LETTER FROM EUROPE

Sudden Impact

The effect of a judicial decision on the economy

I was once interviewed live on Bloomberg radio at some god-awful hour in the morning, following a 30% drop in the share price of Ely Lily resulting from a negative decision in a patent case by the U.S. Court of Appeals in the District of Colombia. If you'd listened carefully, you could almost pick up the rasp of my unshaven face against the telephone receiver.

The news slot was aimed at brokers and bankers in the financial market. The interviewer was clearly keen for me to be some sort of soothsayer—to wring my hands and pronounce the forthcoming doom of Ely Lily, and of the pharma industry as a whole.

"Will this decision have an impact on pharma share prices here in the UK when the markets open?" he asked.

"I shouldn't think so," I replied. *"The Appeals Court in the U.S. has simply ruled that in the case of a U.S. patent owned by Ely Lily, a generics manufacturer could begin marketing its generic version two years earlier than Ely Lily believed they should be allowed to. It doesn't mean to say that a UK court in respect of the equivalent UK or European (UK) patent will come to the same conclusion. These cases are usually fact dependant,"* I concluded.

There was a pause.

"Besides," I added, *"Ely Lily have said that they are going to appeal, so I doubt the generics company will be celebrating just yet."*

I could tell from the tone of the interviewer's voice that this wasn't the Earth-shattering answer he had been expecting, and the interview terminated shortly after, but not before I had suggested (somewhat helpfully, I thought) that perhaps stockbrokers might consult with a patent lawyer as to the impact of IP decisions in court before they make a decision on the share price.

As we were finishing up, he admitted that my answer was something of a wet blanket. I apologised, but I said that I felt it was my duty to douse the irrational flames of stockbroker passion when they clearly did not understand the ins and outs of patent law and the implications behind the decisions. I lamented that IP in all its forms was too little understood. More than two decades later, I still do.

The Ely Lily case highlighted the impact a judicial decision can have on a business. But what of the wider impact a judge can have on the economy as a whole?

Back in the mid to late Nineties, the Dutch courts, spearheaded by a well-respected judge, began granting pan-European injunctions using the "kort geding" (roughly translated, "interim proceedings") procedure. Essentially, where a European patent was infringed and at least one of the parties had a place of business in the Netherlands (and no matter how remote the connection to the ultimate parent company—which would also get dragged into the proceedings), some form of injunction could be granted.

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This behaviour by the Dutch courts caused considerable consternation amongst other EU IP practitioners. It also spawned a practice called "torpedoing"—if a company learned there was a possible Netherlands-based pan-European injunction in the offing, it would initiate invalidity actions in a number of other jurisdictions. Since a European patent is a bundle of national rights, and only the court where the national register is held can deal with invalidity matters, any pan-European injunction would not extend to those countries where the torpedo had already been launched.

The Dutch practice was effectively stopped in 2006 when the ECJ ruled that the Dutch court's view on its ability to grant pan-European injunctions based on the Brussels Convention was flawed. Yet there were those who also observed that what the Dutch court had done was create a "business" in the Netherlands that benefited those who practiced IP, and

particularly patents, there. I don't doubt for one moment that the judge who first handed out a pan-European injunction had only honourable intentions of helping patentees avoid having to litigate in every jurisdiction. Nor do I think he thought he was doing something other than giving justice to the various cases before him. Nonetheless, his ruling was a boost to the Dutch legal economy, however small that was in the overall GDP figures. When you add in that clients have to attend court and fly into the Netherlands, stay a while, eat, drink, etc.—it all adds up and helps the national pot.

At about the same time as this procedure in the Netherlands was being promulgated, the reverse situation occurred in the UK. The general consensus amongst clients and practitioners alike was that the UK judiciary were anti-patentee, as patents were being increasingly found invalid on the ground of obviousness. I spoke to one of the English High Court judges at the time—he robustly defended his position, stating that he wasn't anti-patentee, he was simply anti-bad patents. Nevertheless, potential customers—namely big business—perceived the approach as unfavourable to them, which was, in turn, partly why some preferred to litigate in the Netherlands or Germany. So in that instance, the effect was negative on the UK economy.

That was, however, two decades ago. Judges change, and so does the approach. Now in patent cases, even incremental improvements can be acceptable as overcoming the all-embracing obviousness argument. But in terms of a judge reaching out beyond our shores, that remains rare. However, like the Dutch court before him, our main patent judge in a case—coincidentally one that also involves Ely Lily—has spread his net wider, and concluded that he is capable of deciding whether a potential infringer was entitled to seek relief by way of a declaration for non-infringement in an English court, which covered French, Italian and Spanish equivalents of the UK basic patent. (The basic subject matter of the patent had been extended by reason of a Supplementary Protection Certificate, or SPC.) I should add that the initial proceedings also included the equivalent German patent, but even though the English court proceedings were already happening, an action by Ely Lily in Germany for threatened infringement achieved an injunction despite the jurisdictional challenge by the generic manufacturer. So the Germans picked up their ball and went to play on their own pitch instead of the English one!

It is too soon to know whether, like that Dutch court decades earlier, the English judge has had an impact on the English legal services economy. And really, it would take a proper economic study to determine whether such decisions have an impact at all, and if they do, the extent. Yet this decision clearly shows that English law and English judges are willing to tackle European issues, not just local domestic ones. And just like the Dutch judge, I have little doubt the English High Court judge was doing his best to have one single forum, and to ensure that there was uniformity and certainty of outcome for all concerned. I am equally certain that there will be English IP practitioners who will leap on this particular bandwagon and seek to benefit from it. You can usually tell if this is going to happen by simply counting the number of articles pumped out by lawyers that use the word "landmark" to describe a decision and how it can impact (beneficially, of course) clients.

With the upcoming Unified Patents Court due to begin cranking out decisions as early as 2015, the effect of having a number of specialist judges giving decisions will likely reduce the impact of a single judge in Europe in this area of law. However, potentially, the UPC will have a bigger impact on the economy than many might realise. For an exploration of how this is so, you will just have to wait until the next *Letter from Europe*.