DETROIT MERCY LAW

EDUCATING THE COMPLETE LAWYER

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Via email: denis.martel@canada.ca

RE: Consultation on Intellectual Property (IP) Strategy

Dear Mr. Martel:

My name is Wissam Aoun, I am an Assistant Professor of Law and Director of the International Intellectual Property Law Clinic, an intellectual property clinical program operated jointly between the University of Detroit Mercy School of Law and the University of Windsor's Faculty of Law. The clinic combines Detroit Mercy's United States Patent and Trademark Office (USPTO) Certified Patent Law Clinic with University of Windsor's intellectual property law clinic to create the world's first international intellectual property law clinical program. For 7 years, I have worked as an intellectual property clinician, providing intellectual property legal assistance to young inventors and startups and teaching intellectual property practice in North America and Europe.

This submission is part of the consultation regarding Canadian IP Strategy. The comments do not appear under any specific headings, rather are presented generally for discussion and consideration purposes. As set out at the end, several general recommendations are provided, again, with no specific headings or order. The focus of this submission is IP clinical programs, and the broad role such programs can play in servicing Canada's IP needs.[1] This submission is part of a larger, ongoing research project and as always, I would be happy to provide references and citations for the information contained herein.

Primarily, under the previous *Governance of IP Agents Consultation*, I provided detailed submissions pertaining to the current Canadian governance framework for IP agents and its effect on access to IP services and IP education. I re-iterate in full those same comments herein within this submission.

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[1] This piece has not benefited from a thorough review prior to submission. As such, please forgive any spelling, grammar or citation errors.

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In *The Global Governance of Knowledge: Patent Offices and Their Clients*, Peter Drahos both elegantly and powerfully demonstrates that much of the 'global patent system', in the broadest sense of the term, has been influenced by patent offices and patent attorneys/agents through a 'co-evolutionary process'. The patent attorney profession along with their biggest clients, the multi-national corporations that file the largest number of patent applications, have influenced patent office practice through an 'invisible harmonization' of patent practice around the world. This invisible harmonization has managed to control and shape a predominant global patent practice narrative, an incontrovertible set of practice, regulation and administration standards that have been accepted an implemented across the world.

As Drahos points out, the challenge globally is that the governance, administration and practice of patent law is almost entirely dominated by the large multinational users of the patent system, the patent attorney/agent profession and patent offices that largely view current patent filers and their attorneys as their main 'customers'. The mid-tier IP countries (i.e. non-developing countries outside of the U.S./EU/Japan major filers), a group to which Canada belongs, are particularly sensitive to and dominated by this phenomenon. This is largely the result of the fact that these countries are major exporters of patent services. As such, it is natural for a sort of 'epistemic capture' to occur, wherein the entire patent practice discourse becomes dominated by a single, continuous narrative which has been unable to accommodate the needs of small-to-medium enterprises, a narrative that struggles to imagine alternative forms of IP service delivery. In countries such as Canada, the overwhelming majority of Canadian applications come from abroad, and must be filed by a Canadian agent, leading to a narrative driven almost entirely by the established profession and their clients.

This leaves the patent social contract in jeopardy. From its earliest days, the patent social contract was developed to encourage, promote and reward dissemination of useful knowledge created by *all* inventors, as well as access to such knowledge on behalf of the public generally. Recent research shows that globally, small-to-medium enterprises struggle to access IP services and accordingly, the IP system is out of their reach. Canada is no different in this regard. All individuals and organizations, no matter the size, scope or scale, should have meaningful access to the IP system.

Furthermore, so much of the emphasis during recent IP discourse has focused on the defensive and offense value of patents. A key part of the patent social contract is the public's access to useful knowledge through patent disclosure- essentially, the *teaching* value of patents. We continue to neglect aspects of the provision of patent services that are valuable in this regard. Recent studies have focused on the overlooked aspect of access to patent information for use in incremental innovation. Patent documents represent one of the most comprehensive and intensive sources of practical technical information. A significant percentage of large corporate users of the patent system utilize patent information for R&D, prototyping and other innovative activities. Yet several recent studies demonstrate the dismal statistics regarding utilization of patent information by small-to-medium enterprises. Among the top reasons given for poor utilization of patent information is the lack of access to expertise in locating, analyzing, and overall effective use of patent information.

