

Business Europe / By Ian Harvey

Creativity Destruction

It is frequently many small problems that together cause an aircraft to crash. So it is with innovation and intellectual property (IP) in Europe. We are witnessing, in slow motion, an innovation crash that is likely to hasten Europe's technological irrelevance.

The most recent example is the European Commission's latest challenge to Microsoft Corp. Embedded in Competition Commissioner Neelie Kroes's objections to Microsoft's proposals for licensing its technology to rival firms, which she outlined in March, is that her department—known as DG-Competition—will decide what is or isn't innovative and how much people and companies are entitled to make from their intellectual property. The impact of this negative attitude toward IP rights, however, will not be limited to the American software giant.

In its original 2004 ruling against Microsoft, the Commission ordered the company to license to its rivals the technology that allows programs to work with its Windows server software. The company and regulators agreed that the fees charged for these licenses should, among other things, be commensurate with the level of innovation involved.

The problem, for Microsoft, is that DG-Competition has decided that Microsoft's patents are not innovative—even though the European Patent Office has already decided that they are. An invention will not be granted a patent unless it is innovative, and Microsoft has been granted at least 35 U.S. and European patents for the technol-

ogy in question. Yet Ms. Kroes essentially wants Microsoft to give away expensively developed technology for free.

One might argue that Brussels is particularly obsessed with punishing Microsoft because of the long-running dispute between the two. Yet Ms.

Kroes's findings in the license-fee matter are general enough to pose a threat to any innovative company that depends on a few blockbuster successes to pay for its many failures. Any company that achieves substantial market success through expensive research and devel-

opment should feel threatened by this latest development with Microsoft.

In any case, the record shows that DG-Competition's antipathy toward IP rights extends well beyond the Microsoft case. Take the case of TetraPak, a leading maker of packaging for milk and juices, in the 1980s. The Commission found then that, even though there was no harm done to consumers, TetraPak had abused a dominant market position in Europe simply by acquiring an exclusive right to a new sterilization technology. The mere combination of TetraPak's market dominance and its sole usage of this innovation was illegal in Brussels' eyes.

Ms. Kroes's attitude toward innovation and IP doesn't necessarily reflect that of her colleagues elsewhere in the Commission. DG-External Trade believes that intellectual property is central to a modern economic system. Thus China is rapidly entering the world of IP, sensibly aided by Trade Commissioner Peter Mandel-

son's efforts to train IP judges there. China has been one of the most innovative nations over much of the last three millennia, and its universities are already filing as many patents there as American universities are in the U.S.—and a sobering six times as many as U.K. universities are filing in Britain.

Another arm of the Commission, DG-Research, plans to spend €7.5 billion on "blue skies research"—the kind of curiosity-driven research that has no particular objective in mind, but from which many radical new ideas come. But where is the goal—or budget—for turning this research into actual intellec-

tual property from which Europe can benefit? The first step of granting these funds may be laudable; yet without taking the parallel steps to ensure that the value of the research is captured, the initiative falls short.

China, on the other hand, with R&D spending targeted at 2.5% of GDP, aims to become the world's fifth-largest patent holder and will have the budget and processes to match. Europe's spending on research without plans for capturing the results in the form of IP will be philanthropy to the rest of the world, which can use it for free, patent the further developments and then charge us for them. That's precisely what the U.S. did to the U.K. after Scottish scientist Sir Alexander Fleming's unpatented invention of penicillin in the 1930s.

Internal Markets chief Charlie McCreevy recently promised a fundamental review of patents across the EU. Today, patents in Europe are expensive to acquire

and enforce. The principal reasons are the costs of translating the complex text of a patent into 23 languages and the fact that there is neither a single European patent nor a single, high-quality litigation structure. Efforts by European judges to create a common system for those countries that want to join, known as the European Patent Litigation Agreement, appear likely to be scuppered following a recent opinion for the European Parliament saying that the EPLA would be illegal.

Everyone wants a simpler, less expensive patent system. But the Commission has more or less given up on the idea because of opposition from anti-IP pressure groups within Europe, and from those who don't want their language to be excluded from a common system. Mr. McCreevy's review may put the issue in play again, but despite recent support from German Chancellor Angela Merkel there is no political will to accomplish anything worthwhile.

So who is in charge of IP in the Commission? The answer, sadly, is everyone and no one.

With the Commission's Jekyll-and-Hyde approach to IP issues, many in Brussels seem not to understand that we are in a global economic battle in which, as Chinese Prime Minister Wen Jiabao has said on many occasions, "future competition in the world will be competition in IP." Many across the EU seem to think that we should weaken IP by pursuing our own set of IP/competition rules, without understanding that this will disadvantage us in the rest of the world and, ultimately, in the EU itself when we have to rely on innovation from the U.S. and Asia. The rest of world—the U.S., Japan and, yes, China—are all strengthening their IP regimes. It is economic suicide to weaken ours.

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Neelie Kroes