EIP

A Year in Patents - Part 2/4: Getting to Grips with the Law

Dr Girish Nivarti joined EIP's London office in October 2022. In this four-part series, he chronicles his first year as a trainee patent attorney.

Patents are often misconceived as secretive instruments that hinder scientific progress. In fact, as the history of patents demonstrates, they incentivise creativity by rewarding inventors with exclusive rights to inventions they disclose publicly.

The roots of patent protection can be traced to the Venetian lagoon. In the 15th century, the Republic of Venice was the epicentre of glassmaking innovation, attracting swathes of foreign investors and inventors to its islands. Unfortunately for foreigners, their contributions to glassmaking innovation risked being exploited ruthlessly: membership of guilds, responsible for protecting glassmaking techniques and know-how from outside appropriation, was strictly restricted to Venetian artisans only. Patent rights originated as foreign glassmakers sought to practice locally without fear of their inventions being co-opted by the guilds. They suggested a bargain: in return for publicly disclosing the technical details of their inventions, they would obtain exclusive rights to them. This so-called "patent bargain" ultimately spread from the lagoon to the rest of the world as a by-product of the global glass trade. Patents were born.

The laws governing patent protection in most jurisdictions today draw from rules set out in various international conventions, including the Paris Convention of 1883. The Convention established some global patent principles, among them the provision of "national treatment," which dictates that each contracting state must grant the same patent protections to foreigners as to its own nationals. Another key provision set out by the Convention was the right for inventors to be individually named even in patent

applications submitted by someone else (for instance, a parent company or team of collaborators).

Illustrating how patent law needs to continually adapt and react to novel circumstances, the "right to be named" is currently subject to debate. For the first time, an AI system, rather than human individual, has been named as the inventor in a patent application. Courts in most jurisdictions have responded by keeping to precedent: the inventor named on a patent application must be a person, that is, the individual that devised the invention. Besides pushing courts to continually define and redefine legal boundaries, rapid technological change also fuels philosophical debate. Can AI possess the same moral rights as a human inventor? The judgement of the UK Supreme Court on this matter is highly anticipated.

Halfway into my first year at EIP, I have learned that studying court judgements is crucial to legal practice. Reading them can be intellectually captivating: the best decisions follow logical patterns so clear that they appear almost inevitable, not unlike the flow of a mathematical proof. The illusion of inevitability, however, masks the complex patterns of argumentation, counter-argumentation, application, and interpretation that lead up to the conclusion. The patterns of particularly significant judgements are discussed and debated collectively at the firm. For instance, my practice group recently analysed a trial judgement related to the infringement of a telecoms patent. The dynamic we studied is typical: the claimant's arguments for infringement are met with counterarguments from the defendant, which seek to invalidate the claimant's original patent (and thereby absolve the defendant from compensation). The specificities of each novel case force the law to be applied and interpreted in novel ways. Consequently, each judgement both corrects and contributes to our current definition of "legal precedent."

Being a newcomer to the patent profession is at once humbling and rewarding. On the one hand, setting foot in law as a former academic involves trading the comfort of scholarly expertise to nearly totalising inexperience. Disorientation is a familiar feeling, confronted as I am with novel terms, problems, and methods virtually every day. On the other hand, learning is fast and furious: less than six months into my new role, I drafted and filed my first patent application. The deadline crunch leading up to submission was intense, but made enjoyable and enlightening by the support of my practice group and supervisor. The discomfort of surrendering to inexperience is alleviated by the abundance of training available. In addition to day-to-day support from supervisors and immediate colleagues, trainees benefit from learning modules instructed by senior members of the firm. Learning even extends beyond the doorstep of the office; for instance, a weekly lecture series put on by the Chartered Institute of Patent Attorneys (CIPA) has greatly enriched my understanding of the law.

Both frustratingly and entertainingly, I have spent much time explaining to my friends and family that copyright is not the same thing as a patent. Copyright does not apply directly to novel ideas, but to original expressions of ideas. Obtaining copyright does not require a challenging process of drafting an application or undergoing an examination: once a painting is created on a canvas or a song mixed on a computer, the artist immediately holds copyright on it.

Notwithstanding these key differences, sometimes copyrights and patents intersect and overlap in fascinating ways. Software is a classic example: a snippet of computer code may amount to both a novel function (a patentable idea) and a novel piece of text (a copyrightable expression of the idea) at the same time. Open-source computer codes are often particularly difficult to navigate, since their terms of use may pre-emptively prohibit the patenting of other codes, and subsequent inventions, that draw from the original open-source code. My background in developing both proprietary and open-source simulation software has been beneficial to growing my firm's expertise in this niche. For instance, my technical skills in computational code development have been harnessed for the production of in-house technical reports on the subject. These reports provide the firm's attorneys and solicitors with a technical basis for understanding open-source software development, crucial to their legal work in the field.

On a final note, looking at the cherry blossoms outside, I am reminded that around this time last year I was being interviewed at a number of patent firms. "Application season" in the patent world typically begins in winter, for an envisioned start date in the following autumn, as is common in various graduate schemes across different sectors. Not all firms have openings every year though, and some firms advertise quite late in the season. It is worth remembering that speculative applications are always an option if you are interested in firms not currently advertising. I did exactly this: I approached EIP directly with my CV and a formal cover letter, outlining how my skillset would contribute to the firm, and why I wanted to work at EIP specifically. I then had two rounds of interviews with partners at the firm, the first conducted remotely and the second in person in London. A speculative application does not guarantee a response, but at best, it can result in you snatching your dream gig!

My first six months in the patent world have revealed many surprising and satisfying overlaps in my technical background and the field of law. In the next six months, I will be delving into prosecution, which I will describe in the next instalment of this series.