The work of several prominent IP scholars argues for the creation of a new wave of practitioners, practitioners that promote access to the patent system in the broadest sense and the role of the patent practitioner in promoting the patent social contract. Drahos calls for the creation of a network of 'outsiders' to the current predominant patent practice narrative, a group separate from the traditional players but with sufficient technocratic skills and understanding of the patent system to confront, and when necessary, challenge the current narrative. He highlights universities as strong candidates for this role, given both their public-interest mandate and sufficient separation from the profession and market forces to engage in critical analysis. These 'outsiders' are necessary to refocus the patent practice narrative back towards the public interest, including those small-to-medium enterprises which the current system continues to overlook.

Many countries are now examining new modalities of IP service offerings, largely housed within institutional (and specifically, university) settings. Several developing countries have, with the assistance of the World Intellectual Property Organization (WIPO), established innovative and progressive programs for the delivery of intellectual property services and education. For example, WIPO has assisted in the establishment and development of Technology and Innovation Support Centres (TISCs) on university campuses and research institutes throughout the developing world. TISCs provide many important intellectual property services to both the research community and public at large, including patent information reports, advanced intellectual property education and general intellectual property services. Furthermore, TISCs assist universities with technology/knowledge transfer activities through the provision of patent services and support, and several commentators have highlighted the key role that TISCs may play in supporting knowledge diffusion.

Furthermore, WIPO has teamed up with academia and the patent profession to offer advanced and comprehensive intellectual property training in a number of developing countries. For example, WIPO and various partners have offered advanced patent application drafting training to over 1,400 Brazilian University professors. Currently, Canada has few programs comparable to these programs in scope and level of comprehensiveness.

Somewhat counterintuitively, it is precisely because Canada is *not* a developing country that such programs have not yet emerged. Necessity is the mother of innovation and as Canada is an advanced economy, creation of innovative IP programs has never previously been a government necessity. The patent profession is tightly regulated and its market for patent services is largely foreign based, so taking a leadership role in promoting innovative programs has never been a necessity for the Canadian patent profession either. It is far easier to challenge the predominant patent practice narrative in countries where it has not yet taken hold than in a country like Canada, where the narrative has been deeply rooted for so many years.

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University IP clinical programs can form a key part of the much needed 'outsider' group necessary to challenge the predominant patent practice narrative in Canada. IP clinical programs are non-profit and exist outside of the *traditional* patent profession. University clinical programs across Canada and the US, including some IP-focused clinics, have for many years played a significant part in the more traditional public interest role, including intervening in legal cases to advocate on behalf of the public's interest. IP clinical programs, certified by the USPTO, have been established across the US, accepting clinical faculty alongside traditional faculty. Accordingly, what is proposed herein is not a drastic change to the status quo, rather it is a suggestion to extend IP clinical practice and service offerings to new areas of IP services and new modalities of IP practice.

IP clinical programs provide IP assistance to underserviced clientele while also educating future IP professionals. Educating students through IP clinical programs not only provides these practitioners-to-be with the necessary skills to practice competently, it also imbues these young practitioners with the spirit of the patent social contract. These students will spend the formative years of their careers having a sense of client-centered practice impressed upon them in a non-profit driven atmosphere.

University based IP clinical programs can also work with in conjunction with Canadian technology transfer offices, which historically have been significantly under-resourced, providing meaningful patent services to on-campus stakeholders and furthering the mandate of universities through dissemination of knowledge. As clinical IP services are offered on a pro bono basis, patent searches can be provided and patent applications can be prepared in an environment dictated and directed by both commercial as well as non-commercial considerations. This also serves the public's interest, which as discussed above, is furthered by disclosure of useful knowledge through the patent system. Furthermore, the public's interest is served when all individuals, and especially innovators, understand how to access and learn from patent disclosures to further incremental innovation, a service that clinical programs are uniquely situated to provide.

Several other comments and reports submitted as part of this and other recent consultations have highlighted that placing too much emphasis on commercialization of university research should be approached with a certain level of apprehension. The predominant role of universities, and university researchers, is not commercialization but rather dissemination of knowledge.

In this sense, the role of universities and the patent social contract can align through provision of meaningful patent services to university faculty and students designed to promote affordable disclosure of, and access to, patent information. IP clinics can assist in this regard. Recent innovative clinical offerings in other jurisdictions collaborate with traditional technology transfer offices to provide enhanced education, training and patent application preparation for both on and off campus clients. Many IP clinical programs across the US now work closely with university technology transfer offices to support their mission of disseminating knowledge through patent disclosures and provide access to patent information for incremental innovation.

