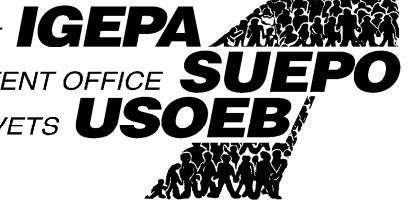


INTERNATIONALE GEWERKSCHAFT IM EUROPÄISCHEN PATENTAMT



STAFF UNION OF THE EUROPEAN PATENT OFFICE

UNION SYNDICALE DE L'OFFICE EUROPEEN DES BREVETS

Zentraler Vorstand . Central Executive Committee . Bureau Central

29.09.2008

ex08112cp - 0.06/2.23.2/2.23.3

Interview with Prof. Paul Seabright

The biggest risks for the future operation of the EPO is ... "that it becomes focussed narrowly on granting patents rapidly for the benefit of their applicants, while overlooking the broader interests of society at large."

1. Applicant behaviour

Professor Seabright , in your study "Objectives and Incentives at the European Patent Office" you say: "...it is not desirable for a patent office to award patents to as many innovators as possible, regardless of the importance or quality of their innovation." (S. 121)

Is the rapid increase in patent applications in recent years symptomatic of a corresponding increase in innovation?

Prof. Seabright: Not necessarily; patent filing can change for all kinds of reasons unrelated to the underlying process of innovation, including for strategic reasons such as to increase bargaining power against competitors. We simply don't know the reasons for recent trends; the only way to know whether innovation has increased in recent years is whether GDP growth has increased, and for that we shall need to wait to gain some historical perspective!

How has the behaviour of patent applicants changed in recent years and what effect has this had on patent offices?

Prof. Seabright: Numbers of patent applications to the EPO have increased by around 150% in a decade, and the number of claims per application as also risen by around 50%, requiring more work to process each application. The picture in other jurisdictions is not very different, though the US has been experiencing the acceleration earlier than elsewhere: applications have been roughly doubling every decade since the early 1980s. The effects on patent offices are not hard to guess. They've had to expand, but numbers of staff have struggled to keep up.

Should the quality of patent applications be improved and if so, how can this be achieved?

Prof. Seabright: There are two aspects of the quality of applications: first, the quality of the underlying invention (for instance, how much of an inventive step it involves), and secondly, how clearly the submitted application reveals the quality of the underlying invention to the examiner. On the first point, nobody really knows what is the “right” level of quality to which patents should be granted. There is a widespread view that the US has got the balance wrong and now grants patents too easily, especially to business methods, with the result that a “patent thicket” is discouraging innovation. There are also fears that resources pressures may lead Europe in the same direction. On balance I am sympathetic to both concerns, though I have to admit that hard evidence is difficult to come by.

I am certainly encouraged that the issue of patent quality was the centrepiece of the 2007 Annual Report of the EPO, but of course it is one thing to say you care about quality and another to implement policies that actually do something to help quality. It will be important to see whether the EPO management can match actions to its words.

Prof. Seabright: Our report suggests, for instance, that one important way to increase the rigor of the patent-granting process is to emphasize examiner teamwork, something that too narrow a focus on individual incentives can tend to discourage.

On the second point, anecdotal evidence suggests patent applications are becoming more difficult to evaluate, partly because they are written less transparently and partly because the prior art is increasingly scattered and hard to search (and increasing proportions of prior art are in languages like Chinese that few examiners master). There clearly needs to be more thought about how applicants’ incentives can be improved, since poor quality applications make the work of examiners harder.

Simply putting examiners under pressure by ratcheting up their incentives to process more applications will not solve the problem, and may even make it worse.

2. The job of examiner

Your report “Objectives and Incentives at the European Patent Office“ looks very closely at examiners’ work and analyses the steps involved, from filing up to grant of a patent. In your staff survey 2.378 Examiners of the EPO answer your questions.

What are the main results of your staff survey?

Prof. Seabright: We were very happy at the high response rate we received (4,269 staff members replied and 3,201 completed all questions). We found a lot of evidence about the team nature of EPO work, and the fact that the quality of each staff member’s work contributes to improving the workload of their colleagues. We also uncovered concern about the risks of allowing emphasis on quantity of applications processed to weaken the quality of the evaluation. This wasn’t a symptom of general dissatisfaction, since the EPO compensation package is clearly viewed as competitive with outside options by a great majority of respondents. Nor was it a sign that EPO staff fail to appreciate the importance of productivity improvements – rather a concern that quality aspects need to be given more explicit attention than sometimes in the past.

Which fundamental problems exist in evaluating the job of a “knowledge worker” - like the examiners of the EPO?

Knowledge workers like EPO examiners are classic multi-taskers, and they depend on teamwork.

Prof. Seabright: Some of their multiple tasks are easier to monitor than others, so a system of rewards that emphasizes the easy parts (like the number of patents granted) can provide powerful incentives to neglect the hard parts (like the rigor of the screening process). It can also lead them to neglect the team aspects of the job: it's harder to observe whether someone is being helpful to colleagues than whether their own in-tray is emptying at the approved speed, but we don't want to give all the incentives to the latter at the expense of the former.

How should the work of patent examiners be assessed and rewarded?

