

By Alain Strowel, 30 November 2015

Time to fix patents, says The Economist, but how?



Cover of The Economist, 8 August 2015,
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This picture illustrated the cover of the August 8th-14th 2015 issue of *The Economist*. In the leading article (p. 9 and [here](#)), *The Economist* takes a clear position: “[Time to fix patents](#)”. “*Ideas fuel the economy. Today’s patent systems are a rotten way of rewarding them.*”

For the economists of *The Economist*, the patent machine is thus broken, it is no more fit for its purpose: to encourage innovation by ensuring an appropriate reward. Also, it is not fit for another aim: spreading knowledge. (This should result from the mandatory publication of patents). Because the patent system is no more fit, a (legal) fix is hardly needed, so goes the argument.

Not fit, why?

The Economist starts by noting that broadening the scope of patents in agriculture and in other industries has not lead to more innovation, more research or more revenues. (But what does ‘broadening’ means?).

The article also underlines the territorial expansion of a ‘strong patent model’ by referring to the adoption of the Trans-Pacific Partnership, a trade agreement covering one-third of world trade, recently signed and discussed [here](#) on IPdigIT. The territorial spread of the patent model at least seems to attract foreign investment. Thus the strenghtening of patents, as illustrated by Taiwan’s 1986 patent reform and its consequence on the economy, arguably contributes to divert investment and R&D to the ‘strong patent’ territory, but with no insurance that the overall amount of innovation worldwide has increased.

The complementary article of the August 2015 issue, *A question of utility*, goes more into details

about the deficiencies of the patent system and relies on the now classic work of two economists, Michele Boldrin and David Levine, [Against Intellectual Monopoly](#) (Cambridge U.P., 2008).

The article does not advocate the abolition of patents altogether – what *The Economist* did back in 1851, as recalled [here](#) -, but their limitation. The article claims that government should force patent owners “to share” as sharing “brings huge benefits to society” and “leads to extra innovation”. Sharing is a nice program, but it remains to be seen whether and how it can be imposed by law.

Even in the pharmaceutical sector, where the support for patents is still very strong as the need to reward huge investments in R&D seems widely shared, the history of patent law, for example in Germany till 1967, teaches that patents have not necessarily resulted in more innovation (see also the Bayer story about aspirin [here](#)). Therefore, the argument that patents should be replaced by prizes is worth considering, as Paul Belleflamme did [here](#).

Away with the patent horror picture show

- For *The Economist*, “One aim should be to rout the trolls and blockers”: Can you explain what a troll and a blocker means, possibly by relying on other articles published on IPdigIT ([here](#), [here](#) and [here](#))? Are there other ‘bad characters’ in the patent field that are distinguished by scientific literature (a survey on the Internet, for instance on ssrn and on IPdigIT might help you to find those ‘bad patent guys’)?
 - **Post-Scriptum:** *The Economist* claims that, back in 1851, it had already identified and attacked what is now called “patent trolls” when the magazine wrote: “Comprehensive patents are taken out by some parties, for the purpose of stopping invention, or appropriating the fruits of the inventions of others” (see [here](#)). Patent trolling is thus maybe as old as patent law is?

How to fix patents? Discussing the proposals to reform the patent system

Among the reform proposals listed by *The Economist*, could you discuss and possibly challenge the following suggestions:

- “Patents should come with a blunt ‘use it or lose it’ rule”: what does it mean? Is this rule not already embedded in patent law? Do you know other rules in IP law based on the ‘use it or lose it’ rule? How could this rule be reinforced in patent law?
- “Patents should also be easier to challenge without the expense of a full-blown court case”: aren’t there not already proceedings which permit to challenge and invalidate a patent without having to rely on a ‘full-blown court’ decision? In the U.S., challenging patents without reverting to the courts has been made possible only recently, in order to help IT companies to fight the trolls. Now it seems it has prompted a new practice (described in a Nov. 18, 2015 opinion published in *The Washington Post* [here](#)) involving predators hedge funds taking short positions on the stock of pharmaceutical companies, then challenging the patents on the drugs, just to obtain a rapid fall of the stocks. If this last development is true, what is the conclusion to be drawn concerning the adequate proceedings to challenge patents?
- “The burden of proof for overturning a patent in court should be lowered”: what is the

presumption of validity of a European patent? Please compare with the strength of a Belgian patent obtained through an application before the OPRI. (There is some case law of the Belgian *Cour de cassation* on this).

- “*The requirement for ideas to be ‘non-obvious’ must be strengthened. Apple should not be granted patents on rectangular tablets with rounded corners*”: what do you think of this remark? Is it correct (in the European context)? Did the UK courts validate Apple’s IP right on this aspect of the iPad?
- “*Patents also last too long*”: when the pace of innovation is faster, like in the information technology sector, some firms might end up with “*monopolies on the building blocks of an industry*”. Is it possible, as suggested by *The Economist*, to “reduce the length of patents” in fast-moving industries? What legal constraints do we have?

I would like to read your responses to the questions listed above, bullet point after bullet point.

You might have a look at the comments and reply of some lawyers and economists to *The Economist*’s article on the IPKat website (see [here](#) and [here](#)).