

Committee on Development and Intellectual Property (CDIP)

Thirteenth Session
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PROJECT ON PATENTS AND THE PUBLIC DOMAIN: SELF-EVALUATION REPORT

prepared by the Secretariat

1. The Project on Patents and the Public Domain, as stipulated in its Project document (CDIP/7/5 Rev.) entails that a final self-evaluation report will describe the key project outputs and offer a final assessment of the project's achievements
2. Accordingly, the Annex to this document contains the abovementioned self-evaluation report.
3. *The Committee is invited to take note of the information contained in the Annex to this document.*

[Annex follows]

PROJECT SELF EVALUATION	
<u>Project Code</u>	DA_16_20_02
<u>Title</u>	Patents and the Public Domain
<u>Development Agenda Recommendation</u>	<p><i>Recommendation 16:</i> Consider the preservation of the public domain within WIPO's normative processes and deepen the analysis of the implications and benefits of a rich and accessible public domain.</p> <p><i>Recommendation 20:</i> To promote norm-setting activities related to IP that support a robust public domain in WIPO's Member States, including the possibility of preparing guidelines which could assist interested Member States in identifying subject matters that have fallen into the public domain within their respective jurisdictions.</p>
<u>Project Budget</u>	Non-personnel costs: 50,000 Swiss francs
<u>Project Start Date</u>	January 1, 2012
<u>Project Duration</u>	15 months
<u>Key WIPO Sectors Involved and Links to WIPO Programs</u>	<p>Innovation and Technology Sector (Program 1)</p> <p>Links to other Programs: Programs 8, 9,10 and 16</p>
<u>Brief Description of Project</u>	<p>The Project on Patents and the Public Domain is described in document CDIP/7/5 Rev. The Project examines and explores the following elements relating to patents and the public domain: (1) the important role of a rich and accessible public domain; and (2) the impact of certain enterprise practices in the field of patents on the public domain. It will supplement the findings of the Study on Patents and the Public Domain which has been undertaken under Project DA_16_20_01, and will take a next step towards further implementation of Recommendations 16 and 20.</p>

<p><u>Project Manager</u></p>	<p>Mr. Marco Aleman</p>
<p><u>Links to Expected Results in the Program and Budget 2012/13</u></p>	<p><i>Expected Result VII.1</i> Enhanced understanding among policy makers on the interface between global challenges and innovation and intellectual property as a basis for improved policy decision making.</p>
<p><u>Overview of Project Implementation</u></p>	<p>A summary of the self-evaluation results based on the key Project outputs is found in Appendix II to this report.</p> <p><i>Deliberation</i></p> <p>As described in the Project document, the Project consisted of a micro level study on patents and the public domain, which analyzed, in particular, the impact of certain enterprise practices in the field of patents on the public domain and the important role of a rich and freely accessible public domain.</p> <p>Consequently, a study entitled “Study on Patents and the Public Domain (II)” (document CDIP/12/INF/2 REV.) was prepared by a group of experts, namely: Professor James G. Conley, Clinical Professor of Technology, Kellogg School of Management, Northwestern University, United States of America; Mr. Peter M. Bican, Doctoral Candidate, Chair of Technology and Innovation Management, WHU – Otto Beisheim School of Management, Germany; and Dr. Neil Wilkof, Dr. Eyal Bressler and Company, Ramat-Gan, Israel. It was presented to the twelfth session of the CDIP, which was held in Geneva from November 18 to 21, 2013.</p> <p>The study, which was built upon the findings of the Study on Patents and the Public Domain (I) (document CDIP/8/INF/3 REV.), was divided into three parts. Part I offered a conceptual integrative model that sought to explain the relationship between patents and the public domain. In Part II, the study focused on the activities of so-called “non-practicing entities” (NPEs) and how their respective business models affected the public domain. Part III described patent practices of entities more broadly, and considered the potential impact of patent management on the public domain. A brief summary of the study is found in Appendix I to this report. The study can be accessed at: http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=253106</p> <p>In accordance with the Project document, the comments from members and observers of the CDIP were appended to the study in their original language (document CDIP/12/INF/2 REV.ADD.).</p> <p><i>Project Content Management</i></p> <p>The Terms of Reference (ToR) for the study were prepared in accordance with the Project document. The study covered the contents</p>

