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2033, Patent rights, Property, Exclusivity and how a Newborn reaching the Age of Maturity will experience the Patent System, if there is still one

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2033

PATENT RIGHTS, PROPERTY, EXCLUSIVITY AND HOW A NEWBORN REACHING THE AGE OF MATURITY WILL EXPERIENCE THE PATENT SYSTEM, IF THERE IS STILL ONE

Severin de Wit[1]

> *If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possess the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lites his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density at any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement, or exclusive appropriation. Inventions then cannot, in nature, be a subject of property.*
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> – Letter from Thomas Jefferson to Isaac McPherson, 13 August 1813

For a start, 2033 is not your usual title for a liber amicorum. The idea came from the *Bilderberg Conference 2015*, organized by the Dutch Employers Association VNO-NCW. The conference theme was what the world would look like for a 2015 newborn child in 2033, reaching 18 years old, the age of maturity. The idea behind the theme is that differences over time are best observed by one generation looking back at the other. Which innovations and changes happen today at the edges of our perception that will have their full impact on the next generation? By 2033 Charles will have reached his 86th birthday. We all hope he will still be able to fully experience both mentally as well as physically the changes that will have shaped Intellectual Property by 2033. This

1. Author was partner at Simmons & Simmons Amsterdam until 2006 after which he founded IPEG, Intellectual Property Expert Group, an IP management consultancy, consisting of 24 consultants in 7 countries.

contribution would like to more specifically reflect on what intellectual property – notably patents and the commercial use of it - will look like in 2033. Will we still be looking at "property" the same way we do in 2015? Will there be a future for patents, not only as a source of knowledge, but also as means to monetize assets?

But before doing so it seems appropriate here to memorize what has been my most memorable experience with Charles. Without exception, the event I remember well was the annual meeting of what was then called the USTA[2] in Toronto, Canada. Charles, together with Remco de Ranitz and myself were taking one of the event tours, and what better place to go to while in Toronto than Niagara Falls. There, behind the waterfall and covered in colorful raincoats to protect against the mighty Horseshoe Falls, we joined what these days is known as the "Journey Behind the Falls". There, Charles, Remco and I came up with the idea of setting up a new Intellectual Property Magazine that would compete with what was then called "Bijblad Bij De Industriële Eigendom", or "BIE"[3]. IER – *Intellectuele Eigendom & Reclamerecht* – was born. The first issue came out in 1985, so this year the magazine celebrates its 30th birthday.

As to our common business of advocacy a trademark case comes to mind that we both litigated at the time. We were both attorneys in Dutch firms, Charles at NautaDutilh, his long time law firm. I was partner at (then called) Buruma Maris[4]. I was representing Renault, the French automaker, in a trademark dispute with Reynolds, which was represented by Charles. Reynolds used the trademarks REYNOCAR and REYNO-TRADE for car accessories. Renault sued Reynolds for trademark infringement based on aural similarity. Of course in preparing for the case we were perfectly aware that pronouncing the word REYNOCAR in English (Reynolds being a US company) would sound quite different from the French pronunciation of RENAULT. However under Benelux trademark law three countries - Netherlands, Belgium and Luxembourg - share one trademark law covering different languages, among which are French and Dutch. Not very surprisingly, Renault lost in first instance at the Court of First Instance in Zwolle (we write January 1991). In appeal – it still was a *kort geding* - the oral hearing before the Court of Appeal in Arnhem had a surprise in mind for Charles as counsel for Reynolds. Something we were prepared for. We found a Belgian lady, a translator, bilingual, whom we hired to translate for the (French) client at the oral hearing. However, we took the opportunity to spend some time with her practicing how to pronounce REYNOCAR en REYNOTRADE "*en Francais*", making sure that, in the (unlikely – it was a *kort geding*) event that the Court would ask her to come forward, she would offer the best "evidence" we could give how "consumers" would pronounce the two Reynolds marks the way

2. United States Trademark Association, since 1993 called "INTA", International Trademark Association, www.inta.org.
3. Now called "Berichten Industriële Eigendom".
4. Currently, after Buruma merged with the Amsterdam lawfirm Houthoff, "Houthoff Buruma".

