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Interview with Professor Peter Drahos

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Today's Global Patent System can't manage the worldwide challenges of our future

„Managing risks whether they are the risks of climate change, food security, loss of biodiversity, or pandemics has become the principal task of international governance. Historically speaking, the patent system evolved out of a beggar-thy-neighbour philosophy in which states used the patent system to maximize trade gains and minimize trade losses. We cannot afford this kind of systems philosophy at a time when global risk management will require much more sharing and diffusion of knowledge and technology.“

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1. The Influence of the Trilateral Offices of Europe, the USA and Japan

Professor Drahos, your book „The Global Governance of Knowledge“ analyzes the worldwide patent system. Your study is based on a detailed analysis of forty-five rich and poor countries. First of all I would like to talk to you about the influence of the three largest patent offices on the rest of the patent world. According to your study, the European Patent Office (EPO), the United States Patent and Trademark Office (USPTO) and the Japanese Patent Office (JPO) take the role of „colonization countries“. They form and influence the world wide patent system by supporting developing countries in founding their own patent offices. How does this work?

Professor Peter Drahos: These three offices were doing capacity building well before the phrase became a cliché in development circles with the EPO and JPO probably more active on this front in the early days than the USPTO. If you look at the history of the EPO, for example, it was one of the first offices to forge a relationship with Chinese patent office. JPO has also been quietly active for a long time, especially in its region. The capacity building undertaken by the Trilaterals takes various forms including examiner training, assistance with the drafting of manuals, the provision of hardware, access to databases and search systems, training in the use of those databases and systems and advice on how run an office. My study found that the most effective way in which these offices enculturated technocratic trust in their systems was through long term training commitments with developing country offices. Examiner exchanges on a regular basis were critical to the build up of this technocratic trust (defined as trust in a system).

While I have been something of a critic of the patent system, I think that there are very useful lessons for capacity building more generally from the work of offices like the EPO and JPO. The way in which patent offices have built technocratic trust amongst themselves has a broader application. For example, in the climate change area an issue between developed and developing countries is measurement, reporting and verification (MRV) of mitigation actions by developing countries. My study of patent offices suggests that countries should establish national MRV offices and then begin to exchange experts in order to build up trust in each others' systems.

In your study you point out that nearly every country in the world has a patent office. You say: „No island seems to be without a patent law“. Why do the developing countries welcome the support of the three largest patent offices – even if they have only a small number of their own inventions or none whatsoever?

Professor Peter Drahos: The basic answer to this question is that it is a matter of resources and costs. Most developing countries have entered or will enter the patent system via the trade regime (for example, through WTO membership). Once a country is obliged to enact a patent law it has to have a patent office to administer that law or it will soon run into criticisms from other states. Establishing a patent office is not cheap when compared to a trademark office. Running a high quality examination system in a world awash with millions of patent applications is expensive even for wealthy developed countries. It is more or less impossible for small poor countries. So developing countries turn to the large developed country patent offices for help. They know that capacity building in intellectual property is a development priority for rich countries and that they are more likely to get the help they ask for. Some of the developing country offices I interviewed thought that they would make lots of money through fees, but others were more realistic knowing they would never be a major patent destination. I think that patent officials in developing countries see that by cooperating with the large offices they are expanding their opportunities to gain resources. They are right about this. I was always struck by the fact that patent offices in poor countries seemed to have better buildings than the health departments that I also visited. Employment conditions in developing country patent offices were often better than in other parts of the government.

What disadvantage does this supporting system have when the developing countries copy the patent system from industrial countries?

Professor Peter Drahos: A simple answer would be that one has to be careful in choosing a leader to follow. Things didn't work out that well for those who followed the Pied Piper of Hamelin. A more sophisticated answer would draw on the variety-of-capitalism literature in political economy and argue that each country should run its patent system in the context of the niche in which it seeks to excel in the world system. Within countries there should be rich local debate about how to administer and enforce patents. Unfortunately, what I found was a form of regulatory automation in which developing country examiners would tend to follow the decisions of the major offices. What is not appreciated enough by developing country policy makers is that the patent system in developed countries has co-evolved with various industries and so inevitably the patent standards of developed countries have a better fit with the industries to be found in these countries. The range of allowable claims that has developed in the area of pharmaceuticals is one example of this evolution. In theory, developing country patent offices could do a lot to adjust these standards to the local innovation system, but in practice this tends not to happen. Politicians in developing countries need to understand that what happens in patent offices matters to their economy. Sending examiners to the USPTO's training labs to learn about pharmaceutical examination may seem like a good deal, but it's not. It is much better for a developing country patent office to have an open dialogue with a range of independent experts, including from its public health and innovation sectors with the aim of creating its own philosophy of examination and interpretation. Some developing country examiners I interviewed were aware of the dangers of an uncritical acceptance of the examination practices of the major offices, but felt powerless at an individual level to do anything about it.

