OPINION

Intellectual Property in the Lisbon Treaty

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EC law; Intellectual property

Expansion of the European Union from 15 to 27 countries meant that new arrangements for its governance were considered to be necessary. These were first incorporated in a Constitution, but this was rejected by referenda in both France and Holland. Virtually all its provisions were then included in a treaty, since treaties can be agreed to by governments on their own. Ireland is an exception to this where European Union matters are concerned, as the result of a Supreme Court ruling. A referendum was necessary there, and this was defeated, leaving the coming into force of the Treaty marginally uncertain.

Of all the Articles in the Treaty, the one which has probably received least attention throughout the European Union has been No.118, and yet it has important economic implications. European court decisions have settled that intellectual property is "a matter for national rules",[1] but this Article gives power to Brussels:

> ". . . to establish measures for the creation of European intellectual property rights to provide uniform intellectual property rights protection throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements".

An important element in the structure of the European Union is that certain policies require the unanimity of all the Member States, whereas others can be passed by "qualified majority voting" (QMV), meaning that no Member State can have a veto on a proposal. The Lisbon Treaty changes 67 areas from unanimity to QM voting. Article 118 is one of these for its substantive provision, but the part of it which deals with languages still requires unanimous approval. This clearly reflects the three decades of disagreement which have so far prevented the Community patent from becoming a reality.

Reinforcing the existing international system

Everything that is known about intentions for the Community patent makes it clear that Brussels would use its proposed new power to reinforce the existing international system. This system was primarily shaped by the United States in the interest of its own largest firms; for example in its latest version, the Trade Related Aspects of Intellectual Property Rights (TRIPs) annex to the agreement which set up the World Trade Organization, it has been rightly pointed out that "twelve corporations made public law for the world".[2] The US Patent Act of 1952, whose provisions about novelty and non-obviousness became the standard throughout the world, was effectively written for the US pharmaceutical industry.[3] It can be no surprise, therefore, that the best available estimates indicate that over two-thirds of the worldwide value of patents now accrues to firms in the chemical and pharmaceutical industries.[4] This can only mean that patents do a correspondingly poor job of protecting innovation in the combination of all other technologies.

The European Union was complicit in foisting the provisions of TRIPs on countries for which they can only be harmful. As a tragic illustration of this, forcing poor countries to introduce a modern trade mark regime has serious implications for the health of their people. The more inhospitable to the tobacco industries the developed countries become, the more their firms are turning their attention to the poorer ones, developing brands there through use of the techniques of mass-marketing which depend upon having *registered* trade marks. As a quite inescapable consequence, smoking-related diseases will increase rapidly in those countries. The resulting harmful

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1 See for example, *Keurkoop v Nancy Kean Gifts BV* (C-144/81) [1982] E.C.R. 2853 and *Thetford Corp v Fiamma SpA* (C-35/87) [1990] Ch. 339.

2 Susan Sell, *Private Power, Public Law: The Globalization of Intellectual Property* (Cambridge University Press, 2003).

3 The judge who as a patent attorney had been the main drafter of the legislation, wrote later: "The [1952] Patent Act was written basically by patent lawyers. . . . A good 95% of the members [of Congress] never knew that the legislation was under consideration, or that it had passed, let alone what it contained" Judge Rich, quoted by P.J. Federico in John F. Witherspoon (ed), *Non-obviousness—The Ultimate Condition of Patentability* (Washington: D.C. Bureau of International Affairs, 1978), s.2:218.

4 J. Bessen and M. J. Meurer, *Patent Failure* (Princeton University Press, 2008), p.109.

effect on vital statistics there could even counterbalance any victories over HIV/AIDS and malaria from advances in drugs and in their availability.[5]

The international patent system, especially after TRIPs, is exactly the opposite of what smaller firms and smaller countries need. Intellectual property laws are the only way to counterbalance the scale and scope of large—and especially multinational—firms. As they exist at present, they reinforce the power of these firms instead. Indigenous industry, especially insofar as it relates to an "information economy", cannot be developed without appropriate intellectual property arrangements, which those of the present international system are not.

Clear evidence of this is given by India's performance. When it became independent in 1947, it followed the example of the German Patent Act of 1877 by refusing to grant product patents for chemical inventions. The motivation was the same for each country, each wanted to build up indigenous industry, and knew that if they granted product patents to foreign firms, their local firms would never get off the ground. India also refused to join the Paris Convention, which was not yet in existence at the time of the German 1877 Act.

In both cases, the level of success was remarkable. By the beginning of the 20th century, German firms had learned how to use the Paris Convention so effectively that they had no less than 90 per cent of all world exports of fine chemicals.[6] Correspondingly, by the time of the TRIPs negotiations, the best Indian pharmaceutical firms had developed to the stage where they were pressing their government to join the Paris Convention, as they now had original drugs for which they wanted patent protection worldwide.