Renault claimed consumers would. As procedural rules are rather lax in *kort geding*, after hearing oral pleadings form counsel, the President of the Appeal Court requested our translator to come forward to the bench. Charles protested – is this supposed to be some quasi-official witness hearing? – but in vain. The Judge wanted our translator to tell the Court how she, as a bilingual Dutch-French, would pronounce REYNOCAR and REYNOTRADE. Not surprisingly she did what we expected her to do, her pronunciation was very French and very close to RENAULT, so with a flat "RUH", rather than a more American English "open" pronunciation "RAY". The Court of Appeal reversed the judgment, accepting aural similarity between the trademarks[5]. The Court of Appeal referred the case to the Benelux Court of Justice because of another issue, namely whether the requested injunction by Renault should be valid for *all three Benelux countries* or rather for only the Netherlands[6]. The Renault-Reynolds case is not so much known for the aural similarity but rather whether the injunction by a Dutch Court can be "extra-territorial" (i.e., for the entire Benelux territory), a subject that kept the legal community in both Europe and the US preoccupied, far into the next decennia after the Renault-Reynolds case. Even as recent as 2013 an article appeared covering the "cross-border" practice in IP litigation[7].

So much for a short recollection of a "Feat of Arms" between Charles and myself. Let us revert to 2033, the title of this essay. Will a new generation born this year and mature in 2033 face a patent law system like we know it today? I doubt it. In my opinion there will be several factors that will diminish the appetite for patent protection. *Firstly* there will be a Great Deception in how patents can bring any fortune for individual patent holders and small and medium sized Companies (SMEs). *Secondly* it will become exceedingly difficult to identify a single "inventor" or innovator to claim an invention. *Thirdly* the concept of "property" will have drastically changed by 2033; and related to this, by 2033 the Sharing Economy will have reached a stage where "property" will be shared for social, economic and ethical reasons, where "exclusivity" will be viewed as non-productive in an innovative society. Our 18 year old will see, in other words, a different world by 2033 where patents will no longer be seen as the property right they currently are.

Before getting into any of this, let me describe where I come from. After spending more than 29 years as an IP attorney dealing with the legal side of (mostly) patents I spent the last 8 years as a consultant dealing with all commercial aspects of patents. This primarily consisted of strategy consulting on commercialization or "monetiza-

5. Gerechtshof Arnhem 28 april 1992, IER 1992, 46 and Gerechtshof Arnhem 22 december 1992, IER 1993, 55, BIE 1993, 64.
6. BenGH 13 juni 1991, NT 1994, 665 m.nt. DFWV, BIE 1995, 7 m.nt. JHS.
7. Dutton, Tyler J., "*Jurisdictional Battles in Both European Union Cross-Border Injunctions and United States Anti-Suit Injunctions*", 27 Emory Int'l L. Rev. 1175 (2013).

tion", valuations and acting as a broker or IP "merchant banker" for large, midsize and small patent holders trying to commercialize their assets. In general, "monetization" of patents means the generation of revenue from a patent or patent portfolio[8]. The term "patent monetization," however, is now mostly linked to so-called patent monetization entities, also known as NPEs[9], or patent trolls[10]. Much has been written about this monetization phenomenon where companies with no actual manufacturing or other commercial activity other than asserting patents extract damages (or license fees) by threatening patent litigation, mostly in the US[11]. In Europe the patent troll phenomenon has not come to fruition, although the coming into force of the Unified Patent Court might change the NPE landscape all together. The media attention overdose for patent trolls had the foreseeable effect on smaller patent owners of inducing them to seek a more profitable use of their patents to turn them into gold sooner than later. As a further result of this attention on NPE practices, the idea took root of having a patent not (solely) for defensive purposes (to protect an innovative invention from being copied by competitors) but to earn money. From several studies and surveys it appears that, especially among SMEs, there is a tendency to patent with an eye to extract license fees or to attract investors for their companies[12]. The settled idea - especially among sole inventors and small companies holding just a single patent - is that you can make money from having a patent. Rather the prospect of making money than using the patent as a protective tool[13] has led to a modern variant of the Gold Rush. The reality, however, is harsh: many individual patent holders and SMEs have gotten seriously disappointed in their attempts to "monetize" patents. Not only do they face immense obstacles to successfully monetizing their patent, another telling fact is that the vast majority of granted patents are basically worthless[14]. This needs some explanation, as the figure is not based on statistical proof – unfortunately patent deals are in most cases confidential. I use the term "worthless" in relation to attempts to have the patented