Prof. Seabright: It's important to have a mix, with some explicit financial incentives and others depending on evaluation of the overall quality of someone's work. It's important also not to under-estimate the importance of the esteem of our peers – the belief that we are doing work that our qualified colleagues appreciate is at least as powerful a motive to work hard as is the prospect of higher pay.

How does your report appraise the evaluation system of the EPO - a system of motivation, evaluation and compensation practices?

Prof. Seabright: I can't do better than to quote from our concluding section: “The evidence we have gathered suggests that the current (note of the editor: the system studies in 2004, i.e. pre-PAX) mixed system of incentives in the EPO works fairly well, given the complex and multi-dimensional nature of the Office's objectives and criteria of excellence. Any proposal to strengthen the explicit component of such a system needs to take care not to undermine the implicit components.

One might hope that a culture of professionalism, as it undoubtedly exists at the EPO, might prevent explicit “gaming” of the system of the kind we described above.

Prof. Seabright: However, a culture of professionalism is itself one of those implicit incentives that can be undermined by changes to the incentive system. There is ample evidence that professionals resent being given excessive explicit incentives and treat such gaming as an appropriate response to what they perceive as a lack of trust signaled by such systems.”

What do you think about performance related payment or other explicit incentives? (risks, alternatives)

Prof. Seabright: I think the paragraph just quoted answers that one.

What impact has the quantity related work of one examiner to the work of his team? (individual quantity - overall quality)

Prof. Seabright: The sheer workload facing each examiner is undoubtedly reduced if that examiner's colleagues do high-quality work (nearly 70% of respondents said that higher quality work from their own-department colleagues would save them "some to a lot" of time).

More importantly even, 95% said this of higher-quality work from applicants. Improving the quality of applicants' submissions is therefore obviously a major priority.

Prof. Seabright: Online applications should soon be made compulsory, for instance, and the format of the applications should be reviewed so as to require applications to meet higher minimum standards of quality than in the past. There's also the important consideration that if applicants come to believe that examiners are too overworked to give their applications a rigorous screening, they will have even less incentive to invest the effort in making good quality applications, creating a downward quality spiral.

What are the biggest risks for the future operation of the EPO that you identified in your report?

The risk that it becomes focussed narrowly on granting patents rapidly for the benefit of their applicants, while overlooking the broader interests of society at large.

Prof. Seabright: However, we've only identified this as a risk; we haven't said this is definitely going to happen. And there have been hopeful signs that the EPO management accepts that this is a risk: let's hope that their policies in future will match this recognition.

Patent application numbers are increasing and prior art is diversifying as ever more innovators from an increasing number of technical fields seek patent protection internationally. What impact does this have on the work of patent examiners?

Prof. Seabright: It's clearly making search harder; it also makes examination more difficult since examination involves more complex judgment than it used to. This will make teamwork even more important than it has been in the past. There are many things that could be done to improve matters here, especially a more imaginative use of applicants' own searches, and of public consultation processes that allow interested parties to see what prior art has already been found and to add to the list online. Even in the age of Google, the onus should not be on the examiner to do all the searching, when there is a distributed community of online interested parties able and willing to contribute.

The challenge is to find innovative ways of integrating that distributed expertise into the patent search and examination process.

3. Developments in the patent system

Do patents continue to fulfil their original aim of providing an incentive to innovate (and at the same time to disclose the invention)?

Prof. Seabright: No-one has yet come up with a better overall system, but that's not to say the system couldn't be improved.

The sooner we move to a single international language for patents the better (and no, it won't be French).

There must also be scope for a more differentiated system, with applicants able to choose between faster or cheaper procedures and a higher level of protection. It's absurd, for instance, that in biotechnology applications are taking nearly five years to process at the EPO.

Here's an idea, which we can call the "fast track".

In addition to the existing procedures, applicants could choose to submit an application which would be guaranteed to be processed within 12 months and would grant a patent valid for ten years, on two conditions: 1) the application must contain a thorough search of prior art with a clear classification of that art in order of relevance, and if subsequent search reveals important undisclosed prior art that the applicant ought reasonably to have known about, the application will automatically be refused with no scope for modification. 2) The application is exposed to open scrutiny on the EPO website with interested parties entitled to submit (within six months of filing) accounts of relevant prior art and short statements supporting or opposing grant.

The advantage of such a fast track procedure would be two-fold. First, applicants would have an incentive to exert greater effort in making high-quality applications in respect of inventions where early patent protection was valuable to them. And secondly, the fast track applications would attract the relatively more important innovations, because it would be easier for the applicants to come up with the relevant documentation.

Of course, some applicants would not welcome such a procedure (especially the public scrutiny part). But many firms already resort to industrial secrecy instead of courting the scrutiny that existing patent applications require. It's true also that some applicants seem to welcome long procedures as the fog of uncertainty discourages their competitors.

We need to think harder about how to make it difficult for firms whose only interests lie in accumulating patents to ambush genuine innovators.

4. Wishes/ Ideas/ Changes/Future

If you could change parts of the European Patent System – What would you change?

Prof. Seabright: In the long run I'd like to see the EPO established as an independent institution entrusted with clear statutory objectives, funded on a secure basis and free of national pressures, like the European Central Bank. But that's clearly not practical in the short term.

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