

## **AIPPI UK event report: Strategies to Improve Patenting and Enforcement**

At an AIPPI UK talk hosted by Bristows, Mark Schankerman, Professor of Economics at LSE spoke to a capacity audience on “Strategies to Improve Patenting and Enforcement: the impact of patent thickets, renewal fees and litigation insurance”. Professor Schankerman, a noted and long-standing commentator on the economics of patents, is a Research Director of the Programme on Productivity, Innovation and Intellectual Property Rights at the LSE Centre for Economic Performance, a Research Fellow at CEPR, and a Director at LECG.

The seminar commenced with an analysis of the rapid increase in the number of patent applications that has taken place over the last few decades. Whilst this trend might reflect growth in innovation, Professor Schankerman noted concerns that increased patenting could impede rather than incentivise innovative activity. Reasons advanced for this included the creation of patent thickets (where fragmented intellectual property rights require the securing of licence agreements from many patentees, inflating the costs of innovation), a corresponding increase in the cost of enforcing patents, and the problems caused by patent trolls.

Professor Schankerman discussed potential strategies to address these issues, motivated by the basic objectives of maintaining innovation incentives, preserving effective competition amongst innovators, and using market-based solutions.

Patent screening processes could be divided into two categories: *ex ante* screening (undertaken by the patent office examiner); and *ex post* screening. The talk focussed on the latter, and in particular on two particular forms of *ex post* screening, the first being litigation by private parties, and the second, somewhat surprisingly, the level of renewal fees. Recent econometric research demonstrated that the decision to renew a patent is sensitive to economic considerations, including renewal fees, the size of the market, and the threat of litigation. Professor Schankerman postulated that governments could use renewal fees as an active instrument of patent policy to increase the effectiveness of *ex post* screening. Raising renewal fees could, for instance help to dramatically reduce the number of patents ascribed a low value by their proprietors, and act to deter patent trolls.

He also reported research that demonstrates patent renewal fees can be used to improve the innovation incentives generated by patent rights. Professor Schankerman set out an analysis of renewal fees as a tax on the property right conferred by a patent, and proposed that the effective tax rate be adjusted to provide socially optimal incentives. His analysis suggests that existing renewal fees impose a highly regressive tax on patents, and suggested that renewal fees should be very substantially increased, especially in later years, to make the effective taxation rate progressive.

The heterogeneity of patent litigation was next discussed. Research suggests that litigation is not randomly distributed across technology areas, and that the fraction of patents litigated across the lifetime of the patent varies in accordance with the characteristics of the patent holder. Individuals and small firm patentees were found to have much higher average litigation rates than both US domestic stock-exchange listed firms and foreign firms patenting in the U.S. By comparison, post-suit settlement rates were shown to be almost identical for all types of patent-holders. Reasons behind these trends were suggested, but the take-home

message was that these differences in litigation exposure for different types of patentees underscore the importance of developing ways to create a more level playing field for patent litigation, in particular through the use of market-based patent litigation insurance. Currently, the take-up rate of such insurance is low, particularly among smaller firms, and presumably due to the cost of it. Professor Schankerman suggested that the adoption of a rationalised risk model by insurance companies, incorporating his empirical findings about the factors that influence litigation risk, would significantly reduce the cost of such insurance for smaller firms, and ultimately provide smaller firms with increased bargaining power in the settlement of disputes. The seminar came to an end following a lively and thought provoking question and answer session.

In wrapping up the session and offering a vote of thanks to the speaker, AIPPI UK President Trevor Cook noted that intellectual property lawyers have not been used to analysing the IP system in economic terms, but that increasingly an economic analysis of the system is likely to become an important part of the IP lawyer's toolkit.

The full paper of Professor Schankerman's talk, and a report on AIPPI UK's other seminar this month ("Community Designs - a Silver Bullet or a Rubber Dagger?" Henry Carr QC and Dr Henning Hartwig, 7 May at Linklaters) are available on the AIPPI UK website: <http://www.aippi.org.uk/>.