

Interview with Dr Heiner Flocke, chair of *patentverein.de* eV

"Keeping thousands of tactical patents needs to hurt financially"

Patents are seen as "recipes for more innovation", essential for protecting intellectual property and an indicator of economic growth. What part do small firms play in this system?

Dr Flocke: If there are two things that really don't go together at all, it's SMEs and the patent system as it stands. The filing figures alone show that small firms are a "patent-free zone": 50% of applications are filed by just 3% of applicants, one third by only 0.3%. According to the DPMA, SME filings are falling.

But that does not mean trying to make SMEs fit the patent system. On the contrary: how can the system change to support SMEs and gain their acceptance? They are the backbone of the German economy, providing 70% of jobs and 80% of apprenticeships. They have great innovative power; 40% of mechanical engineers work for firms employing fewer than 250 people.

*You helped set up the *patentverein.de*, to bring SMEs together. Why?*

Dr Flocke: Our association is an initiative by small firms opposed to abuse of patents and aware that innovative small manufacturers are especially threatened when the patent system takes the wrong turn. SMEs are focused on their own products – and indeed may well apply for patents to protect genuine inventions against copiers – not on patents as a tactical assault weapon or a source of licensing income. SMEs rely on creative R&D and a sensible patent system as the lawmaker intended.

"But some big firms' patent departments are more creative than their R&D"

Most patents come from big firms; SMEs file maybe one a year, every so often. But this unequal distribution is a particular threat to technically advanced innovations offering SMEs the prospect of market success. For them, ignoring or "ducking" patents is not a good defensive strategy.

What are SMEs' expectations of the European patent system?

Dr Flocke: Engineers and the famous "skilled person" are often flabbergasted by the low technical level of patent applications. They have other ideas about what "inventive step" is. But it stops being so funny once that lawyer's letter arrives. And although the opposition rate is only 5%, that does not mean all the rest are good.

"Small firms expect patent offices to take the lead on quality"

SMEs are unable and unwilling to waste their best people's talents on a flood of patents which do not speak their language or even use standard terminology. They want to be able to rely on the examination quality the lawmaker intended, and to understand patents in their field so they can avoid infringing them with their products.

What in your view are the weaknesses of the European patent system?

Dr Flocke: One big problem with the whole system is lack of quality and the ensuing flood of patents. Patents are granted too easily nowadays; make some trivial change to the prior art and you might get one. The worst examples are "use patents", such as your "dimmer's in the oven" or "microprocessor for photo-electric sensor". They were patented, even though dimmers and microprocessors were developed to perform precisely such controls. By merely changing the use situation, the applicant can keep a manufacturer's standard products out of certain markets. Obvious purposive uses must not be patentable, even if new.

Why are patents granted so easily?

Dr Flocke: The Guidelines for Examination, planning and pay-related targets make it easier for examiners to grant a patent than refuse the application. Refusals must be substantiated in detail, and 30% are liable to be appealed and thereby reopened. Repeated appeals can harm examiners' careers, whereas nodding patents through minimises the work involved. Nor do applicants make examiners' lives easy: filings are often deliberately abstruse and complicated, using terminology which foils search engines. Examiners have to search the prior art worldwide; it may be hidden away in articles and company publications in foreign languages. And they have to do all this under time pressure, because they only get three working days per case, i.e. for searching, examining and then granting or (with reasons) refusing the application. That's not enough. Even we specialists often spend weeks agonising about the possible scope of an equivalent patent.

So the EPO should be doing something to improve quality?

Dr Flocke: It already is. The President is right to want to "raise the bar". It's also a brave move, because the EPO has conflicting interests. Its income falls if the number of grants goes down. And the Administrative Council, its governing body, is made up of 34 member states. Each sends two representatives, almost all of them drawn from the upper echelons of national patent offices. So they are patents people. And half of renewal-fee income goes to their offices. The result is a supra-European organisation (the third biggest in the world, with its 6 500 staff) which is self-regulating and makes money from that. I would certainly change that set-up; indeed, I wonder if it's even legal. But which court could decide that? Which parliament could start drafting the necessary legislation?

Ultimately, patents mainly concern industry. But there are no industry representatives on the Administrative Council. Whether from small firms, big firms or associations. That's a major flaw.

