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The Global Governance of Knowledge: Patent Offices and their Clients

Peter Drahos

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“Patent office administration would strike many a person as a dull topic” (p. xiv). This seems like an inauspicious opening sentence for a book on patent office administration, and the author is of course quite right. It is *not* a very exciting subject.

It is an *important* subject, nonetheless, and Peter Drahos does a very good job of explaining what it is, exactly, that these bureaucracies do, how they go about their day-to-day routines, and who their major clients are. Moreover, he describes how the different national patent offices have gradually become part of a globally integrated international patent system that, he argues, serves in practice to protect the interests of large multinational corporations. Given the strong monopoly provisions of the patent system, this is a matter of central importance that touches all aspects of business innovation.

Drahos states that he began his study with the hypothesis that “patent offices around the world are cooperating to integrate their administrative procedures and technical systems,” thereby building a system for what he calls the “global governance of knowledge” (p. 3). To investigate this hypothesis, he gathered information about the extent of cooperation among the different national patent offices. His main source of information was a series of interviews conducted over a five-year period (2004 to 2008), in the course of which he interviewed 140 officials from 45 different patent offices, ranging from the largest and most important—the US Patent and Trademark Office (USPTO), the European Patent Office (EPO), the Japanese Patent Office (JPO), the so-called “Trilaterals”—to some of the smallest patent offices in the world.

One main finding is that, although patent law in theory continues to be an area over which countries have sovereign discretion, in practice “[t]he network of patent offices is not a flat structure of equals. Rather it is a tiered structure dominated by a core of large offices made up of the EPO, JPO and the USPTO” (p. 46).

The patent offices outside of the core forge relationships with those in the core in different ways, but ... it is the core that leads when it comes to developing a global system of patent administration Developing-country offices ... are being encouraged to accept the standards and decisions of the core offices. Progressively an automation of decision-making is taking place in which independent examination by many offices will be replaced by examination by a very few and mechanical acceptance by the many (pp. 46-47).

Throughout the book, Drahos argues that a common culture is being developed, much of it the result of training programs for patent examiners and other forms of technical cooperation that the large core offices provide for developing country offices: “Much of the

training that the Trilaterals provide for examiners in developing-country patent offices is aimed at building a borderless interpretive community when it comes to the application of now largely globalized patent law principles” (p. 53).

This is an arresting thesis, and much of the book is devoted to documenting it. Chapter 2 starts out by describing the essentials of patent office procedure, filing routes for patent applications, and grant procedures. The general sense is that patent law, in its practical application, is a game for insiders with rules designed for maximal complexity, and Drahos captures this quite well:

The comparative advantage of patent attorneys lies not in their knowledge of patent law, but in their knowledge of many hundreds of rules and guidelines that make up patent procedure and the drafting of the claims that define an invention. A key part of their work is keeping track of the many deadlines that exist for the submission of documentation that accompanies the application process (p. 55).

“Welcome to the maze,” as he puts it.

Chapter 3 provides a brief history of patent law and patent offices, and Chapters 4 to 10 are then devoted to descriptions of the characteristics and special problems of individual patent offices or groups of offices. Perhaps inevitably, the book loses much of its momentum in these sections, although we are often rewarded with interesting bits of information. One historical trend that comes across crystal clear is the tremendous growth in patenting activity. The USPTO, the largest and oldest patent office in the world, is the best example of this trend: 10,000 patents were granted in the United States from 1790 to 1836, an amount that by the 1920s was being granted every three months, and by 2006 the USPTO was receiving more than 417,000 patent applications per year (pp. 151-152). And that is just in the United States. Elsewhere, we are told that “[c]ollectively in 2007 the Trilaterals received a little over 993,000 applications” (p. 74).

One might naively assume that this should be a cause for rejoicing. All those new inventions! Those who know a little about the patent system are aware, however, that the rising flood of patents is not really a reflection of greater inventive activity. Rather, what it reflects is an increase in patenting *per se*. Drahos attributes this to a historical decline in the cost of patent office fees, plus what he describes as “the missionary behaviour of the patent profession” (p. 109). At one point he compares patenting activity to an arms race, with patent offices and patent attorneys in the role of arms dealers:

In an arms race one party tries to stay ahead of the other through stockpiling more arms in order to maintain superiority. The other party does precisely the same If some companies begin obtaining monopoly privileges their competitors are likely to follow suit. Naturally the attorneys and patent offices will encourage the purchase of more arms. If the costs of patenting are cheap one would expect patenting to go up. This of course means that patent offices will become flooded with patent applications (p. 109).

