Monday & Tuesday, December 5 and 6, 2011
Thierry Calame

Monday morning

On Monday morning the WIPO seminar on technology transfer was well attended. Francis Gurry first gave a short introduction. He mentioned three areas in relation to technology transfer where WIPO was already active: (1) the database Patentscope; (2) WIPO platforms Re:Search and WIPO Green; (3) capacity building in developing countries.

The WIPO chief economist Carsten Fink then gave a speech on the economical underpinnings of technology transfer. He mentioned empirical studies, including Branstetter, Fishman and Foley (2006), among others. He said that empirical studies show that trade, foreign direct investment and licensing respond positively to strong patent rights.

Prof. Rasiah from Malaysia then gave a speech about a study he had conducted in the area of integrated circuits and tech transfer in East Asia and Southeast Asia. His conclusions were that Korean and Taiwanese companies had strongly benefitted from technology transfer and on this basis were able to build up a position of strength. Notably Samsung had initially relied on third party licenses and paid royalties, today they own a major patent portfolio and gain substantial revenues from licensing.

Mr Gabriel Clerk, Head of the Technology Transfer Office of the EPFL in Lausanne (Swiss Institute of Technology), gave a speech on industry collaboration and technology transfer between a University and industry. The audience was very interested in what he said as evidenced by the number of questions put to him afterwards. When asked whether there was any tech transfer from EPFL to developing countries, he said that apart from education of students from developing countries, there was little tech transfer as there were only few industry partners from those countries and EPFL projects were perhaps not suited for tech transfer to developing countries because they were too much in the research stage to raise interest in developing countries.

In the end one of the delegates from an African country said that after hearing all three speeches he was still not sure whether patents were an obstacle or an incentive to tech transfer. The speakers confirmed that the answer depended on multiple factors and there was diverging empirical evidence, but that there were clear indications that at least in the pharmaceutical industry (where there is no substitute technology) patents were an incentive to technology transfer. Prof. Rasiah also mentioned the positive example of integrated circuits.
Monday afternoon

Albert Tramposch announced at the outset that he would try to lead the SCP in an efficient manner. After having him seen in action, one can safely say that he is a very capable Chairman. He announced the following change of agenda:
Monday afternoon: exceptions and limitations to patents Tuesday morning: quality of patents/oppositions Tuesday afternoon: CAP Wednesday morning: patents and health Wednesday afternoon: technology transfer Thursday and Friday: resuming unfinished business, decisions

On Monday afternoon exceptions and limitations were discussed, but no decisions were taken. The question is whether the Secretariat shall be asked to carry out an analysis of the responses of the delegations to the Secretariat's detailed questionnaire. The decision making will be taken up again on Thursday/Friday. I had prepared a short statement, but NGOs were not invited to make any comments in this part of the agenda. However, Albert Tramposch and Philippe I Baechtold invited me to make a short statement also on exceptions and limitations when I would speak on quality of patents.

Tuesday morning

Quality of patents was discussed all morning. Canada and UK explained their revised proposal and Denmark stressed the importance of quality management. There were some critical voices from the African countries and DAG as to the definition of "quality of patents", but overall there were a lot of positive statements from the groups and much support for UK, Canada and Denmark.

Tuesday afternoon

After lunch the NGOs were invited to make their statements on quality of patents. There was very good representation of the NGOs at the SCP: Larry Welch (our active programme Committee member from Eli Lilly) for IPO, Alan Kasper for AIPLA, Ivan Hjertmann for ICC, Jim Patterson for ABA (as announced by Rich Beem), Santos Chari from IPIC in Canada (who was active in Q217 in Hyderabad), François Curchod for CEIPI and Arild Tofting from FICPI, among others. IPO, FICPI, AIPLA; IPIC, ICC and AIPPI were able to make strong statements on quality of patents. I attach the statement which I made.

The chair asked whether Canada, UK and Denmark wanted to respond to any of the comments made, but they all said they first wanted to sleep over it and then resume the discussions on Thursday.