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Canada requires new IP professionals with a unique view of their professional identity, educated within a context providing broad appreciation of the patent social contract. These new patent professionals can certainly be patent *agents*, preparing, filing and prosecuting patent applications on behalf of their clients, large and small alike. But students trained through IP clinical programs are also trained to be *educators*, providing access to patent information and learning to teach traditionally underserviced clientele, as part of the provision of services, on how to effectively use all aspects of the patent system to further their innovative activities. Training in a non-profit, clinical setting, serving clients with commercial as well as non-commercial interests (such as university stakeholders predominantly interested in dissemination of knowledge) teaches students to appreciate their role in the patent system from a broad and diverse perspective. This may help to create new patent professionals viewing themselves as more than just patent agents, but *agents of knowledge transfer* as well. Students trained through non-profit clinical programs would hopefully develop a sensitivity to the needs of traditionally underserviced client segments and more young practitioners would be trained to practice in underserviced Canadian markets.

In patent matters, it is the patent office (i.e. CIPO) that is the agent of the public. Patent offices have viewed this obligation largely as constituting the examination and publication of applications. This *passive* view of the role of a patent office is part of the current dominant patent practice narrative, and emerging discourse challenges the patent office to take a more *active* role in fulfilling its duties to the public as part of the patent social contract. This requires promotion of IP education, promoting greater access to patent information for innovation and supporting entities committed to serving those individuals that have been overlooked by the dominant patent practice narrative.

CIPO has made considerable progress in transitioning to a more active role. CIPO has greatly improved its website to promote usability, and the new IP Academy is providing fundamental IP education across the country. CIPO need not take on the responsibility of protecting and promoting the public's interest all on its own, and where possible can and should collaborate with partners having resources and expertise to assist in fulfilling this mission.

University based IP clinical programs can play a significant role in supporting CIPO in its role as agent for the public's interest. CIPO should do more than simply acknowledging these programs. CIPO as agent for the public must *actively* support such programs, through formal recognition and where possible provision of available resources. CIPO should formally integrate these clinical programs into the agenda- similar to the USPTO Clinical program, which was passed into law with the passage of the *America Invents Act* (AIA), CIPO should support the formal creation and recognition of such programs. CIPO can assist in furthering the public's interest by certifying and supporting IP clinical programs, clinic programs which, as discussed above, provide a unique public service apart from that offered directly by the patent office and the Canadian patent profession.

Establishing robust and innovative clinical programs would not only supply under-serviced individuals with access to meaningful IP services, but it would also provide Canada the opportunity to be on the leading edge of a nascent global movement. As discussed herein, these emerging modalities of IP service have already started to take shape in other jurisdictions, and Canada can position itself as an innovator and leader in this field.

Several general recommendations include:

- Exploring the creation of university accredited educational programs as part of Canadian agent qualification
- IP clinical programs should be a mandatory component of any such accredited educational programs. This will ensure the growth of clinical programs. Furthermore, this will ensure that future practitioners are trained in a non-profit, client-centered context during the formative years of their careers
- CIPO should consider funding the development of educational resources for IP clinical programs, which resources will assist in the proliferation of clinical programs across the country
- IP clinical programs should be fully accredited and institutionalized by CIPO, similar to the USPTO Certified clinical programs (and similar institutionalized programs currently in development in other jurisdictions)- CIPO should provide support, including possible funding, to facilitate establishment of IP clinical programs on university campuses across the country
- CIPO should consider the creation of a comprehensive online training component as part of IP agent qualification, as well as incentive programs for individuals from traditionally underserviced communities (smaller cities outside of the large Canadian commercial centers) to participate in IP clinical programs, as well as returning to practice in these underserviced communities
- CIPO should explore opportunities for facilitating the integration IP clinical programs with technology transfer offices, with the objective being dissemination of, and access to, useful knowledge through the patent system
- CIPO has already launched a series of IP educational programs for the public through its IP Academy. These efforts should be commended. While many of the programs focus on foundational or introductory IP topics, CIPO should consider offering more advanced educational and training programs, covering topics including (without limitation) searching and prior art assessment, patent drafting and patent application/prosecution processes. When and where possible, should partner with educational institutions, including IP clinical programs, for the development and delivery of such programs

Thank you for your consideration, I would be happy to discuss in greater detail at your convenience.

Yours truly,