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THE GLOBAL GOVERNANCE OF KNOWLEDGE: PATENT OFFICES AND THEIR CLIENTS, by **Peter Drahos**. Cambridge University Press, 2010. 340 pp. Hardback \$115.00, Paperback \$45.

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“It is a little surprising that one can apply for a patent in Kiribati” (p.1). So begins Peter Drahos’ fascinating exploration of the ubiquity and often under-appreciated influence of patent offices around the globe.

THE GLOBAL GOVERNANCE OF KNOWLEDGE: PATENT OFFICES AND THEIR CLIENTS covers the results of an in-depth, interview-based study of 45 patent offices, their operations and policies, and how they fit into the larger global patent network. Of course the large patent offices are covered (e.g., the IP5 members that receive the largest numbers of applications: the U.S.(USPTO), Japan (JPO), China (SIPO), South Korea (KIPO) and the regional European (EPO) patent offices), but Drahos also includes a diverse cross section of other kinds of offices.¹ Emerging economy offices in India and Brazil, regional offices in addition to the EPO, developing and least developed country offices such as Cambodia, Vietnam, Indonesia, and Kiribati, entrepreneurial offices such as those in the UK, Denmark, and Australia are all represented and tied together in a novel and eye-opening construct that sheds important new light on a system which may, by Drahos’ account, be anything but benign.

As Drahos himself labels patent office administration “an excruciatingly dull topic” (p.xiv), one validly might approach this book with some trepidation. Such concerns are completely unfounded as Drahos turns this enquiry into an intriguing and enlightening explanation of “why our [patent] world is the way it is” (p.xiv) and what we might do to change it. The book is well-researched, engaging, and filled to the brim with thought-provoking nuggets of current and historical information. Even the book’s organization is impressive; beginning by providing a contextual and linguistic framework

for the study and its results, then discussing well-designed groupings of offices, their origins and particular features, and their role and position in the global patent order.

Draho asserts, then supports, the contention that patent offices around the world are cooperating and integrating into a global knowledge governance network that exists primarily to serve the interests of multinational corporations (MNCs) sometimes at the expense of, and counter to the interests and policy of, the domestic government and consumers of the country in which the office operates. According to Draho, the goal of MNCs is to create uniform global patent rules to “make it cheap to obtain patents, that maximize the scope of patentable subject matter and that minimize state control over the technology” all in an effort to build a system of private taxation² of technology markets (pp.4-5). The fact that one can obtain a patent in Kiribati, a very poor island nation with a population of around 100,000 people,³ is, according to Draho, emblematic of this goal.

Articulating a modified version of the social contract justification for the patent system as “society offering a monopoly in exchange for the release of an invention of social value,” Draho posits that patent offices are not currently fulfilling their role in the contract. Namely, in representing society, patent offices have the duty to (1) ensure an inventor delivers (not just discloses) an invention of social value, (2) help diffuse invention information that the inventor reveals in the application process, and (3) ensure the highest degree of patent system transparency to those the system affects (pp.33-34). Draho sees patent offices as violating these duties in a number of ways, such as failing to require access to source code for software inventions and not providing comprehensive, user-friendly search systems to make it easy for the public to find relevant patents. The reasons why patent offices fail—often knowingly—in their public good functions are the focus of this book.

After laying his foundational premises, Draho launches into a deep yet concise and eminently interesting history of the role and rise of patent offices in the global patent system. He traces the rise of specific patent offices, noting along the way interesting historical vignettes that support the longstanding primacy of the patent social contract, such as the early Venetian and French patent system working requirements. Draho also highlights the interplay between a country’s substantive patent law implementation and its patent office, noting that a country with a clearly delineated substantive patent law but no patent office, such as Indonesia between 1953 and 1989, is still unlikely to issue many patents, even though

the country received thousands of applications during that time period. He further identifies patent offices as “crucial sites of interpretation of patent law” (p.11) indicating many ways in which substantive patent law can be manipulated through patent office rules. For example, while Switzerland’s patent law in the early 1900’s provided for patents on methods, the patent office required the submission of models for all inventions, effectively eliminating the availability of process patents. One current development Drahos considers particularly pernicious is the proliferation of claim drafting formats that facilitate the expansion of the subject matter of patents and that then spread virally to examiners in other offices who may not fully understand what the new claim format is protecting.