Concerning the challenges of the future – climate and disease control - you say: „Today's globalized patent system was never designed by states as a tool for the management of risk“. Could you give an example?

Professor Peter Drahos: Managing risks whether they are the risks of climate change, food security, loss of biodiversity, or pandemics has become the principal task of international governance. Historically speaking, the patent system evolved out of a beggar-thy-neighbour philosophy in which states used the patent system to maximize trade gains and minimize trade losses. We cannot afford this kind of systems philosophy at a time when global risk management will require much more sharing and diffusion of knowledge and technology.

A good example of the kind of risk I am referring to can be seen with the patent over oseltamivir (Tamiflu). The increasing number of deaths from human avian influenza in 2004 and 2005 resulted in countries scrambling to acquire or increase their stockpiles of antiviral neuraminidase inhibitors. Tamiflu was in high demand. During the rush Roche, which was the exclusive patent licensee of Tamiflu, followed a profit-maximizing strategy. The result was much lower stockpiles than were forecast to be needed. It is also clear that the patent control of antivirals had led to a situation where the option of stockpiling had been made unaffordable for the Asian countries in which the risk of pandemic outbreak was the greatest. All countries would have benefitted from these few high risk countries having larger stockpiles because antivirals reduce the risk of transmission. As a tool of pandemic risk management, the patent system on this occasion utterly failed.

2. Changes and Chances

Political influence

Professor Drahos, you criticize the lack of political influence on the patent system. You say, taxes, law and order and health services are the stuff election campaigns are made of – patents are not. You want to change the composition of the committees that conduct the development of the patent office system. In which way?

Professor Peter Drahos: My basic argument is that the evolution of the patent system has for too long been dominated by an insider network. Fritz Machlup and Edith Penrose in a wonderful article published in 1950 show how towards the end of the 19th century patent policy discussions came to be dominated by the insular interests of attorneys and industry. More than a hundred years later my study suggests that not much has changed. Patent policy decision-making processes need a radical overhaul. A good place to begin is by looking at the membership of the key committees that currently drive these processes. Instead of having committees stacked with attorneys and large patent owners we need a much more independent and diverse membership that reflects the reality that many groups in society are potentially affected by the granting of patents. We could include on these committees independent scientific researchers, public health representatives, representatives from companies which operate with a different business philosophy to those of patent owners (eg the free software movement) or that are disproportionately affected by patent quality issues (eg the generic industry), representatives from indigenous groups and consumer groups etc. We need much more deliberation about patent policy than we are currently getting. Finding ways to bring more people into the patent policy process will help bring about this deliberative turn.

Transparency of knowledge

Apart from the lack of political influence you also mention that „public patent system makes a poor job in making information available“. Establishing a transparency register is one of your ideas for improving this „poor job“. How do you want to make sure that there will be no „hidden surprises“ for companies when they file their inventions?

Professor Peter Drahos: One of the paradoxes of the present patent system is that despite all our information technology tools finding all the patents relevant to a particular technology is very difficult. This has become a major source of uncertainty for companies, researchers, regulators and many others affected by patents over technologies. Uncertainty over the scope and ownership of technologies brings with it unacceptable social costs and risks.

One way to deal with this uncertainty is to give regulators such agricultural, environmental and public health departments the power to create a transparency register around a specific technology where public transparency and certainty are thought to be vital (for example, the patents around oseltamivir). The basic idea behind the register is that a patent owner would by law be required to disclose all the patents it held around that individual technology. Failure to disclose would attract penalties (including not being able to enforce the undisclosed patent) as would attempts to game the register by disclosing patents of doubtful validity. Any other company could then rely on the ownership position disclosed by the

register and this reliance would be protected by law. There would be no hidden surprises. Obviously regulators could cooperate across borders with their counterparts in other countries. Transparency registers would help to lower the costs of patent uncertainty for small to medium enterprises in areas where the costs of uncertainty were socially unacceptable.

You make reference to the concept of defending the „public good mission of science“. How could this work?

Professor Peter Drahos: The institutions of patent and science operate with different reward systems. Patents turn inventive knowledge into a private good while the institution of science reputationally rewards those who publish first and work to diffuse their discoveries as a public good. Societies need a mix of reward systems to generate knowledge. It is a mistake to become too dependent upon one system. We also need to remember that the knowledge foundations of most of our scientific disciplines were laid down as public goods. The reward system of science has a good track record. Along with many people, I believe that the patent system is interfering too much with the public good mission of science. It is a mistake, for example, to allow the patent system to turn something as important as a gene into a private good, relying on the silly argument that a functionally identical but isolated and purified gene is somehow different to the one found in nature. This is about as convincing as saying that a rock found in the forest is, when removed and washed, an invention.