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But to get back to your question, I do not believe that the EPO in its present form is strong enough to make the necessary changes on its own. If applicants realised they would not get a patent for every triviality, they would file less. But that's not really what the EPO wants – not with its existing governance and financing arrangements. The whole patent system exhibits a kind of "emotional solidarity". Everyone involved – including patent agents – is wary of any downsizing; the forces of conservatism are very strong, and after all something rather grand is in place. Legislation is needed, because we cannot go on like this. The "patent system worldwide is on the brink", to quote a recent headline in the well-regarded *VDI-Nachrichten*. Small businesses – our economic engine and biggest employer – have fewer resources. Therefore they are more at risk from the patent deluge and possible abuse, and have a right to more attention from patent offices and politicians alike.

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Are fee increases an effective way of improving filings quality?

Dr Flocke: They're an interesting idea, and could make up for some lost income. We are seeing early efforts to use the fee structure to improve quality, for example by charging higher filing fees for applications with more than ten or fifteen claims. Or you could try to stem the filings flood with a drastic fee increase offset by certain financial dispensations. Basically, keeping thousands of tactical patents needs to hurt financially.

As Professor Dietmar Harhoff (innovation researcher at Munich University) has said, fee reductions across-the-board are a step in the wrong direction. I agree. Attempts were even made to present the last fee reduction as good for small firms. It would be better to ask SMEs themselves what's good for them.

You mentioned Germany's patent courts. What are the problems?

Dr Flocke: One major problem in Germany is the "split proceedings" principle. We have studied a number of cases which go as follows: somebody gets a patent, and shortly afterwards sues you for infringing it. You defend yourself, and challenge the validity of the plaintiff's patent by opposing it. In Germany, under the "split proceedings" principle, you now have two cases running concurrently but asynchronously. The infringement case is heard by the patentee's chosen civil court,

usually Düsseldorf. Meanwhile, in Munich, the EPO boards of appeal or the Federal Patents Court review the validity of the patent.

"One major problem in Germany is the 'split proceedings' principle."

As a rule, the infringement court is quicker. The judge weighs up the product against the patent, including equivalents – which may be differing embodiments having the same effect. The court does not review the actual grant, or search to see if the "equivalent" embodiment is from different prior art. It is made up of lawyers, and from that perspective frequently finds that infringement has occurred. Only rarely does it suspend the proceedings (if the patent is clearly invalid), and its judgment is enforceable straight away.

In other words, these judgments are based on patents which have been examined and granted only cursorily and often wrongly, and drafted by their owners. Where else is that possible? The patentee writes his own (often deliberated convoluted) text, and an infringement court then passes judgment on it, trusting that the patent has been properly examined and granted and is therefore legally valid. It seems not to realise, when issuing a judgment rather than suspending the proceedings, that patent offices' examining practice makes that a rather rash assumption.

The plaintiff (patentee) acts carefully with this ruling. He knows the second instance (*Oberlandesgericht*) may find against infringement, and more particularly that the patent court may overturn the patent on technical grounds. So he does not enforce the judgment by having the offending product destroyed – which would expose him to risks of damages later – but by requiring disclosure to determine damages. The alleged infringer must then disclose, to his competitor, his prices, costs, calculations and list of clients and provide him with copies of delivery papers, invoices etc.

In parallel to the infringement proceedings – but usually much later – the patent is reviewed by a technical patent court, which – because, as we know, examiners are under time pressure – may well revoke it. So before the case is really over, the infringement court's earlier judgment has already had drastic effects which can no longer be rectified even if an independent technical court removes its whole legal basis by revoking the patent.

"As currently constructed, the patent system is unfair and damaging to the economy"

We are collecting examples of such cases. First we look for infringement judgments available in anonymised form in hard copy and on the internet, or supplied to us by the parties. The patent in suit gives the applicant, opponents and legal status e.g. in patent office databases. The "web-to-print" case, for example, concerns data communication for print commands, the "data interface" case is about serial protocols. In both cases, the courts found for infringement without suspending the proceedings, despite pending opposition or revocation proceedings, and their judgments were enforced by requiring disclosure.