According to Drahos, history and cost help explain the world’s poorest countries have patent offices and why they are being brought into the global patent fold. Many offices in the poorest countries represent the lingering remnants of colonization when European patent laws were imported wholesale into numerous colonies through military or economic coercion (p.143). As he notes, imperialism not only spread the patent institution much faster and farther than might have occurred naturally in developing countries, but the type of patent system seen in these countries would likely be different as well and more tailored to a particular country’s needs (p.113). The fact that one could re-register a UK patent in Kiribati, a British colony, in the early 1900’s, had virtually nothing to do with the needs of the indigenous population but rather facilitated market division and relations among European powers.⁴

Things are not much different today, as Drahos details the reinvigoration of the UK re-registration system through the European Patent Convention (EPC) and Patent Cooperation Treaty (PCT), and the economic coercion of the TRIPS Agreement and TRIPS-plus bilateral agreements. It seems to be déjà vu all over again. He also illustrates how new patent colonization mechanisms are emerging, with many developing countries today having express (e.g., granting patents based on the grant decision in another country) or de facto (granting patents based almost solely on examination results from another patent office) patent re-registration regimes, a situation that may be far from optimal for the particular society in which the office resides. He also uses the striking difference in pharmaceutical application filing rates in Vietnam and Cambodia to demonstrate an effect (a significant increase in total and specifically pharmaceutical patent applications) of PCT accession that developing countries may not fully appreciate (pp.270-272). Moreover, while there is nothing new in the assertion that the bulk of patents in developing and least developed countries are foreign-owned,

Drahos' interviews with patent office officials in several such countries reveal a uniformly negative perception of the competence of local patent attorneys (except for those employed by MNCs). While the perception may be based on reality, even where it is not, it points to a fundamental difficulty that local inventors in such countries will face in trying to obtain patent protection at home, let alone abroad.

From a cost perspective, Drahos illustrates that it is relatively cheap for large developed country offices, such as the EPO, to provide a variety of "technocratic trustbuilding" aids, such as examiner training and exchange, examination manual production, and prior art databases to allow developing country offices to automate and "mimic" developed country office patentability decisions. The trust developed also reinforces a hierarchy among patent offices, with the EPO being perceived by many smaller offices as providing perhaps the highest quality examination. Moreover, patent offices are jockeying for position in the global order, by, *inter alia*, seeking WIPO (World Intellectual Property Organization) International Searching Authority (ISA) status under the Patent Cooperation Treaty (PCT) (recently achieved by Egypt and Israel in addition to India and Brazil), as well as seeking leadership positions (being the "go-to" office) in a particular region (p.254).

Drahos provides a timely account of the origins of the global patent machine in operation today, tracing the history and development of individual patent offices with the enduring remnants of colonization providing a constant echo. He intertwines these strands in a narrative that describes a system divorced, in some cases, from the public and societal interest that justifies it. What emerges is a troubling picture of a global regime that exists to facilitate MNC collection of private taxes in the form of patent rents, populated by patent office employees who in many cases lack a clear concept of the larger societal ramifications of their actions. For example, with an anecdote from one of his interviews, Drahos illustrates the potential for disconnect between a patent office and the larger society in a developing country and how cheaply integration into the global governance network can be purchased:

Patent official, Pacific island country: We are planning to join the PCT.

Drahos: Why?

Patent official: The PCT will generate more applications and more fees for the patent office.

Drahos: What if more pharmaceutical patents are registered and cause problems for your population in terms of access?

PAUSE. . .

Patent official: We haven't thought of that (p.336).

Drahos traces this disconnect to the profound impact of switching to a self-funding business model. This model allows offices to keep their fees instead of returning all revenue to the general treasury, but leads to a focus on more applications to drive revenues, and the efforts necessary to keep clients, not the public, happy and coming back for more. This is a debate which is currently playing out in the US. By creating dependencies on revenue generation from application and maintenance fees and the parties who pay them, patent office focus and incentives shift to being not only more pro-patent, but also more sensitive to MNC interests. This model has trickled down to many smaller countries, often resulting in a situation where the patent office may be very pro-patent, while the rest of the country may be more concerned about access to medicines and other development issues. Drahos refers to this as a type of patent office “schizophrenia” (p.254), which can be especially problematic when the patent office is looked to by others in the government for expertise in setting a developing country's patent policy.

Drahos describes the domination of patent offices by a relatively small number of MNCs⁵ and the unsettling results of the TRIPS-induced need for developing countries to fairly quickly develop an examining corps and infrastructure to handle applications covering inventions in every field of technology, including pharmaceuticals. This need not only results in heavy dependence on larger patent offices and WIPO “missionaries,”⁶ for training, guidelines, and technical assistance, but also on the training of examiners by patent attorneys from firms representing MNC companies (p.249). Another unfortunate but not surprising result is that patent office hiring of examiners tends to further reduce the already small pool of valuable scientific talent that might otherwise engage in inventing and technologically advancing a developing country from within an industry or university setting.