Then CAP was discussed. There were a lot of very positive statements from many groups. The Swiss delegation took the lead and expressly mentioned AIPPI's submissions several times and also strongly supported AIPPI's position and proposed to follow the voluntary minimum standards approach proposed by AIPPI. We from the Swiss group had contacted the Swiss patent office beforehand, but even I was surprised at how positive their statement was. Importantly, also the US group specifically supported AIPPI's position (which even surprised some of our sister associations). France, EU, Spain, Denmark, Australia and Japan also all supported continuing CAP. Interestingly, no opponents spoke in the first round. Then the NGOs were invited to make their statements. IPO, FICPI, AIPLA; ICC; ABA, GRUR, CIPA; APAA; JPAA and AIPPI were all able to make strong statements on CAP. ABA and AIPLA specifically referenced AIPPI's submissions and supported AIPPI's position. Since Michael Dowling was unfortunately fell ill on Tuesday, I read out the statement which he had made available to me. I attach a copy.
After the NGOs had spoken, some of the opponents spoke. Algeria on behalf of the DAG, South Africa on behalf of the African group, Brazil and Egypt reiterated their negative statements made in SCP 16 and stressed that they did not think that the SCP would get anywhere with this topic as the national differences seemed to great. South Africa said that they would not accept any norm-setting in this area and Brazil pleaded for a very cautious approach.

The chair then reminded these speakers that a minimum standards approach on a voluntary basis had been put forward, so that any concerns that there would be norm-setting were unwarranted.

After the session, Philippe Baechtold confirmed that we had great support from the B group countries. Alan Kasper still thought that CAP would not proceed, but Philippe is convinced that it will stay on the agenda. The decision will be taken on Thursday/Friday.

Philippe Baechtold also invited me to make my two statements and the more detailed paper available to him.

**Wednesday, December 7, 2011**

*Laurent Thibon*

**Wednesday morning**

The whole of Wednesday focused on Patents and Health.

First, South Africa’s delegate, on behalf of the DAG and of the African Group, presented the proposal made during the last session of the SCP, the discussion of which was postponed to the current session. The general purpose of this proposal is to preserve the capacity for the States, especially for developing countries, to protect public health despite the existence of Patents. The proposal contains three points:

1. The commission of a study by independent experts to examine the challenge and constraints faced by developing countries and least developed countries (LDCs) in making final use of the public health related patent flexibilities both in the pre-grant and in the post-grant stage.
2. Organizing information exchanges between the countries on their use of patent flexibilities for promoting public health objectives, and developing a database on the patent status in WIPO member states of relevant diagnostic tools and essential medicines.
3. Providing a technical assistance regarding the difference between compulsory licenses under the procedure of Part II of the TRIPS and those granted under Part III.

After this reiteration of the proposal, she indicated that WIPO should lead the issue of Patent and Health.

The delegates then discussed the three points above and the question of the right Committee/Organization for discussing the issue of Patent and Health. Countries considered that the SCP16/7 proposal was not acceptable as presenting Patents as an obstacle for human health (US, on behalf of Group B, PL on behalf of EU, NO, CH) and others (BR, CN) strongly supporting the proposal. However, a consensus appeared on the fact that the SCP is the right Committee for this issue.
CH and US expressed that they prefer a system of voluntary licenses instead of compulsory licenses. For the US delegate, with a compulsory license, the licensee would probably not receive technical help from the patentee, which is usually needed in the field of producing medicines.

An interesting intervention was made by the Russian delegate, who said that, in practice, the implementation of the two first points, already started and that the way of implementing point 3 may depends on the results given by points 1 and 2. My impression is that this intervention was the start of a more fruitful discussion.

At the end of the morning, US made a proposal, and announced that a paper concerning this proposal would be available in the afternoon. The US delegate said that, in this proposal, WHO will be invited to present the availability of proper/improper medicines in the developing countries. Further, this proposal will ask for a study, on the one hand, of the benefits of Patents as an incentive for R&D, resulting in saving lives and, on the other hand, of the live saving effect of non-patented medicine. This proposal was finally distributed only at the end of the afternoon session, for discussion after the point concerning Transfer of Technology.

