

Copyright For Innovation

A System of Fast, Cheap and Narrow Exclusion Rights for the Future

Hartmut PILCH
<http://eupat.ffii.org/c4i>

April 17, 2009

Integrating the patent and copyright system into a paradigm that is compatible with the digital age

Contents

1 Copyright is (close to) the “Intellectual/Industrial Property” (I2P) Paradigm of the Future	2
2 Features of future Integrated System of I2P	2
3 Early disclosure, an advantage of the patent system?	3
4 Special rules where state imposes burden of clinical tests etc	3
5 Possible special rules for inventions based on expensive experiments with forces of nature	4

6 Discussion papers about future of I2P **4**

The dichotomy of “copyright for literary creation, patents for technical invention” has visibly broken down due to the appearance of software and the debate about copyrightability vs patentability for software. It is time for an integrated redesign of the intellectual/industrial property (i2p) system. Recent experience shows that copyright comes closer to what is needed than patent law. Future exclusion rights should be Fast, Cheap, Narrow. Initially they should be biased in favor of the rightholder, but the burden should shift soon.

1 Copyright is (close to) the “Intellectual/Industrial Property” (I2P) Paradigm of the Future

- Salient features of copyright are: low burden, narrow claims, proximity to the natural innovation incentive system (“fast, cheap, narrow”)
- Copyright is already the main IP system for non-esthetic creations such as instruction manuals, software, architecture and, to varying degrees in different jurisdictions, functional industrial design. It is considered to be appropriate for logical creations (as opposed to in the classical patent theory). Currently many people observe “convergence” of both, and the trend is to solve more problems at the level of logical creations.
- Publication of claims and disclosure at an early stage impose burdens and disrupt rather than support the natural system of innovation incentives based on fast movement, business secret, competition etc
- There may be some exceptional areas where codification of claims with their inevitable corollary of early disclosure and cumbersome procedures could still be justifiable in the future. These are related to special circumstances where high burdens are already imposed by facts such as
 - governmental safety certification requirements (e.g. clinical testing)
 - expensive experimentation with forces of nature (classical domain of “technical invention”)

2 Features of future Integrated System of I2P

- immediate acquisition of right, low costs, narrow claims (“individual creation”)
- low initial burden for rightholder, burden shifting from Public to rightholder over time
- burden of proof on the suspected plagiarator during an initial period (e.g. 2 years)
- broad interpretation of scope of “individual creation” during initial period
- no need for disclosure of plans/source/ideas at the beginning (see discussion below)
- after a few years (e.g. 3-10) have elapsed, prolongation justifies a burden, including registration, disclosure, and from some point on increasing renewal fees
- registration, renewal, disclosure, examination etc need to be handled by private parties according to standards approved by the lawmaker
- low complexity, care to avoid creation of special interest groups that hijack the legislative process

3 Early disclosure, an advantage of the patent system?

Patents are touted to be “deal” of “monopoly for disclosure”, where society benefits by having the “invention” disclosed at an early stage.

In reality, a monopoly **cannot** be granted without disclosure. Broad claims need to be codified and publicly scrutinised. What is touted as a deal is a **necessary feature** of any monopoly right rather than something for which there was a demand by the public.

If broad monopoly rights are not granted by a future “fast, cheap, narrow” i2p system, there is also less of a need for disclosure.

Yet, even in a “Fast, Cheap, Narrow” i2p system, the rightholder often has an interest in being able to prove when he made his achievement, and disclosure will help him. Competition will build further incentives for disclosure.

In the case of software, object code can usually not be decompiled in a meaningful way. Decompilation does not seriously lessen the first mover advantage, because it does not provide a useful result to the competitor. Much of the advantages of the original achiever are based on this type of informal property right, and society has little interest in obtaining the source code at an early stage. For the initial 1-2 years, even a decompilation ban might not hurt.

This can be generalised to logical creations, and even in engineering in the applied natural sciences, there is something like a difference between the conceptual level (source code), to which the originator has early access, and a level of more or less intransparent work results. It is said that chromatography makes this difference very small, but this probably has to be investigated more closely – after all the software patent lobby also tends to exaggerate the power of decompilation in software. In any case, often the public’s interest in early disclosure is fairly low compared to the public’s interest in leaving natural market incentives for creation/innovation undisturbed.

4 Special rules where state imposes burden of clinical tests etc

The pharma industry is said to need patents especially because of the high expenses involved in clinical testing.

However clinical testing is not directly related to invention, and there are more direct ways of granting those who have successfully passed clinical tests a monopoly right which allows them to recoup investments. E.g. it is common practise in some countries to grant the introducers of a newly tested medicine seven years of exclusivity, during which nobody else can introduce the same medicine based on the same testing data.

5 Possible special rules for inventions based on expensive experiments with forces of nature

Development of new chemical, biochemical or pharmaceutical solutions is said to regularly involve high investments in conducting experiments. Moreover, it is said that the resulting knowledge tends to be suitable for claiming as done in patents, such that one patent closely corresponds to one product. This seems to be so particularly in cases where experiments with forces of nature are involved and the invention is built on a discovery of a new causal relation between the means employed and a “surprising effect” which was obtained thereby.

Since empirical knowledge in applied natural sciences is clearly distinguishable from logical knowledge, it is possible, even within a copyright-based paradigm, to have special rules that allow a seamless continuation of the most legitimate core parts of the traditional patent system.

6 Discussion papers about future of I2P

- Paul Geller 2003: International Patent Utopia? (originally published in the European Intellectual Property Review, 2003, 515, and then in French translation in Propriétés intellectuelles, 2004, 503, in German translation in GRUR Int., 2004, 271, and in Chinese translation in Intellectual Property Studies, 2004, no. 15, 78.)
- Jerome Reichmann @ Duke Univ 2000: Repackaging Rights in Subpatentable Innovation
- Wikipedia: Idea-Expression Divide
- L.A. Hollar: Patent 2.0: A new type of patent is needed
- 2006-02-06 UK The Register: Four-year ‘limited patent’ proposed
- “Free Culture” or Lawrence Lessig advocates obligatory registration of copyright and increasing renewal fees as a way to make old copyrighted content, that is currently being blocked by unknown licensing requirement, better accessible to the public
- Reform of Patent Examination System – in this reform vision, patents are published immediately without examination, and burdens on the proprietor (including registry of licensing conditions, duty to compensate private parties who detect invalidity, renewal fees) increase over time
- MEP Gierek (Poland) and some national MPs have been espousing a version of copyright with some specific adaptations to software innovation, including an explicit exclusion of patenting in this area