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Discussion

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Patent Office, the people who have issued the patents.[29] So finding one of them not valid is going to be a rare occasion under the European Patent Litigation Agreement.

A part of my job now is, as a matter of fact, to lobby against the EPLA. And fortunately for me, the French don't like it either.[30] As I made a comment to my boss when the French came out with their statement that they wanted something different than EPLA, he said, "I can still see Admiral d'Estang's fleet out on the horizon there. They came to our rescue again." However, he then reminded me that it was a Canadian company.

But the fact is that the EPLA is a bad approach.[31] And we hope that the community, rather than the EPO, will be the people in charge of the EPLA – or something like the EPLA – because you have more checks and balances at the European Court of Justice. And, you have the national judiciaries that can be tapped and those kinds of things.[32]

Oh, I only have five minutes? You could have just said five minutes. You were trying to be subtle, weren't you? Okay. Shall I go faster? I can just quit now. Okay. See, I switched to the last page of my notes. I hadn't even turned from the first page before that. All right?

That's the European problem, and I can talk for a couple of hours on that one, but I won't. In fact, I will really quit.

So what we are really talking about now is that every entrepreneur, especially new ones, has to do two things. One, they have to have an R & D department, an innovation department. And then they have to have a legal department. And everything else is superfluous. If you don't have those two, you are out of business.

And I think that that's something – well, it is good for the profession, it is delightful – it actually is not very efficient for the economies. And so we have to fix the problem of the IPR law. And I don't know how yet, but I am trying to figure it out. If anybody has any ideas, I will be happy to hear them. See, I am all done. Okay?

DISCUSSION FOLLOWING THE REMARKS OF WILLIAM A. DAVIES

MR. CUNNINGHAM: Okay. Great. You can't leave. We have questions and answers. You can't get out of here that quick.

MR. DAVIES: Okay.

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[29] Paul Meller, *European Parliament Wants Changes to Patent Agreement*, IDG NEWS SERVICE, Oct. 12, 2006, http://open.itworld.com/5007/061012eupatent/page_1.html.

[30] *France: Why We Oppose the EPLA*, MANAGING INTELLECTUAL PROPERTY, Jan. 9, 2007, http://new.managingip.com/Article.aspx?ArticleID=1257409.

[31] *See* EPLA: Full Briefing, http://epla.ffii.org/briefing (listing a number of criticisms of the EPLA) (last visited Oct. 7, 2007).

[32] *Id.*

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MR. CUNNINGHAM: I have to say in MC-ing the questions and answers, you have to understand how low-tech I am.

One of my associates put a "Dagwood and Blonde" cartoon on my door in my office, and it shows Dagwood going in to return a cell phone that he has bought. He is complaining that it is too complicated, and he can't understand it. And that all he wants is a phone that sends and receives telephone calls. The young salesman just goes ballistic and says, "I don't have time to deal with a lunatic like you."

Let me begin with a question. We have talked about how the EU patent system and its conduciveness to trolls and things like that is not good – is counter productive for an entrepreneurial system. Is there anything you could single out about either the U.S. or the Canadian system that jumps to mind as something that really needs reform in terms of patent protection for entrepreneurs?

MR. DAVIES: First, let me correct that statement a little. The European system as is, is pretty good.

MR. CUNNINGHAM: As proposed, it is pretty bad.

MR. DAVIES: As proposed, it is awful.[33]

MR. CUNNINGHAM: Okay. That's what is called progress.

MR. DAVIES: Yes, that's right. What would I change in the U.S. system? I guess the Supreme Court did a pretty good job on *E-Bay*. But I guess I would make sure that there was always adequate time for review of a patent on validity, and I would put back some sort of connection between courts and the Patent Office. Right now, as you know, the Patent Office and the courts don't necessarily pay attention to each other.[34]

And we need to put that connection back together, because if the Patent Office is at all good – we won't go into that, that's too much of a problem, whether they are good or not – but if they are doing their job, they can serve as a pretty good technical resource for the courts. But right now we have it pretty well disconnected. There is no way the Patent Office can serve as that resource.

DR. KING: What would you do, make them advisors? Is that it?

MR. DAVIES: Well, you know, the German system is pretty good. What the Germans do is – they don't have a connection with their Patent Office, either – but what they have is, they have three judges. There are two legal judges and one technical judge for every patent case.[35] And the technical judge is drawn from that technology.[36]

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[33] *See Id.*

[34] *See generally* Justia: Patent Overview, http://www.justia.com/intellectual-property/patents/ (discussing the roles of the United States Patent and Trademark Office and the federal courts in the patent system) (last visited Oct. 7, 2007).

[35] *But see* The Technical Judge in the German Patent Proceeding,

In other words, if it was an electronics case, it would be an electronics technical judge. It works pretty well. There are very little problems with judges who don't know what they are talking about on technology. I don't know if that would work here because we are so invested in our system – which by the way I think is a great system (the jury system) – that I doubt we could get away with changing to a technical judge.