8. I am not going into the various means of monetization but it comprises licensing, selling, sale and lease back, securitization and other forms of transferring a patent into "money".
9. Non Practicing Entities.
10. see: "*The NPE ("Patent Trolls") Minefield*", http://www.ipeg.com/the-npe-patent-trolls-minefield/.
11. Interesting to read to get a not mainstream view on NPEs or patent trolls: Colleen V. Chien, "*Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents*", North Carolina Law Review, Vol. 87, 2009.
12. Gaétan de Rassenfosse, "*How SMEs exploit their intellectual property assets: Evidence from survey data*", Melbourne Institute of Applied Economic and Social Research (MIAESR), and Intellectual Property Research Institute of Australia (IPRIA), December 2010.
13. And even that is a common misunderstanding: having a patent does not protect against being sued for infringement by another patent holder.
14. I am not alone in this view, see Mariana Mazzucato, "*The Entrepreneurial State: Debunking Public vs. Private Myths*", Myth 4 (2013).

technology monetized, i.e., licensed or the patent sold to a party interested in using the patent, either to assert to collect damages or force third parties into taking licenses (NPEs), or for R&D purposes (to get "freedom to operate") or for some party to boost its own portfolio. The patent - obtained at considerable cost - serves in many cases no other purpose after grant than to soothe the mind of the patent owner that it provides him "freedom to operate"- and even that will not be assured. The patent often reaches no balance sheet, attracts no investors, and yields no user fees, yet it is tucked away in the mind of the owner that the patent serves some business goal, although he is not sure which one. Obviously there are significant differences between patent holders. Intentionally I am focusing on single inventors and owners of only a small number of patents, thus leaving aside pharmaceutical companies and large companies that clearly have their own patenting strategy and for which the value of a patent does not solely lie in its potential to "make money".

A single patent owner looking for monetization will experience sooner rather than later the hardships that must be endured to reach a truly successful deal that will bring him fortune, at least a decent return on his investment in the patent. For an inventor, a patent is only as valuable as his willingness to enforce it. This gives large corporations with deep pockets a distinct advantage over single patent holders or SMEs with only a small number of patents.

The burdens a patent owner has to overcome before his patent(s) can be monetized are widely underestimated. Most sales materials I have seen over the years show overrated marketing opportunities, fail to address validity, don't provide claim charts, forget to provide the potential buyer with market analysis that relates to the potential for licensing the patent, to name a few insufficiencies. The lack of prior art search and validity analysis is often justified by owners with the argument that this would have negative effects on the filing of continuations (in which case known prior art must be cited), whereas buyers do not want to see detailed claim charts, enhancing the risk of double or treble damages due willful infringement. This unfortunate circle results more often than not in a situation where parties dance around the pot, making no decisions or, as often occurs, argue who should bear the costs (and risks!) of doing the analysis necessary to successfully monetize the patents.

A further phenomenon that pays a role in patent monetization is what is called the "endowment effect." Owners are reluctant to part with their property, and the amount that they are willing to accept to sell it generally far exceeds the amount that others are willing to pay for it. This gap has been termed the "endowment effect," [15] and

15. Some economist describe the endowment effect as inconsistent with standard economic theory which asserts that a person's willingness to pay ("WTP") for a good should be equal to their willingness to accept ("WTA") compensation to be deprived of the good.

it has been detected for a number variety of forms of property. In *investing* this effect leads to an inherent tendency for an investor not to sell an investment as one values his own investments well above the current market prices, which in turn affects decision making to sell.

A 2010 study[16] explored the existence of an endowment effect for property that, like intellectual property, (1) was actually *created by* the owners and (2) is *non-rival* (i.e., a good where consumption by one person does not prevent consumption by another, e. g. an intellectual property license). The study finds a substantial valuation asymmetry between creators and purchasers of IP, with creators valuing their work more than twice as high as potential buyers do. Importantly, the research was unable to diminish the asymmetry either by using transaction intermediaries or providing additional market information.

Not only the single inventor will be disappointed with the potentials of his newly acquired asset. There is a broader discontent with the functioning of intellectual property which justifies the question whether our 18 year old in 2033 will still be facing the same paradigm held by many that ever more patent applications are a sign of growing innovation. The European Patent Office, publishing its latest data on patent filings in 2014[17], heralds the ever growing number of applications as a sign of increased innovative power, even suggesting that smaller sizes of countries in comparison to the number of new applications filed is a sign of innovative competitiveness.

In one of my publications[18] I described changes to the predominant theme around intellectual property - the right to a creation of the mind – to own this as if it is one's property – enabling the holders of that IP "property" to exclude others. I pointed out that over the last few years there has been a change in the concept of "property" which caused many to argue that a right to exclude third parties from using such property should be altered into a *compensatory liability regime*.