Competition in lawmaking

In their desire to control, Brussels centralisers fail to understand the reality that competition has advantages, not just in industry, but also for bringing about innovation in law-making. Diversity of initiatives is the key to all sorts of advances. Since the start of the industrial revolution, every economic forward thrust or "long cycle" has begun with an improvement in the way in which law protects information. Further, these improvements originated in different countries and were copied by others when they were seen to work. England was the first to introduce general limited liability, which then spread to the rest of Europe within 10 years; France invented trade mark registration, likewise copied everywhere; and Germany's Patent Act of 1877 became the model for all others in Europe.

"Centralised Union-wide authorisation, coordination and supervision arrangements" will therefore inevitably deprive the European Union of the value of legislators and civil servants in the 27 Member State countries trying to develop new laws to facilitate innovation. There is irrefutable evidence that even in the United States, similar centralisation at the Federal level has choked off valuable legal innovations devised in individual states. This centralisation was caused by the fact that uniquely until now, the United States is the only country which has an intellectual property clause in its Constitution. (The equivalent of the Lisbon Treaty Art.118 in the failed Constitution would have made the new state that the European Union is intended to be, the second).

Damage from centralisation in the United States

The existence of this constitutional clause "froze" the development of trade marks for several decades, to the disadvantage of American firms which wanted to obtain protection for their brands in other countries. Although most states had passed trade mark laws earlier, the first such Federal law was passed in 1880 and a second one in 1886. These were struck down by the Supreme Court in 1889, on the ground that they gave a monopoly (which is of course perfectly true), whereas the only monopolies sanctioned by the Constitution were those allowed to authors and inventors under Art.1.8.8. A trade mark, the Court held, did not require the creativity which was prescribed for the grant of exclusive rights.[7] A way was not found out of this constitutional difficulty until 1905, when a new Federal

5 See W. Kingston, "Trademark Registration is not a Right" (2006) *Journal of Macromarketing* 26 (1) at 17–26.
6 See J. P. Murmann, *Knowledge and Competitive Advantage* (Cambridge University Press, 2003).
7 The Trade Mark cases, 100 US 82, 94 (1879). Chapter 5. 70.

trade mark act was passed under power given to Congress by another clause of the Constitution. This, the "Commerce" clause, regulates trade "between the States, with the Indians and with foreign powers". It was this "foreign powers" aspect which made the act constitutional. The fact that this legislation also gave trade marks (and consequently brands) a monopoly within the United States, was incidental to the enablement of foreign trade.

The United States had joined in negotiating the Paris Convention in 1883 and had ratified it in 1888. However, the Supreme Court's decision in the following year rendered this of no value to its firms which wanted to get trade marks in foreign Convention-member countries. Without a Federal trade mark act, they could not obtain a valid priority date for a foreign application. The fact that they could obtain trade marks in individual states was irrelevant, since none of these states, but only the Union itself, was (or indeed could be) a Convention member. Passing the Trade Mark Act of 1905 therefore meant that US firms could at last benefit from the Paris Convention in seeking trade mark protection abroad. However, the delay had measurably damaged their foreign expansion. It meant, as just one illustration, that the British firm, Lever Brothers, got a head start in world-wide soap product markets over the American Procter and Gamble, which was not overtaken until well after World War II.

Florida's boat design protection

More recently, how centralised lawmaking, imposed on American intellectual property rights by its Constitution, impedes useful changes, is shown by what happened to an attempt by the state of Florida to protect radical new technology in boat building. This technology involves the replacement of wood by fibreglass and resin. Once boats could be made in this way, a designer might expend significant effort and expense to produce a boat hull with superior characteristics, and hope to sell many hundreds of identical copies of these from its "plug" or mould. In such a hull, the designer has produced information of a quite new type. It cannot be expressed in the explicit way needed for the grant of a patent, nor can it even be fully captured in a combination of copyrightable drawings and design protection, or by trade secret law. However, *it is all contained in the hull itself*. All a rival boat builder needs to do to obtain and use this information, therefore, is to buy a single hull from the originator, make his own "plug" from this and start selling perfect copies, having made no investment, nor taken any risk in respect of the research and testing needed to develop the special shape.

The authorities in Florida were rightly persuaded that the ability to free-ride in this way was a deterrent to investment in boat design and building in their state, and so they passed a law granting exclusive rights in the information contained in "plugs" by preventing them from being copied. Those who wanted freedom to copy naturally challenged this in the courts, where they won on the ground that Art.1.8.8 of the Constitution explicitly puts intellectual property under the control of Congress. This made it a Federal matter, not within the power of the individual states. The words the Supreme Court used in striking down the Florida law were, "the federal patent laws must determine what is protected, but also what is free for all to use".[8]

The response to this Supreme Court decision by the boat builders, who of course wanted protection, was to seek to obtain it through copyright. Their efforts resulted in the "Vessel Hull Design Protection Act" which became Chapter 13 of the Copyright Act in 1998. This is a curious hybrid, which provides additional confirmation of how centralised lawmaking is incapable of co-evolving with technology so as to protect new kinds of information. It sets out to provide design protection to a "useful article" which is then defined as being only:

> "... a vessel hull, including a plug or mould, which in normal use has an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information".

