

IPAN issue brief - no. 5

issue: European patent reform – a "European" Patent?

The 27 member states of the European Union have different, albeit "harmonized", Patent Laws, but all are members of the European Patent Convention (EPC), so enabling Patents to be obtained in each member state via the national Patent Office or via the European Patent Office (EPO). The European Patent Organisation (which runs the EPO) is not an EU body, so the Commission does not govern its operations, unlike the case for Trademarks and Designs, where the "Office for Harmonisation in the Internal Market (Trade Marks and Designs)" is an EU institution.

Patent protection in some EU member states but not others could have a distorting effect on interstate trade, and The European Commission has wanted to set up a "Community Patent" for several decades. A convention was signed in 1973, but has never come into force. It proposed that the EPO grant a single Patent (not a bundle of national patents as currently) which would be effective throughout the EU.

Since 1983 there have been many attempts to agree a Community Patent System, but these failed as member states were not able to agree a language regime. The EPO operates in English, French and German, but if the bundle of Patents it grants is to be effective, translations into local languages were needed under the National Laws of most member states. The cost was substantial, and though in May 2008 the London Agreement (which has the effect of reducing the number of translations needed) came into force, the cost of translation still induces many patentees to proceed with patent protection in only a subset of the EU states.

A separate issue, but of importance to certain industries, is that although a substantial level of harmonization of national Patent laws has occurred, there are still differences of approach between member states, particularly in the biotech and computer implemented inventions areas. The Commission wishes to have a common approach throughout the EU, but this is unlikely absent a Community Patent.

The EPO, even if it becomes the granting authority for a Community Patent, has no jurisdiction with respect to enforcement, which must still be dealt with via national courts. Differences in approach could undermine the unitary effect intended for the Community Patent. Since unification of the judicial systems of the EU member states is not an early prospect, there are moves to unify the

approach adopted by courts dealing with Patents by way of a European Patent Litigation Agreement (EPLA). Under the system currently envisaged there would be first instance courts based in particular states or with regional responsibility for several states, which could issue an injunction effective throughout all the states party to the EPLA. Appeals from the first instance courts would be heard by a central appeal Court.

The EPLA is not dependent on there being a Community Patent, as if the EU countries (preferably but not necessarily all of them) agreed, it could come into force, and there is no reason why non-EU countries which belong to the EPC could not join.

The present costs associated with securing a patent position in Europe and possibly enforcing it are substantial and deter smaller industry from using the system, but even large users wish for a simpler, speedier and less expensive system, and one less patchy in its effects.

Work on the Community Patent and EPLA has been vigorous in 2008, but until it is crowned with success, there is a hidden cost to all in innovation, and the achievement of a common market in the IP area is frustrated.

suggested links for further reading:

- [*EC patents web-page*](#)

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