**Wednesday afternoon**

The beginning of the afternoon was dedicated to three presentations by WIPO, WHO and WTO concerning the cooperation of the three organizations in the field of Patent and Health. WIPO's representative listed the seminars and Colloquium of the past year. WHO insisted on the collaboration between WIPO and WHO and the use of Patents for transferring the technology they contain to countries where the product is not patented. WTO's presentation was very brief and, in my opinion, with no real substance and just a reminder that the Doha declaration is 10 years old.

After these presentations, some delegation took the floor, but mainly to repeat the position expressed during the morning. The change in the attitude of the delegates was more perceptible after the Coffee Break, when first Algeria and then South-Africa's delegate, on behalf of the African Group and the DAG, said that there was a misunderstanding of their proposal (the proposal does not say that they are against the Patent system, or that Patents are the only obstacle to the Health in developing countries). South Africa's delegate thanked the US and RU for their constructive proposals. After saying that most of the developing countries were unfair during the last session as they refused to examine the proposal SCP16/7 arguing that it was submitted too late, she indicates that the African Group will examine the US proposal even if the paper will only be available after today.

Only two NGO's made interventions. MSF said that Patents affect the price of medicines and that it is crucial to maintain generic production in developing countries. KEI said that point II and III of TRIPS are often confused when referring to compulsory licenses. KEI further considered that the lowering of the patentability requirements leads to an increase in the power of Patent owners, who obtain monopolies on drugs, even if the active principle is in the public domain.

Albert Tramposch announced that the Transfer of Technology will be discussed tomorrow morning, so that the delegations will have time to study the US proposal on Patent and Health that will be discussed later.
Thursday morning

The morning of the fourth day (Thursday) started with a presentation of the pharma company Gilead. I attended together with Larry Welch (Eli Lilly), member of the Programme Committee.

Gilead was introduced as being a leading producer of HIV drugs and treatments for other diseases like hepatitis B and C.

We were informed about the Medicines Patent Pool of Gilead. They put a number of their pharma patents into a patent pool for producers of generics that can license these patents for a rather reduced license fee (5%) for sales of these products in a limited number of least developed countries. Gilead provides detailed information on the drug, the production technology and any other aspect of importance for the production and distribution of the drug. This way, Gilead’s drugs are distributed into countries that could never afford treatment of their patients for the normal price. This also generates an additional, though limited income for Gilead. Finally, Gilead can even profit from the know-how of the generics producers as they have very valuable knowledge and skills on how to produce and distribute high quality drugs for very little money. Thus, this kind of technology transfer works both ways.

Gilead claims to very successfully distribute their products in the least developed countries. This approach is considered even more efficient than the absence of patents or compulsory licenses as it includes know how transfer for the generics producers.

Larry told me that he had heard about such concepts but that pharma industry is rather critical.

Nevertheless, it may be an interesting item for one of our workshops at the 2012 congress.

The SCP session continued with the usual delay.

Technology Transfer

The discussions on technology transfer continued. They were very controversial. For developing countries (DAG) patents are obstacles to technology transfer. For developed countries (Group B+), patents foster technology transfer and are a precondition for any transfer of know-how.

Patents and Health

A proposal on this issue submitted by South-Africa in May 2011 is on the table. This paper seemed to imply that the limitation of patent protection in the field of pharma patents would automatically provide good supply of drugs in developing countries.

The United States have submitted their own paper on the issue of patents and health. This paper was perceived as a counter proposal to the South-African draft containing the opposite statements.

Obviously, the two proposals seem to take off into two different directions. However, I think that the US proposal eliminates many misconceptions in the South African proposal.

Removing patent protection in less developed countries will not automatically remove patents
in the rest of the world. Drugs will not automatically be available around the world if patent protection is limited. Limiting patent protection may even reduce the availability of drugs in less developed countries due to reduced licensing activities.

Thursday afternoon and Friday focused on the summary of the SCP session and the definition of future work without the participation of observers. On Friday evening the attached SUMMARY BY THE CHAIR (document SCP/17/12) was adopted.

Two issues are of particular importance.

1. The Summary by the Chair announces invitations to the observers such as AIPPI to comment on two topics, namely
   a. Quality of Patents, including Opposition Systems
   b. Patents and Health
2. The Summary by the Chair announces that the topic "Confidentiality of communications between clients and their patent advisors" will remain on the agenda and the WIPO Secretariat will explain possible remedies identified in the area of confidentiality of communications between clients and patent advisors.