The result is administrative overload, and overworked patent examiners under great pressure to reduce the growing backlog of pending applications by increasing their “productivity,” i.e., by devoting less and less time to each individual patent application. One interesting statistic that emerges is that, among the Trilaterals, “time spent on the examination of an application generally falls into a range of 10 to 20 hours” (p. 74). This

leads to the approval of many applications that would not survive a more rigorous scrutiny. Add to this another source of built-in bias, which comes from the nature of the patent office's business model. Patent offices depend upon their fee income, and most of that comes from renewal fees, a source of income that would dry up if the rejection rate for patent applications were too high: "... under this kind of model [patent offices] have to ensure that a significant number of patent applications make it to grant, otherwise there will not be enough of a renewal stream of income If they issue a small number of patents, using, for example, a much more stringent test of inventiveness, they will have to contend with a lower income" (pp. 19-20). And herein lies the danger of the *de facto* harmonization of patent systems that Drahos sees as emerging via the "interpretive community" that he describes throughout the book: "In the case of patents there is a potential cost if the developing-country patent examiner is automatically following the low-quality output of developed-country examiners" (p. 262).

A related consequence of this business model is that patent offices have gradually developed a client-orientation and a "customer focus," much like private businesses. The problem, however, is that the "client" in this scenario is not the general public, but the giant corporations who are by far the largest users of the patent system. Ideally, patent offices have a public mission, and Drahos repeatedly refers to what he calls the "patent social contract," namely, the idea that society is willing to grant monopolies to inventors in exchange for the production of non-obvious and socially useful inventions. This notion underlies (and justifies) all existing patent laws. In practice, however, this is not how patent officials view their mission. Indeed, Drahos reports that in more than 140 interviews, this idea of a patent social contract was only mentioned twice (p. 38). Rather than being beholden to the public interest, "[a]n organization that operates on a fee-for-service basis is likely to see the person paying the fee as its customer" (p. 159). In the case of patent offices, "the persons paying the fees" are increasingly the large multinational corporations, and if they had their way they would patent everything under the sun. However, as Drahos points out:

The patent social contract is not a contract aimed at the grant of more and more patents, but rather at the diffusion of more and more significant inventions citizens acting rationally would only want to grant monopoly rewards to inventions that were genuinely creative It is high-quality inventions that society wants, not high-quality patents which can only be a means to an end and never an end in themselves (pp. 78-79).

This is as good a statement as any of what we might call the "conventional view" on the relationship between patents and inventive activity. Defenders of the patent system never cease to stress the need to stimulate further technological development, and the implicit assumption is that patents are in fact the cause (or at least one important cause) of technical progress. This assumption has been so much taken for granted that evidence is hardly ever offered to support it. Moreover, when it *has* been examined empirically, the evidence almost uniformly fails to confirm it, and there is nothing in this book to suggest otherwise. On the other hand, Drahos provides ample support for the view that the patent system imposes large costs upon society, and that its main beneficiaries are (1) the large corporations that hold the vast majority of patents, and (2) their patent attorneys.¹ The "patent social contract" supposedly balances a social good (technical innovation) against a social bad (monopoly), though one should more properly speak of a "presumed" social

good, since we cannot say for sure that patents do in fact significantly stimulate invention. Even Drahos is skeptical in this regard:

Whether this staggering global growth in patent bureaucracy and patent regulation of markets actually caused much important scientific and technological innovation that would otherwise not have occurred, and at a cost that did not outweigh the benefits, is a question to which we will probably never have an answer (p. 285).

Monopoly, on the other hand, is unquestionably a social bad, and patents are nothing more than legal monopoly privileges granted by state fiat, which is why there has always been a dissenting tradition within economics that views patents with suspicion. Since the costs are obvious and the benefits doubtful at best, why not just do away with patents altogether?

Drahos does not draw this extreme conclusion, and instead he outlines in Chapter 11 a series of proposals designed to “reclaim the patent social contract.” Space does not allow for a detailed discussion of these proposals. Suffice it to say that they are interesting and sensible, and I wish him well in his efforts in this regard. However, he will perhaps forgive me if, on the basis of the evidence that he himself amasses in this book, I also remain somewhat skeptical about the possibilities of actual implementation of his suggestions. In fact, it seems to me that this book identifies and describes important problems in the global patent system, without expressly drawing the conclusions that they warrant. There seems to be widespread agreement that today’s patent system is broken, and although Drahos is among those who think it can still be fixed, some of us think it is broken beyond repair. We should consider the possibility that the patent system is simply unreformable.²

But an author is entitled to his own opinions. This is a very informative book, and I highly recommend it to anyone who is seriously interested in intellectual property issues. Drahos also writes well, and he even manages to inject occasional humor into this inherently dry subject. My personal favorite: “Patent harmonization negotiations become like a circus act in which the clowns go through a fixed routine while pretending spontaneity [They] are a circus, but without the laughs” (pp. 50-51).

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Notes and References

1. A recent book by James Bessen and Michael J. Meurer, *Patent Failure: How Judges, Bureaucrats, and Lawyers Put Innovators at Risk*, Princeton University Press, Princeton, NJ, 2008, suggests that the lion’s share of those benefits actually accrue to the patent attorneys.
2. For a spirited argument in favor of intellectual property “abolitionism” see Michele Boldrin and David K. Levine, *Against Intellectual Monopoly*, Cambridge University Press, Cambridge, UK, 2008.