But I think it is something that would give technical weight and advice to the courts and would be very, very useful.

MR. CUNNINGHAM: Interestingly, in the United States, in one part of our patent protection system, that is, Section 337, which is a device for protecting against imports that are violating patents and copyrights,[37] you do have a technical judge.

MR. DAVIES: Right.

MR. CUNNINGHAM: And I have known people who have said, "Boy that makes it much better." Then, usually among people who have lost the cases, they say, "Boy, what you really need is a jury of good men and women."

MR. DAVIES: That's an administrative remedy.

MR. CUNNINGHAM: That is an administrative remedy. Right.

MR. DAVIES: So you can get away with that, but not in the law, not in the courts.

MR. CUNNINGHAM: Right. You are drawing a distinction that some of my partners draw between what I do and practicing law. But can we have some questions from the audience here? Yes, sir.

MR. HICKS: You have talked about the importance of research and development and legal groups in your company working together. We kind of know a little about how the two groups interact. Could you comment on how the two groups interact, with what frequency? Is it a month later, a quarterly review of what is or is not patentable?

MR. DAVIES: Well, on the patent side, we have a patent committee, as every R & D based company does, and the patent committee meets every couple of weeks, actually. One of the things it does is to review for

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http://www.bpatg.de/bpatg/das_gericht/techn_richter_englisch.html (stating that Technical Boards of Appeal are composed of three technically qualified judges and one legally qualified judge and that Revocation Boards are composed of two legally qualified judges and three technically qualified judges) (last visited Oct. 7, 2007).

[36] *Cf. id.* (stating that technically qualified judges do not need to be experts in the specific field of expertise at issue in a case).

[37] Understanding Investigations Of Intellectual Property Infringement And Other Unfair Practices In Import Trade, http://www.usitc.gov/ext_relations/about_itc/us337.htm (last visited Oct. 7, 2007).

patentability, innovation, prior art, and those kinds of things – the usual things that a patent committee does.[38]

And the patent committee has a representative from the patent litigation people. So there is somebody who is part of the legal team that is on the patent committee. That's different from the normal patent committee, which is made up wholly of engineers.[39] Also, the engineers that are in it, almost all of them are ones who exhibited interest in doing that, who weren't shanghaied if they are interested.

For example, one of our people on the committee is probably one of our brightest young engineers, very creative, and he has also got the sort of mind that remembers everything. And so he is just wonderful because somebody comes up with a thing that everybody says, "Wow, how did you think of that?" And he says, "I think in 1947..." You know? And the engineer who thought it up had never heard of this 1947 thing and finds the prior art that way.

MR. CUNNINGHAM: I find all this to be refreshingly anti-Shakespearean. As you recall, he said, first thing we do, let's kill all the lawyers. And now the first thing we do is keep the lawyers, and one other group.

Doug, you had a question.

DR. BARBER: I was wondering if there hasn't been some significant change, which isn't just about globalization, shifting, manufacturing, and so on. I have been around long enough to remember when getting a patent approved was a pretty rigorous process, and it was a very rigorous process on prior art, and that kind of thing, and once you got it approved, you had this feeling that you had an airtight case with the patent itself.

Today, the impression I get is that you can patent anything because otherwise how do the trolls take patents? And it is kind of left up to the courts to decide whether it is valid or not. And then the issue of prior art is often just one of the elements in the argument. It may not be a significant one.

Is that a change that has taken place, and how did it happen?

MR. DAVIES: Well, I don't know exactly, but I think it has happened, and it has gotten a lot easier to come up with some pretty silly ideas.[40] The idea that you could patent business methods...[41]

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[38] *See generally Practical Tips for Managing a Biotechnology Patent Portfolio*, June 3, 1998, http://www.townsend.com/resource/publication.asp?o=4358 (recommending the formation of a corporate patent committee and describing the responsibilities of such a committee).

[39] *But see id.* (suggesting that one of the members of a patent committee should be a patent attorney).

[40] *See generally* Teresa Riordan, *Patents; An Appeals Court Says a Mathematical Formula Can be Patented, if it is a Moneymaker*, NEW YORK TIMES, Aug. 3, 1998 at D2, *available at*

MR. CUNNINGHAM: [Phone rings.] This is all designed to show that this audience is more important.

MR. JANSEN: Is that message saying he has got five minutes?

MR. CUNNINGHAM: I will handle that message.

MR. DAVIES: That was low-tech.

MR. CUNNINGHAM: This was the five-minute message.

MR. JANSEN: He wanted to know what the bank was offering.

MR. DAVIES: Yes. To answer the question, I think it has gotten easier. We changed the criteria when we allowed for computer-implemented inventions.[42] What happened was that they forgot about the fact that it has to be an invention, and there were an awful lot of computer-implemented things, which have nothing to do with the physical world.[43]

So, I think, that's one of the things that has happened. And also, the pace of patenting has gotten to the point where, for a while the Patent Office was overwhelmed, and they couldn't do anything. Now they just came out with something, by the way, which I am horrified about to a certain extent. It is a new streamlined procedure.[44] You are supposed to do certain things to get the streamlined procedures, but I can just see what's going to come out of that one.