	<p>which were required in the ToR. The phase-gate process was used in order to ensure that the contents of the final study would be in accordance with the ToR.</p> <p><i>Project Timeline</i></p> <p>Finalization of the study was delayed by five months due to the longer preparation period requested by the authors in view of the complexity of the topic. The final study, however, was published well in advance of the twelfth session of the CDIP (i.e., more than two months before the session), which allowed ample time for Member States to review the study.</p> <p><i>Budget Utilization</i></p> <p>The budget utilization rate is 84%. The travel cost of an expert to present the study at the CDIP session was less than expected, since, due to the unavailability of the main author, he was replaced by one of the co-authors.</p>
<p><u>Impact of the Project and Key Lessons Learned</u></p>	<p>In order to support the Project Objective, a side event was organized by the Secretariat during the twelfth session of the CDIP. One of the co-authors presented the study. Around 30 participants attended the side event. In view of the limited time available during the CDIP plenary session, it was considered that the side event provided the opportunity for the authors to better communicate the findings of the technically complex study to Member States. Further, it facilitated dialog between the authors and the members and observers of the CDIP who were interested in the subject matter.</p> <p>Feedback on the study received during the side event as well as the plenary discussion was largely positive. One Member State acknowledged the study's conclusion that the overall relationship between patents, innovation and a rich and freely accessible public domain was complex and nuanced, and expressed its belief that the study was useful in understanding how various actors and factors affected the public domain. One non-governmental organization, however, stated that due to the lack of their technological base, developing countries could not effectively use the inventions which were in the public domain in their jurisdiction.</p> <p>While no Member State has indicated, either explicitly or implicitly, that the study did not meet the objective of enhancing an understanding of the issues, it should be noted that the quantity of feedback received from Member States on the study when presented to the CDIP might not be sufficient to make any statistically meaningful assessment. Further, while the study may have contributed to better understanding of the issue, the conclusions of the study could be tested only through the use of its findings by Member States in practice.</p>

[Appendix I follows]

APPENDIX I

Summary of the Study on Patents and the Public Domain (II)

Built upon the findings of the Study on Patents and the Public Domain (I), the Study on Patents and the Public Domain (II) provided further contribution and new insights to the discussion on patents and the public domain. In particular, in Part I of the study, authors developed a conceptual integrative model that sought to explain the relationship between patents and the public domain both during the pendency of the patent right and after its expiry. The authors explained that the public domain consisted of both *de-jure* and *de-facto* components and that the potential contribution by the patent system to the public domain occurred not only when a registered patent expired after the conclusion of its full statutory term, but also took place prior to the completion of such term. Those dynamics were explained in a series of graphical and formulaic representations, augmented by explanatory text, in support of the authors' heuristic model. The possibility for patent arbitrage of the public domain by countries in which no patent right was sought, and the potential of such arbitrage to contribute to national innovation, especially for developing countries, were also discussed.

In Part II, the study focused on the activities of various non-practicing entities (NPEs) as regards the contribution of their respective business models to the public domain. In particular, authors analyzed the following categories of potential NPEs: (i) patent assertion entities; (ii) patent aggregators; (iii) non-competing entities; (iv) patent intermediaries; and (v) universities and research organizations. The study proposed a linear representation in the form of two graphical continua that set out the contribution of each type of entity to the public domain and the propensity of each entity as patent holder to enforce its rights.

Part III described patent practices of entities more broadly, and considered the potential impact of patent management on the public domain. Both patent strategies and the on-the-ground implementation of those strategies were considered. In addition, how activities carried out by patent actors could contribute to a rich and freely accessible public domain was examined. In particular, Part III focused on patenting and the innovation process, whereby the following issues were analyzed: incremental improvements and tree of subsequent knowledge release; defensive and offensive patenting; hidden applications; submarine patents; and patent scope refinements. Further, the study discussed patent donations and open innovation, followed by the discussion on the patent management practice termed "evergreening" with a particular focus on the development of the generic pharmaceutical market by the enactment of the Hatch-Waxman Act in 1984 in the United States of America.

In conclusion, the Study pointed out that the relationship between patents, innovation and a rich and freely accessible public domain was complex and nuanced. While authors did not make generalization of that relationship, they conceptualized a heuristic model that could materially contribute to an enhanced understanding of the issue.

[Appendix II follows]

APPENDIX II

Evaluation Results Based on the key Project Outputs

<u>Project Outputs¹</u> <u>(Expected result)</u>	<u>Indicators of Successful Completion</u> <u>(Output Indicators)</u>	<u>Evaluation Results</u>
Micro level study on patents and the public domain	Completion of the study within the established timeframe and the quality required by the TOR for presentation to the CDIP.	The study was completed by external experts with the quality required by the TOR, and presented to the twelfth session of the CDIP. The completion of the study was delayed for five months due to a longer preparation period requested by the experts.
	Feedback from Member States on the study when presented to the CDIP.	A feedback on the study received during the side event organized on the margin of the twelfth session of the CDIP as well as during the plenary discussion was largely positive. However, the quantity of the feedback received from Member States on the study when presented to the CDIP might not be sufficient to make any statistically meaningful assessment.

<u>Project Objective(s)</u>	<u>Indicators of Successful Completion</u> <u>(Output Indicators)</u>	<u>Evaluation Results</u>
Enhanced understanding of the impact of certain enterprise practices in the field of patents on the public domain and the important role of a rich and accessible public domain	Feedback by Member States on the extent to which the outputs have met their concerns.	One Member State, in particular, acknowledged the study's conclusion that overall relationship between patents, innovation and a rich and freely accessible public domain was complex and nuanced, and expressed its belief that the study was useful in understanding how various actors and factors affected the public domain.

[End of Appendix II and of document]

¹ As per the original Project Document, Section 3.2.