The growing discontent with the functioning of the intellectual property systems I mentioned earlier is due to a number of developments. Firstly, the changing moral

16. C.J. Buccafusco, C.J. Sprigman, *Valuing Intellectual Property: An Experiment*, University of Virginia School of Law (March 2010).
17. "Europe's strength in terms of innovation and technology is also highlighted by the number of applications filed with the EPO relative to the population of a country", *see* EPO website http://bit.ly/1BfK9R.
18. *"Challenges in Public and Private Domain Will Shape the Future of Intellectual Property"*, published in: The Law of the Future and the Future of Law: Volume II, editors: Sam Muller, Stavros Zouridis Morly Frishman and Laura Kistemaker, Torkel Opsahl Academic Epublisher The Hague (2012), also appeared in: NTUT, Journal of Intellectual Property Law & Management, Vol. 3, no.1 (2014).

and social understanding of how property can be the legitimate reason for an IP right holder to exclude others even if this exercise of ownership has consequences on public health, security or public safety. Can a holder of patented AIDS/HIV medicines prevent countries from delivering generic copies of the patented version to open up a market that would otherwise be restricted to the rich and fortunate?

Furthermore, the age of digital technology, the internet and the greater ease of reproduction have increased the demand for modifications in intellectual property practices. Young people have difficulty understanding why music, videos and other information products cannot be downloaded freely. Perceptions of "property" rights on information have undergone an almost revolutionary shift from the powered few having access to proprietary information and resources to a mainstream audience on all kinds of public internet platforms assuming and demanding information to be "freely available." This shift in perception of access to information has dramatic effects on the core of traditional IP thinking: property and exclusivity.

The infinite information resources that the internet provides give further impetus to a shift in ideological views on who owns information materials, ranging from the concept that ideas and information should be completely free – unprotected and unrestricted – to the belief that intellectual property laws should remain the ultimate means of regulating who can and should get access to information, and at what price. It is this constant legal and societal battle that forces traditional providers of information – publishers and writers, composers, entertainers, film-makers and inventors alike – to change their business models over time. Again, this search towards the boundaries of private ownership where concepts of "property" and "exclusion" are the main themes will have serious implications on what intellectual property law will look like over time. For advocates of the commons model[19], the legacy of the internet's development provides even further reason for questioning the durability of broad intellectual property protection as a means of spurring innovation.[20]

In the private domain it can be seen that intellectual property concepts – long held to be the cornerstone of the legitimacy of that part of the law – meet increasing criticism, questioning whether intellectual property has a future at all. It is undeniable that the form of intellectual property we have been taught at law schools and which are propagated by institutions, governments and multinational corporations and IPR practitioners – a system of complex statutorily defined property rights – is in dire

19. a model whereby multiple contributors ("commons") or authors share their work, without individual authors claiming copyright, yet providing the "commons" with the option to license the use of the entire work back to both the contributors and the general public.

20. Severin de Wit, "*Challenges in Public and Private Domain Will Shape the Future of Intellectual Property*", par. 7.

need of reconstruction. The future of intellectual property is at stake. No longer can the IPR establishment – current users of IP systems and lawmakers who have been proliferating the advantages of IP – rest on their laurels and rely on fundamentals that have guided them for centuries: that patents reward inventors by granting them a monopoly for a limited time in exchange for the patentee disclosing his invention so that others can rely and build on his work, thus fostering innovation as a theme that slowly develops into anathema.

A further development is causing our newborn, now 18 years old, to experience a profoundly different patent law (if it still exists at all). Criticism of the relationship between innovation and patents is increasing and certainly no longer limited to the academic world. As a result of modern technology, children of the information age hold different views on "openness" and "free (available) information". The general idea is simple enough, as Robert P. Merges describes in his book "*Justifying Intellectual Property*"[21]: digital media, driven by the internal logic of widespread availability and network effects, will flourish better and more effectively serve the goals of the intellectual property system if digital content and the platforms that carry it are freed from property based limitations. Merges' book is a legal and philosophical work in search of the best answers to these "openness" and "commonality" trends. He defends the idea that IP protection is in no way inconsistent with the promotion of a flourishing environment for digital media; quite the contrary, IP rights are essential to this goal.

Alternatives have been proposed to intellectual property as a right based on property that allows the owner to "exclude" and "control." IP laws that favor liability rules have been proposed as an alternative to exclusion. Property rules, as the name suggests, secure "entitlements" (like an injunction against a party that uses the patented invention or the trademarked sign or the copyrighted work, or monetary compensation – a royalty) as "property". To secure something as property, the rules must effectively prohibit others from taking or damaging the entitlement without first gaining the consent of the owner. Liability rules, on the other hand, neither seek to provide the security of a property rule nor seek to force those who would take or damage an entitlement from first obtaining consent from the IP right owner, but rather constitute a (legal) obligation or infringement to remedy the use, by paying a reasonable price or "rent" in economic terms.