MR. CUNNINGHAM: One of the things, one of the problems we dealt with when we were working with your old company, Motorola, was the Armageddon. Everyone was supposed to get buried by Japan, and then everyone was going to get buried by China.[45] That was a concept called patent flooding where the idea was that Japanese companies would see a valuable patent held by Motorola, or in your case by Research in Motion, although you didn't exist at that time, and they would do literally hundreds of patents all around that with tiny variations on your patent, such that whenever you went to Japan, you would encounter things that were almost

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http://query.nytimes.com/gst/fullpage.html?res=9D0CE6DE1F38F930A3575BC0A96E958260 (quoting Richard H. Stern saying that "The direction the Federal Circuit has been moving is to say you can patent anything as long as it's economically valuable.").

[41] Patent Business Methods, http://www.uspto.gov/web/menu/pbmethod/ (last visited Oct. 7, 2007).

[42] *See* Diamond v. Diehr, 450 U.S. 175 (1981) (holding that using an algorithm on a computer could be patentable).

[43] *See generally* Michael Guntersdorfer, *Software Patent Law: United States and Europe Compared*, 2003 DUKE L. & TECH. REV. 6 (2003) (stating that the U.S. unlike Europe does not require inventions to exist in the physical world to be patentable).

[44] *See generally* Patent Docs: An Analysis of the New Rules: 37 C.F.R. §§ 1.78(d)(1) and 1.14: Streamlined Examination, http://www.patentdocs.us/patent_docs/2007/09/an-analysis-o-5.html (discussing the new streamlined procedure for continuation applications) (last visited Oct. 7, 2007).

[45] *See* Sri Krishna Sankaran, *Patent Flooding in the United States and Japan*, 40 IDEA 393 (2000) (discussing patent flooding in Japan).

entirely identical to yours, but they were patented. Indeed, sometimes they brought cases against you for infringing their patent.[46]

MR. DAVIES: Their patent.

MR. CUNNINGHAM: Is that still an issue?

MR. DAVIES: Not really.

MR. CUNNINGHAM: Why has that ceased to be an issue?

MR. DAVIES: Well, first of all, I think, because Japan has gotten freer in their imports.[47] And I think that was basically a non-tariff barrier that they were working. And MITI has stopped pushing – I'm sorry. Maybe it is –

MR. CUNNINGHAM: No. That's what we tried to get MITI to do. I mean, my God, we won, and we didn't know it.

MR. DAVIES: Well, I don't think we won. I think it is just the world changed.

MR. CUNNINGHAM: That's what I always say when we win.

Henry?

DR. KING: Yeah. Is there much of a case for a North American patent system?

MR. DAVIES: Well, I suppose there could be. The issue, again, would be right now where we have – we only have one patent system in North America that anybody pays attention to, and that's the U.S. system. I know that both the Canadian and Mexican patent offices exist. People file there, but they don't file initially there. They file in the U.S. first.[48]

So it is really sort of an integrated one. I think it would be great if NAFTA had run a system. They were to get our reforms in through there.

MR. CUNNINGHAM: Other questions?

Well, I think this has been terrific. Certainly, I learned a lot, a terrific presentation.

And I got to say that your company stands out as the sort of thing that the West needs to look to as the model for how we are all going to preserve our economic role in the world rather than what the doomsayers say is going to happen to us.

If we can all give a hand to Bill here.

MR. UJCZO: And we are completed for today. The bar area will remain open for about another hour or so here, so we invite you to continue the

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[46] *Id.*

[47] *See generally* Michael Richardson, *Asia-Pacific Sees a Chance for Freer Trade*, INTERNATIONAL HERALD TRIBUNE, January 19, 2001 at 17, *available at* http://www.iht.com/articles/2001/01/19/trade.2.t_4.php (discussing bilateral trade negotiation involving Japan).

[48] *See* Patents, http://www.graytown.ca/dbus/legal/patents.htm (recommending that Canadian inventors in the United States file in the U.S. first or obtain a foreign filing license because otherwise a patent granted by the U.S. may be held invalid) (last visited Oct. 7, 2007).

professional and personal relationships and conversations that have been established throughout dinner.

For those members of the Canada-United States Law Institute Executive Committee, we will be meeting about 8:30 in the Dean's Conference Room, which is straight away down the hall, and just take a hard right when you get to the glass. Don't walk into the glass, please.

For those of you that are retiring for the evening, we will see you at 8:45 in the morning as we open with our first session. It will be a tough day to match, but I think that all of our panelists tomorrow are up to the challenge as well. So we thank you again. We thank all of our speakers today for their comments as well as for – to all of you for being here throughout the day today, and we look forward to seeing you in the morning. Take care.