambitions and land in *a world where geopolitics is the dominant driver and the players have changed*. **Whose game** is this?

What counts is no longer profits or shareholder value, but national interests and hegemony. **It is not the power of the rules that prevails, but rather the rule of power**. At the same time, this is the story of a boomerang effect which strikes today's dominant patent players. Contrary to the intentions of the West, globalisation is backfiring as things turn around and the powerful new entrants use IP as a pawn in a game for world hegemony.

Kenneth Cukier, Technology Editor of "*The Economist*", puts it bluntly in the year 2007: *"Within the next 40 years, some of the most major innovations will come from elsewhere – outside the west. For the moment, the west is lucky that they don't have IP protection. But within 40 years you can imagine that the great scientific cures and great IT innovations are going to come from other regions."*<sup>8</sup>

Driving this stunning change are the relentless efforts of hundreds of millions of people who feel that the time has come to secure their share of prosperity and self-respect. East and South-East Asia crystallise as the geopolitical epicentres of this unstoppable movement, both demographically and in terms of economic power. Sensitive technological know-how moves rapidly eastwards, driven by massive outsourcing of R&D by western TNCs and by the rise in production skills in Asia. The developed world increasingly fails to use IP to maintain technological superiority and many developing countries are excluded from the process, and work instead within a 'communal knowledge' paradigm.

Nations and cultures compete, and IP has left the private and business domain to become a powerful weapon in this battle. The new entrants become increasingly successful at shaping the evolution of the system, using IP and industrial standards to establish

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<sup>8</sup>[http://documents.epo.org/projects/babylon/eponet.nsf/0/96D56E6A679C489CC12572DC0030ABD9/\\$File/Interview\\_Cuckier.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/96D56E6A679C489CC12572DC0030ABD9/$File/Interview_Cuckier.pdf)

economic and geopolitical advantage, adapting the existing rules as their geopolitical influence grows. The West devises alternative protection mechanisms to erect trade and IP barriers to respond to the rising competition from newcomers, and - following an older plan<sup>9</sup> - eventually reacts with the establishment of a Transatlantic Free Trade Union, a new single market, including Europe and North America. In addition to the harmonisation of norms and standards and liberalisation of trade within the zone, imports from outside the zone are submitted to new environmental and labour standards. That means, not only product specifications but rather HOW a product is produced determines its eligibility for import and consumption within TAFTA. Asia responds with a Transpacific Alliance, linking key Asiatic with Latin American countries.

Thus, two dominant trading blocs emerge by 2025 – the Transatlantic and the Asia/Pacific. Competing trade zones battle for skills and knowledge with rival IPR regimes. New entrants' revenues from IP licensing abroad are now huge, but - back home – they follow a different model: collaborative, open innovation helps their economies grow faster and some developing countries focus on collective intellectual rights to try to manage their biodiversity heritage. Threshold countries in 2007 are the top innovators in 2025 and defend a strong global patent system. Stronger 'outsider' nations cut their own deals and poorer ones simply bypass IPR or use open source as the only route past the digital divide. Under these circumstances, global enforcement systems wither, and TRIPS loses virtually all relevance.

The fragmentation of the world into blocks is certainly not a dream scenario, in an era where global challenges, e.g. climate change and scarce natural resources, demand globally co-ordinated actions. This is not a world we and our children wish to live in. Fortunately, we can press the reset button and try a new mix. What about trying some revolutionary romantic instead? We land in the forest of the **Trees of Knowledge**, *a world where society is the dominant driver*.

In this story, diminishing societal trust and growing criticism of the IP system result in its gradual erosion. The key players are popular movements – often coalitions of civil society, businesses, concerned governments and individuals – seeking to challenge existing norms. This Kaleidoscope Society is fragmented yet united – issue by issue, crisis by crisis – against real and perceived threats to human needs: access to health, knowledge, food and entertainment. Multiple voices and multiple world views feed popular attention and interest, with the media playing an active role in encouraging debate. This loose 'knowledge movement' echoes the environmental movement of the 1980s, initially sparked by small, established special interest groups but slowly gaining momentum and raising wider awareness through alliances such as the A2K (Access to Knowledge) movement. The main issue is how to ensure that knowledge remains a common good, while acknowledging the legitimacy of reward for innovation.