In "*Ignoring Patents*"[22], Mark Lemley points out that it is currently very much in vogue to talk about patent rights as a form of property, and in particular to draw analogies to real property. He refers to what is known as "anticommons" in patent

21. Robert P. Merges, *Justifying Intellectual Property*, Harvard University Press, 2011.

22. Mark A. Lemley, Michigan State Law Review, 2008, Vol. 2008, No. 19.

practice: it is virtually impossible to identify, let alone acquire, all the (patent) rights a company needs to bring an innovative product to market. This is a particular problem for semiconductor, telecommunications and software companies which must aggregate hundreds of thousands of different components to make an integrated product. Each of those components may be patented, some by many different entities. As is shown in US patent practice, the owners of such patents can extract damages and huge license fees using the judicial system, making it economically virtually impossible to check all these rights and obtain licenses. That is why in the mobile industry, for example, many parties have no choice but to ignore patents. Indeed, actively looking for patents that may cover the products a company intends to market may lead to "willful infringement", increasing the exposure to multiple damage claims.

So Lemley engages in a thought experiment by asking what would happen if we were to behave with patents the same way we do with real property. Unlike what we just described happens in the technological world, no venture capitalist, bank or shareholder would fund a semiconductor company that wants to construct a new fabrication plant (fab) unless it could demonstrate that it had conducted an exhaustive search for patents it might infringe in manufacturing its chips and had obtained irrevocable or at least long-term licenses to use any patent that anyone might conceivably later assert. Obviously this process would be so cumbersome and time-consuming that the construction of the fab would be held up for years, with obvious effects on innovation. In other words a "real property"- or "title search" - patent system would simply not work[23].

All this has resulted in a growing discontent with the current patent system as a property based system where exclusivity and exclusion are predominant. A further development that will reverse the current patent practice is that by 2033 the "sharing economy" might have taken over the traditional ideas about ownership and exclusivity. Uber, Eatwith, ZipCar, AirBnB, RelayRides, TaskRabbit and Peerby.com as well as other sharing economy platforms facilitate short-term rentals, transportation and property co-sharing. These "sharing economy" companies are part of what is also called "collaborative consumption" or "the peer-to-peer economy" and will have a profound impact on how property will be treated and looked at in the future. The companies in the sharing economy use technology to connect people who have private excess capacity to those who want to purchase or rent it[24]. As to patents, "sharing" type of initiatives sprout up following the copyright creative commons idea

23. Lemley describes other interesting aspects of such a system where IP is being treated the same way as "real" property.

24. For further reading: Abbey Stemler, "*Betwixt and Between: Regulating the Sharing Economy*", Indiana University - Kelley School of Business - Department of Business Law, Research Paper No. 15-6, December 2014.

and "open source" software: code that is freely available in source form for modification and redistribution. As in the world of copyrights, attempts have been made to formulate repositories of patents that are freely available for use without restriction, a "patent commons." Tesla, the electrical carmaker, opened up its patent portfolio for free use, to "accelerate the advent of sustainable transport." Two other initiatives underscoring this sharing trend[25] are the eco-Patent Commons, organized by the World Business Council for Sustainable Development[26] and the Patent Commons Project organized by the Linux Foundation[27].

Apart from the revolutionary changes we will see in the way property is being perceived, some other issues can be brought up. I mentioned earlier the increasing difficulty in identifying who are the actual "inventors" of the patented invention. More collaborative ways of working together, the tendency towards sharing as well as the need to cooperate – often with competitors – will have an effect on inventorship as we know it. As lawyers we know that the current practice of mentioning a multitude of inventors in the patent, sometimes resulting in co-ownership, is something to avoid as all costs as untangling the legal issues that come up with co-ownership in enforcement situations.

So, in conclusion: The young adult I have in mind writing this essay, will, in 2033, be faced with a radically different view on property in general and intellectual property in particular. We all hope Charles will be able, even at his 86th birthday in 2033, to understand and follow this intriguing trend. Knowing Charles, he will just enjoy it and no doubt have his own ideas about it.

25. Janelle Orsi (ed.), "*Practicing Law in the Sharing Economy*", American Bar Association, December 2013.

26. http://ecopatentcommons.org/.

27. http://www.patent-commons.org/.