In the Copyright, Patents and Designs Act of 1988, Britain had introduced non-registered functional design protection, and the American Act echoes

8 *Bonito Boats v Thunder Craft Boats Inc* (Sup Ct) 109 S.Ct. 971 (1989).

some of the wording of this, including that the design must not be "staple or commonplace". The wording of this Bill when it was introduced in Congress and the discussion of it there reveals a lot about the constraints of centralised lawmaking on intellectual property reform and development. In the dual patent-copyright paradigm as it developed during the 19th century, patents protect "function" and copyright protects "expression". Since the Supreme Court decision had eliminated any question of being able to protect a hull design by a patent, that is, for its function, it was essential that the new protection should be firmly located in copyright, that is, in "expression".

To achieve this, the Vessel Hull Design Protection Act contains a provision that it cannot apply to any design which is "dictated solely by a utilitarian function of the article that embodies it". It has indeed been claimed that "the perfecting of a type of object mechanically is evidenced by its beauty",[9] but this is hardly what is at stake here: the shape of an aircraft's wing may be beautiful, but in the very highest degree it is function and not aesthetics which determines its shape, and exactly the same is true of the shape of a vessel's hull. Yet, if the new type of information that comes with a new technology of boat construction is to be protected at all in the United States, legal semantics like this are required to try to keep within the Constitution and still provide some protection for innovators.

Value of diversity in judge-made law

The inflexibility in US intellectual property law imposed by the Constitutional clause, is reinforced by lack of diversity in judge-made law. Bessen and Maurer's recent compilation of a wide range of empirical studies forced them to the conclusion that progressively from the 1980s, except for chemicals, the American patent system has actually been acting as an economic *disincentive* to investment in innovation. This was especially notable in biotechnology, software and complex industries, and it has been primarily due to an explosion of litigation. These authors blame much of this in turn on the centralisation of decisions in the Court of Appeal for the Federal Circuit, which had been set up in 1982:

> "Patent law needs to adapt to these new technologies, yet, as several legal scholars have emphasized, a single centralized appeals Court might be a poor institutional arrangement to develop new law. In other areas of law, where there are multiple appellate courts, different courts adopt different policy innovations and there is some degree of competition between them. Each gains experience with different doctrines, allowing the Supreme Court (or the appellate courts themselves) to select the best approach based on this experience. . . the Hruska Commission warned against the creation of a single appeals court, concerned that it would become subject to 'tunnel vision,' lacking the insights to be gained from exposure to a wide variety of fields. . .The structural deficiency is no doubt exacerbated by the tendency of such institutions to expand their own role and by the expansionist ideology of some judges, who seek to expand patent coverage to 'everything under the sun that is made by man' . . . "[10]

The downside of having multiple courts, of course, is "forum-shopping" and it was in an attempt to curb this that a central Court of Appeal for intellectual property cases was set up in 1982.

EU's vulnerability to lobbying

Apart from the harmful results of centralisation, we can expect that whatever legislation is drafted under Art.118 of the Lisbon Treaty, will increasingly reflect the influence of interests concerned to get laws which suit them. When he retired from the European Investment Bank recently, Ewald Nowotny wrote that:

> "One of the most remarkable shifts in European economic policy governance in the last decades has been the evolution from a 'social partners' approach to a lobby-influenced approach of economic policy [and] In fact, US companies and lobbies in many cases have been able to play this system much more efficiently than their European counterparts."[11]

9 S. C. Gilfillan, *The Sources of Invention* Chicago University Press, 1935), p.8.

10 Bessen and Meurer, *Patent Failure* Princeton University Press, 2008), p.229–230.

11 E. Nowotny, "Evolution of Structures f European Policy" (2004) *Journal of Evolutionary Economics* 14 (2) at 211–215.

This efficiency was very evident recently in the attempts by the Commission to get the patent protection for computer programmes in Europe which the large US firms wanted, and which was frustrated by the European Parliament in the largest negative vote in its history.

What Nowotny has noted is easily explained. The desire of Brussels bureaucrats to expand their role is manifest, but, in fact, as the European Union has grown, their ability to do this in any sort of coherent way has diminished. Anyone who has been involved with the European Union over a significant time, as this writer has, cannot fail to develop the strong impression that, especially from the 1980s onwards, the length of time any senior Brussels civil servant spends in one post has shortened progressively. In fact, it seems that the most able of them have hardly had time to master their brief before they are promoted, leaving a replacement to begin the learning process anew. This leaves an informational vacuum which lobbyists, who by definition are completely on top of their task, and single-minded about their objectives, find it all too easy to fill.

Finally, another provision of the Lisbon Treaty rebalances voting weights in favour of the larger countries. When this is coupled with the fact that the key decisions made under Art.118 are to be by qualified majority voting, it seems inevitable that the influence on intellectual property law matters of the largest countries and firms can only increase. This is precisely the influence which needs to be countered by the widest possible diversity in the relevant laws, whether statute or judge-made. It is just this diversity which "centralised Union-wide authorisation, co-ordination and supervision arrangements" will prevent.