Drahos delivers a strong indictment of patent offices—and the patent attorneys who practice before them and benefit from their pro-patent policies. He argues that these offices all-too-often abdicate their national patent social contract responsibilities to their respective publics by pandering to the interests of MNC's directly and indirectly, such as by

participating in treaty negotiations to create ever more pro-patent laws and policies. To the extent one believes a pro-patent agenda is a good thing, these patent offices should be applauded, not castigated. Moreover, while patent offices certainly play a critical role in the patent system, all of the ills chronicled in the book cannot be laid (directly at least) at their doorstep, for example, the historical colonization that led to the imposition of patent systems on many developing countries in the first place. Nevertheless, there can be too much of even a good thing, which Drahos seems to suggest is the case in relation to a strong pro-patent agenda that has already begun to eviscerate the social contract.

The picture painted by Drahos is not completely bleak, however. He does note the virtues of several patent office initiatives in helping less developed offices handle the costly and resource intensive examination responsibilities required under their laws in a way that enhances quality over what they likely could do alone. He also highlights the genuine desire and efforts of many patent offices to draw more small and medium sized enterprises into using the patent system. He also shows patent offices as the complex, multifaceted organizations that they are, noting, for example, JPO initiatives to help Japanese companies obtain patents in foreign countries faster (p.175).

Finally, after delivering the “bad” news about the current global patent office system, Drahos discusses several controversial ways in which the patent social contract can be renewed and patent offices held accountable, such as the formation of outsider governance networks, introducing the separation of powers principle to break up unhealthy (to society) concentrations of power in the system, external audits, increasing transparency and more. Some of these proposals seem quite radical and doomed to failure. Nevertheless, incremental progress is possible. For example, a positive (if small) transparency development in this direction since the publication of this book is the expansion by WIPO of an online search tool providing access not only to PCT applications, but also to the previously inaccessible (or difficult to access) patent collections of 24 countries and three regional offices, thus enhancing public access to patent documents.⁷ Drahos also has special advice for developing countries, such as using their sovereignty to make patent offices part of the public, not private, nodal governance network, careful use of outsourcing of the patent social contract, and learning from the mistakes (and successes) of countries like India and Brazil.

THE GLOBAL GOVERNANCE OF KNOWLEDGE: PATENT OFFICES AND THEIR CLIENTS is a timely and, I expect, enduring contribution to the patent literature. It should be required reading not only for patent office personnel, attorneys, and scholars, but also for government officials and legislators, particularly in developing countries, who could benefit from a better understanding of the role, motivations, and limitations of the patent office in their country as they formulate laws and policies that concern public health, technology transfer, innovation, and more. One need not agree with all of Drahos' conclusions to derive a significant benefit from the book. Examples of the trends identified by Drahos abound: Qatar and Rwanda recently acceded to the PCT, the IP5 continues to make progress on a group of worksharing initiatives, bilateral patent prosecution highways between various offices are proliferating, and the Vancouver Group (comprising the UK, Canadian, and Australian patent offices) has been formed to share work and results (between these offices having a common cultural and legal tradition), and create a new examiner worksharing tool with WIPO.⁸ Of course, how these trends will manifest themselves in the future and whether there will be significant benefits to individual countries and the greater global society remains to be seen.

ENDNOTES

¹ The complete omission of African country/regional offices from the interviews is puzzling; however, several are discussed in later chapters.

² According to Drahos, "each time a patent office grants a patent, it issues a right to collect taxes" (p.8).

³ Sadly, Kiribati is expected to be the first country to have all of its land disappear due to global climate change. "Kiribati's President: Our Lives are at Stake," ABC News, available at <http://abcnews.go.com/WNT/story?id=3002001&page=1>, (last visited Aug. 14, 2011).

⁴ For more on this issue see Ruth L. Okediji, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System*, 7 *Sing. J. Int'l & Comp.L.* 315, 320-325 (2003).

⁵ Noting that in 2007, 3.6% of applicants in the German Patent Office accounted for 60% of the applications (p.15).

⁶ Another fascinating account of this type of influence is provided in Carolyn Deere, *THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES*, 257-58 (Oxford University Press, 2009).

⁷ WIPO Patentscope, available at <http://www.wipo.int/patentscope/search/en/search.jsf> (last visited Aug. 15, 2011).

⁸ See, e.g., “PCT Newsletter,” June 2011, available at http://www.wipo.int/edocs/pctndocs/en/2011/pct_news_2011_06.pdf (last visited Aug. 15, 2011); “Vancouver Group and WIPO launch new international work sharing tool to reduce patent backlog,” available at <http://www.ipo.gov.uk/about/press/press-release/press-release-2011/press-release-20110317.htm> (last visited Aug. 15, 2011); The IP5 website, <http://www.fiveipoffices.org/obj.html> (last visited Aug. 15, 2011).

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