Editorial

Time for a Tsar—and a Tsar for our time?

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Does the government of a country with an open economy, based on principles of private investment in competitive industry, require the appointment of an IP Tsar?

The question does not admit of a single unqualified answer, since it is contingent on the identification of functions which the Tsar is to discharge and on the facts that these functions are not being discharged by other public offices or are being inefficiently discharged.

In the USA, the appointment of Victoria Espinel as IP Tsar last year raised initial interest, a little mirth, and not a little admiration. Since then, we have seen little. Even for a person who is expert in the field, to be newly appointed as IP policy coordinator for any large, IP-rich and sophisticated economy requires months of listening, learning, aggregating shared opinions, and balancing opposing ones. Ms Espinel's first strategic IP plan, unveiled this June, has received a mainly warm reception from IP rights owners but a less enthusiastic one from those who are not. This is predictable and owes less to the quality of the plan, or to the role of the Tsar, than it does to the fact that IP policy is always a balancing act between opposites. While it is not often a zero-sum game, many of its protagonists generally react as though it were.

While it cannot be argued that the brief, recent experience of a Tsar in the USA has much evidential or precedental value in other jurisdictions, there is no basis for rejecting the experiment—in the same vein or with local variations.

Let us list some of the things that an IP Tsar might seek to do. Since there is already a surfeit of IP policy-making and strategic advice in terms of the civil law, this list concentrates more on the criminal side:

- Identify and coordinate the various public sector bodies that deal with IP issues and seek to repair the functional deficiencies which are caused by failure of one part of the public sector to deal with another. For example, the police, administrative authorities, customs, and taxation officials must be synthesized and coordinated, so that, instead of getting in one another's way, they work efficiently together;
- Identify and improve the points at which public and private sector activity meet. Thus data protection laws should not be allowed to interfere in matters such as the identification of infringers, and the laws of evidence should not hinder the use of evidence obtained in criminal proceedings when subsequent civil proceedings are brought, and vice versa;
- Take steps to publicize the wrongness of the most clearly immoral infringing activity and to utilize the media more effectively in naming and shaming the most serious infringers;
- Work to improve the speed and the extent to which proven infringers are separated from their ill-gotten gains;
- Hit together the heads of the many petty fiefdoms of IP whose organizations appear to mimic or duplicate each others' aims and efforts to combat IP infringement;
- Oversee a licensed profession of IP infringement bounty hunters who would, under the terms of an approved code of conduct, root out infringers on their own initiative and be rewarded on a scale relating to the social or economic damage inflicted;
- Stand up to the competition authorities and explain to them what it is that IP owners do, any why they do it, and insist that the formulation of competition policy should require the full and informed cooperation of IP owners as well as generic competitors and consumers.

While a case for each of these roles must be made in respect of each jurisdiction, and may not be necessary or appropriate in any given state, it is submitted that a strong argument may be made for a Tsar whose duties are based upon these roles, and others like them, in almost every IP-rich jurisdiction. If there is no such Tsar, let the government of each country that rejects the notion at least affirm that the deficiencies in IP enforcement and in the formulation of any sort of strategic policy either do not exist or are adequately addressed by its current legislative programme.