In other cases – "barcode", "security control" and "broncho-constriction" – the damage has already been done. Here too infringement judgments were enforced, but now the patent court has revoked the patents. So now the case goes back to the infringement court for further prosecution. Products and technical progress are harmed, and the mystery is why infringement courts allow themselves to be pawns of the system. They need to be confident that the patents they are ruling on were lawfully granted; otherwise they are working in the dark and possibly making mistakes. Everyone involved agrees that the flood of filings causes quality problems, and the examiners' open letter warns us that they can no longer do their legal duty. Ultimately, this problem too will have to be addressed by the lawmaker and the constitutional court.

I regard the patent system as currently constructed as not only inequitable (see "split proceedings") but also damaging to industry. Patent law today is achieving the opposite of what was intended, namely to allow temporary monopolies (although 20 years is an eternity in modern technology) to protect investment and innovation. The patent system was not supposed to prove that monopolies are actually fatal to industry. The idea behind patent law is fundamentally sound, but the toughest yardsticks must be applied when awarding monopoly rights, because they limit the rights of everyone else in a free-market economy.

Protecting intellectual property is only fair, but the patent debate hardly impinges on inventors. Everyone like the idea of independent inventors beavering away in their workshop or laboratory – but they're not your typical patent-filers.

In patent law as now implemented and interpreted, the pendulum has clearly swung too far away from the protection of innovation towards the granting of monopolies. Patents have degenerated into weapons for use in economic battles, and if anything are an obstacle to innovation.

Can building up your own portfolio of "defensive" patents be a good response?

Dr Flocke: Sometimes yes, unfortunately, but ultimately it's counterproductive and only perverts the system further. Time and again I hear that small firms studying other people's patents get so frustrated and angry that they decide to file everything too, i.e. what used to be self-evident day-to-day work of their engineers, the oft-cited "skilled persons" who solve technical problems. Small firms especially must be careful not to over-estimate the effectiveness of this strategy; it also uses up a lot of money and creative energy better expended on innovative product development.

First, I would advise any small firm to patent their own genuine inventions. And when developing products they should of course also research the patent situation, to identify potential for infringement before trying to market them. They are often not careful and organised enough. Creative product engineers find it hard to get their heads around patents and patentese. And even in their specialist areas they may not be able to see from a convoluted patent whether their products might be affected (especially as regards equivalence).

In case of doubt, the best idea may well be to join in this nonsense, and protect your product with a thicket of defensive patents. Your potential attacker then at least knows that you too are armed, and scope for equivalence is limited.

Are any voluntary efforts under way to improve the quality of filings?

Dr Flocke: If my patent gives me a monopoly, I'm taking a right away from every other citizen. So the burden must be on the applicant, using comprehensible language and the usual terminology, to say clearly what that right is. Using straightforward text, clear diagrams and few claims. If you can't explain your invention in three pages, three diagrams and three claims, you don't really deserve a patent. Today's tactical patents can be an affront to those required to search, evaluate and delimit them.

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Years ago we launched an "ethical patents" initiative aimed at industry and patent practitioners. The reaction was interesting: it ranged from spontaneous approval to denial that ethics have any place at all in economic competition. This initiative was just a signal. It's all very well for to advertise your personal commitment to patent quality, but without legislative reinforcement it is meaningless.

What else might improve filings quality?

The key word is "public". Patent offices have figures for filings, but not for litigation at infringement courts or boards of appeal. But each case is public; they just need to be collated and analysed, to see who is suing whom, where, and about what. At present *patentverein.de* is drawing up a list of cases with just those bare facts (no evaluation) plus the courts concerned and their judgments, and putting them on the internet for information.

Firms subject to patent attack can offer rewards for relevant information, especially prior art leading to revocation of unjustified patents. Good places for such searches, besides the internet and libraries, include company publications, catalogues, theses and dissertations and documents from abroad (including the former East Germany).

We want to increase interest and awareness about patents generally, and make the system more transparent. And IBM has suggested a chatroom to identify and publicise unjustified and trivial patents.

But these are all just different responses to an unsatisfactory situation. Ultimately, we need legislation. Justice and economics ministries must start listening to small firms' complaints that the patent system allows abuse and is bad for industry, and then take action to preserve the system in the right kind of form.

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