One of the regulatory proposals I advance in my book¹ is for the creation of an External Patent Audit Committee (EPAC). The members of this committee would include scientists of international stature who cared about the public good tradition of science and who were prepared to lead an external audit process of a patent office's work. An EPAC could report directly to a legislature and in this way a legislature would get an independent evaluation of what the national patent office was doing. An EPAC would help to catalyse a public dialogue around the major issues facing patent offices today, issues such as the height of the inventive step and how to improve patent quality.

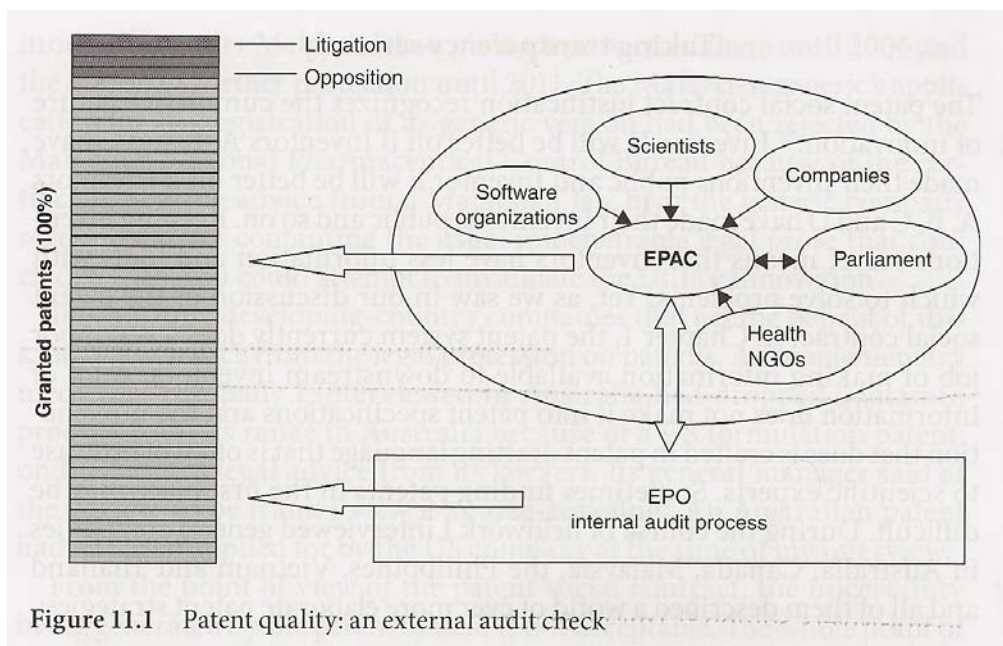


Figure 11.1 Patent quality: an external audit check

3. Back to the Social Contract of Patents

The current global patent system is a long way away from the primary idea of the social contract of patents. Today, multinational companies aim for worldwide and maximized patent coverage. How could developed and developing countries recapture the public spirit of the patent social contract – for the good of both of them?

Professor Peter Drahos: The core message of my work is that we have to find ways to recapture the spirit of the original patent social contract. I locate this spirit not in the disclosure conception of the contract, which I think is an arid and excessively lawyerly version of the contract, but rather in the medieval idea of a fair exchange in which both parties receive something of value. Reinvigorating the patent system with this old ideal is not easy because the system has become colonized by large players that use it for opportunistic purposes. In other work that I've done I have argued that the true social cost of this opportunistic behaviour has been underestimated.

Recapturing the patent social contract will require an integrated strategy that directly confronts this opportunistic behaviour. I argue for the use of the criminal law against patent attorneys who help game the system by deliberately drafting patents of doubtful validity, an idea that will probably not be enthusiastically supported by the profession. Other ideas such as the transparency register and an EPAC can also help deal with aspects of this opportunistic behaviour.

However, while these and other regulatory tools will bring some improvement, states must be prepared to invest in the creation of regulatory networks that are animated by the ideal of the patent social contract. For example, patent gaming behaviour by multinational pharmaceuticals inflicts social welfare losses on citizens in terms of costs and access to medicines in both developed and developing countries. Being able to respond effectively to this kind of behaviour depends on the networked cooperation of many actors, including civil society, health departments, competition authorities and patent offices. The challenge for patent offices in the 21st century is whether they will take on more of a leadership role in these networks, becoming champions of a people's social contract or whether they will spend their time handing out customer satisfaction surveys to their multinational clients and hoping for lots of ticks of approval. The latter, I predict, will do little for the morale of their examiners.

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ⁱ Drahos, Peter: „*The Global Governance of Knowledge: Patent Offices and their Clients*“, Cambridge University Press, Cambridge, 2010