AIPPI's committee Q199 will support the work of the WIPO Secretariat. It has become clear that we will not see an adoption of minimum standards within the SCP. AIPPI's committee Q199 will investigate in cooperation with the Bureau, whether we can support harmonization in this field in a multilateral agreement on the basis of WIPO's explanations. Although we would prefer to see harmonization within WIPO this would be an excellent result for the privilege issue. The SCP work would lead to an actual harmonization in a significant part of the member states.

Report written by:

Stephan Freischem, Secretary General
Laurent Thibon, Deputy Secretary General
Thierry Calame, Reporter General
AIPPI Submissions for SCP 17 Meeting

Dear Mr Chairman

AIPPI wishes to congratulate you on your chairmanship and thanks for the opportunity to briefly speak on this important issue. AIPPI is an international organization with over 9000 members in over 100 countries and is dedicated to the development, and improvement of intellectual property law.

My short intervention is on the topic of patent quality. However, since Exceptions and Limitations to Patent Rights were discussed yesterday, let me just mention that AIPPI supports the study of exceptions and limitations to patent rights. AIPPI has studied exceptions and limitations to patent rights in several instances and has adopted a number of Resolutions in this regard. An AIPPI "Resolution" is a Statement of Policy regarding a specific Intellectual Property issue, which is issued only after lengthy study and discussion and subsequent vote by a majority of delegates present at an Annual Meeting of AIPPI. For reasons of time, I will not address the Resolutions here, but we shall make a detailed paper available to the Secretariat. Since we will discuss Patents and Health later this week, let me just mention that our most recent Resolution on exceptions and limitations to patent rights deals with the issue of patents and health. This is not surprising given that exceptions and limitations to patent rights may play an important role in providing access to patented medicines.

As to the quality of patents, AIPPI supports the revised proposal on quality of patents submitted by the delegations of Canada and the United Kingdom. Quality of patents is a very important topic – not only
from the office’s point of view, but also from the applicant’s point of view and the point of view of the general public. The primary focus of the process improvement component is the search and examination processes in the patent offices. AIPPI supports quality management programs as described for instance by the delegation of Denmark. A quality management program in the patent office ensures products of uniform quality.

AIPPI also supports worksharing between offices as an efficient means to improve quality of examination while also contributing to reduce backlog in examination. FICPI recently submitted a position paper in this regard which AIPPI supports. However, like FICPI, AIPPI also considers that the ability of mutually exploiting search and examination results can be improved if patentability requirements are made more uniform. AIPPI supports discussions around making patentability requirements more uniform. Only a couple of weeks ago in its annual meeting in Hyderabad in India AIPPI for the first time adopted a resolution on the inventive step requirement where all delegates managed to agree on a common definition of inventive step and on a common approach to determining inventive step.

AIPPI has recently adopted other Resolutions which are also relevant to patent quality and opposition systems. Again, for reasons of time, I shall not address these Resolutions here, but include them in the more detailed paper that we will make available to the Secretariat.

Thank you very much.

6 December 2011

Thierry Calame

Reporter General
CAP

In relation to protection of confidentiality of communications between clients and their patent advisers, I refer to the AIPPI submissions already posted on the WIPO website. In addition, AIPPI makes the following three observations and a submission.

First, the responses of the Member States and Observers to WIPO's inquiries on cross-border protection of confidentiality and remedies as reported in SCP/17/5, are consistent with AIPPI's findings as supplied to WIPO in October 2010.

Secondly, the responses of the Member States and observers and AIPPI's findings show that many if not most countries do not provide such protection, have no laws proposed to provide such protection, and there are no proposed remedies.

Thirdly, AIPPI supports the WIPO SCP process as the preferred process to study remedies now that the problems have been well-established in the SCP. One reason for preferring this process is that it has the potential for obtaining the input of all Member States. Thank you very much.

Thus, AIPPI submits and urges all Member States that they should mandate WIPO to study and report to the SCP on remedies and preferred courses to solve the problems which the SCP has established. This will allow all Member States to contribute to the process of analyzing potential remedies.