YOUR INVENTION? MY CREATION!
INTELLECTUAL PROPERTY – A NEW “BET THE COMPANY”
BATTLEGROUND

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A hot topic

Intellectual property is a hot topic for business. In the words of David Morley who opened the seminar: “IP really is the premier global currency for creating value… it affects the everyday lives of everyone on the planet.”

IP has passed from the legal journals into the mainstream media and from the business pages to front page news. The recent cases between Apple and Samsung are just the latest examples of IP’s emergence into the mainstream – driven principally by the rise of the internet, which has transformed the way in which knowledge is shared, exchanged and traded.

IP has become a crucial issue for business and governments everywhere, discussed by company boards and politicians and central to their policy decisions. It even has a direct impact on consumers, dictating which products are available on the shelves. As globalisation has accelerated in the past decade, so IP has cast its net wider to embrace the emerging economies of Asia and Latin America.

Economic impact

IP matters to business because this branch of the law has such a big influence on the development of new products and services. It goes to the heart of international trade and indeed human progress. Without a patent system would, say, the drug companies have invested such huge sums in the development of life-saving drugs? Investment in research and development is encouraged by resulting IP rights.

However, our IP regimes can also stifle innovation. The patent wars between aircraft makers the Wright Brothers and Glenn Curtiss in the early years of the last century had the effect of inhibiting the development of new aircraft in the US and stopped third parties entering that business. When the US came into the First World War in 1917, the government was forced to intervene and require both sides to pool their patents in order to get the aircraft industry moving.

Some commentators believe that similar “patent thickets” and “patent wars” are impeding innovation today, particularly in the life sciences sector and with the development of new software in the computer industry. However, there is still very little high quality research on the effect of IP on innovation.

What no one disputes is that, for better or worse, IP considerations play a major part in business decision-making. In April 2012, a spokesman for Microsoft went on the record and said: “We would have preferred to keep our European distribution center in Germany, where it has been for many years. But unfortunately the risk of disruptions from Motorola’s patent litigation is simply too high.”

Many of the live issues facing IP practitioners currently – from the rise of patent “trolls” to the fragmentation of IP rules and judgments in different jurisdictions – have a direct bearing on the plans and fortunes of individual companies and hence the countries and communities in which they operate.
Innovation

Professor Ian Hargreaves, who headed the UK government’s independent review of IP in 2011, concluded that the IP framework in the UK needed to be more responsive to change. He argued that in several areas, notably copyright, IP policy has failed to keep pace with technological developments. The relevance of this review is of course not restricted to the UK.

Echoing this view, one panellist suggested that the internet in particular has highlighted issues with IP, running the risk of making copyright law “defunct” because the way in which the internet functions is so at odds with the application of copyright law as we know it. The internet has created an environment where everyone can compete on equal terms in developing knowledge products and exchanging ideas.

It can be argued that the IP system in many countries no longer reflects or properly serves a business world in which investment in ideas has overtaken investment in physical things like buildings and machines. The holy grail then is to create an IP system which appropriately matches the scale of investment and length of time needed to develop a new product with the level and length of protection granted to the originator of the idea.

This will be different from industry to industry. In IT, some inventions being made today may be obsolete in five years’ time. Whereas in life sciences, protection for 20 years or more may not be enough to encourage the substantial financial investment required to develop new drugs. The interests of inventors, academics, businesses and consumers must therefore be carefully balanced if innovation is to thrive and must not be stifled by a “patent arms race” or anti-competitive behaviours.

We are also seeing more of a portfolio approach adopted with IP rights in general. For example, while it may be possible to patent software in the US, doing so means the technology is in the public domain and accessible even in countries where this sort of protection is not available, so protection of trade secrets becomes critically important. For consumer-facing products, protection of designs is becoming vital, recognising that value resides not only in the technology “under the hood” but also in softer aspects of the product such as how the design is linked to branding (and we have seen this aspect played out in the California courts recently as Apple and Samsung argued about the rounded corners of their respective tablets and smartphones).

A number of other incentives for innovation have been proposed, such as prize funds. It was suggested that these could be tried out in parallel to the current IP system, but it would not make sense to damage the current system in the absence of evidence demonstrating that an alternative would truly be better.

IP and public policy

The complexity of the IP world and the way in which it entwines with other areas of public policy calls for an increasingly sophisticated and nuanced approach to IP among practitioners and policy makers/legislators.

For example, in Australia a controversial new law requires that cigarettes should be sold in non-branded packets and a similar consultation is underway in the UK – both examples of the tension between public health policy and IP rights. A similar tension arises when companies and scientists collaborate on new inventions. How far should this collaboration, which may speed the progress of life-saving drugs to market, be curtailed by the patent application or competition law concerns? Consumers too wield increasing power – smartphone wars may take an interesting turn if decisions made in the courtroom mean that the person on the street can no longer buy his or her gadget of choice; and in the digital arena where copying and file-sharing are commonplace, consumer power and preference is already seen to be overtaking protections previously afforded by IP.

In a recent decision from the Court of Justice of the European Union, it was held that “a fair balance must be struck between the right to intellectual property on the one hand and the freedom to conduct business, the right to protection of personal data and the freedom to receive and impart information, on the other hand.” All these rights may conflict on occasions and lines will be drawn in different places by different countries and indeed different judges.
Globalisation

Globalisation and scientific advances/technological progress have been the biggest game-changers for IP in recent years. Modern technology and communications transcend national borders, while the BRICs and other newly emerging economies have complicated the IP landscape, which was previously mainly focused on the US, Western Europe and Japan.

A key issue for IP therefore is whether it is desirable or even possible to harmonise IP rules and protocols on a global basis. The painful efforts in Europe to create a European patent litigation system, through the European Unitary Patent Proposals, show how hard it will be to achieve common IP standards globally. One panellist commented: “This is the worst case of European decision-making; it’s taken 40 years to get to a bad place.”

The panel took a pragmatic view of harmonisation. The acid test is whether it will improve the system overall and preserve its integrity. For example, there are arguments for introducing a “grace period” in Europe, which would enable someone to publish their invention and then seek patent protection within a defined period after publication. Currently, in most countries, publishing means losing the right to apply for patent protection. A grace period, such as is available in the US, would provide a safety net. However, panellists agreed that simply importing the US system into Europe is not the solution, a holistic view has to be taken on the impact of any such change.

Rather than harmonisation for its own sake, the emphasis should be on using an evidence-based approach to work out which bits of national or regional systems work well and take that best practice to drive “convergence.” Practitioners are already alive to what is happening in different jurisdictions. Increasingly we are seeing judges reading and commenting on judgments in other countries.

Conclusion

In the end, it is likely to be market forces and consumer pressure which determine the future course of IP. Governments will want to ensure that IP rights are not unduly restrictive, so that their publics see the benefits of innovation and collaboration across borders in the flow of new products and services. Our panel concluded that while there are problems with our current IP regimes and we must not be complacent about these in the face of globalisation or the rapid pace of technological change, the current system does work to incentivise innovation. One panellist drew an analogy between IP protection and types of government, reminding the audience of Winston Churchill’s comment: “No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time.”