Due to the shrinking of the patent system, only a very few patents are granted in the sensitive field of standards. As a result of the A2K movement, restrictions on copyright are also drastically limited. In general, there is strong societal pressure for IP free standards.

Good news for standards, bad news for patents, so what about letting us, technicians, take the lead? Our credo: where there is a problem, there is a technical solution, the **Blue Skies** is our only limitation, this is *a world where technology is the dominant driver*.

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<sup>9</sup> *Supra* 2

This final story revolves around a split in the patent system. Societal reliance on technology and growing systemic risks force this change; the key players are technocrats and politicians responding to global crises. Complex new technologies based on a highly cumulative innovation process are seen as the key to solving systemic problems such as climate change, and diffusion of technology in these fields is of paramount importance. The IP needs of these new technologies come increasingly into conflict with the needs of classic, discrete technologies. In the end, the patent system responds to the speed, interdisciplinarity and complex nature of the new technologies by abandoning the one-size-fits-all model: the former patent regime still applies to classic technologies while the new ones use other forms of IP protection, such as the licence of rights. The patent system increasingly relies on technology, and new forms of knowledge search and classification emerge.

As the IP system splits across industrial sectors, the "soft IP" regime with licenses of rights is introduced as a rule in almost all standard-related technological fields for Telecoms, Audio-Video-Media and Computers. Exclusivity of patents is thus abandoned in these fields of industrial standards<sup>10</sup>, at least in theory. Because, as you may easily imagine, other serious problems arise. Drawing a legal line between technological sectors opens interminable legal debates about where the line should be drawn, by whom and how. The engineers who initiated this paradigm change despair: it is the lawyers' triumph again.

## Outlook

Let us now come back to the present and to the contested reality. As the Compendium and our Interviews for the Future both indicate, there is so much tension and conflict within the IP arena that change is almost inevitable. Although, already now, several key elements of the presented fictions look increasingly probable, it should be clear that our scenarios were not conceived as predictions and are by no means "visions". In particular, the implications mentioned for standards are nothing more than plausible examples, brainstormed by a small group of experts, following the inner logic of the scenarios contexts and serving merely for demonstration purposes for this symposium.

We think however that already this modest application gives a hint of the real potential of our approach: offering four windows on potential worlds, against which actors and institutions can check the consistency and plausibility of their strategic decisions as well as the existence of possible blind spots they might have.

As the aim of our EPO Scenarios was both global in vision and as neutral in nature as possible, they become potentially a useful tool for any institution or organisation interested in the impact of IPR, the currency underpinning the globalised knowledge-based economy of today. The insight we have gained in the meantime has confirmed these assumptions. And taking the positive reactions from many disparate quarters, we have clearly come some way in achieving our goals.

Our current target is therefore to get this tool used, both internally and externally. One may of course ask why should the EPO be interested in an external use, including the standards domain? The reason is that we understand that the "global" IP system is under tremendous

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<sup>10</sup> Early indicator, see <http://www.iam-magazine.com/blog/Detail.aspx?q=f4c17b39-bc4b-41ce-ad08-76e522648c6d>

strain, we are a part of it, standards is one of the hottest spots and usually it is more expedient to try to find quick-fix solutions for certain symptoms than to deal with the root causes. However, we believe that both the IP and the standards systems as well as their inherent interdependency are of such global importance that we have to go beyond the quick-fix temptation, to think further and to engage with those also considering the future of both systems, to ensure that the adaptations and compromises are in society's and industry's best interests, before the conflicts get out of control. Both for the IP and the standards world, we have to close the gap on the perceptions about what "F" stands for in the acronym FRAND (Fair, Reasonable and Non-Discriminatory).

The EPO's contribution could be (of course, taking into account our limited resources and core priorities) to provide interested key organisations and institutions with the tools and manpower (Scenarios Compendium, trained facilitators, scenario methodology, etc.) to facilitate a workshop on the future of IP and standards, on what fairness may look like under very different circumstances and assumptions, for a group of stakeholders of their choice. This would be a challenging alternative to look into the underlying long-term aspects of the patents-standards interference.

Alternatively, the EPO could organise a second workshop, this time including SDOs from Asia, and using the scenarios methodology. In both cases, the contents of the workshop would remain confidential within its confines, and we would do our best to work with you to find fresh solutions and thinking which breaks the current, potentially adversarial status quo.