

The European Community Patent - A Realisable Dream

The Vice-President of the European Commission, Günter Verheuegen, stated at the European Patent Forum in Munich in April 2007 that "an incomplete European patent system puts European businesses at a competitive disadvantage" and that he expected the Community Patent to become reality "in the next five years".

It is unfortunate that many others do not see the Community Patent as realisable, due to the well known translation and jurisdictional problems. They are instead focusing efforts on patent litigation systems such as the European Patent Litigation Agreement (EPLA) and on the London Agreement on translations as partial solutions to the problems.

Speaking at the European Patent Forum in Munich in April 2007, Hans-Ulrich Maerki, IBM's EMEA Chairman, pointed to the increasing importance of collaborative innovation and stressed the need for a balance between open and proprietary development based on standards. Leading on from this, he emphasised that we need intellectual property protection that serves both open and proprietary innovation. Society stands to benefit from both these models.

At the same event, the European Patent Office (EPO) announced the Scenarios projects and one of the four, the Blue Skies scenario, presented a novel idea for the future of IP. A break-out session followed and one of the suggestions was that a new form of IP is required. "Soft IP" was the name given to this new form of IP.

Soft IP is a system that enables efficient capture and protection of IP, with provision for making licenses available to all interested parties. This is particularly applicable to patents. This scenario acknowledged the value of IP in a licensing context, the need for balance between uses of IP in various industries and development models and the fact that the value of a patent does not always reflect the value of the invention but more the cost of being unable to continue using the invention when an injunction is given. While the injunction based leverage available from a patent is perfectly appropriate in some contexts (e.g., pharmaceuticals), it may not be appropriate or fair in other contexts such as standards and interoperability in industries with significant network effects.

The Soft IP approach would be particularly attractive in situations involving the so-called honest concurrent user (to borrow the trademark term) of the invention. Such people are, of course "innocent" infringers. Innocent infringers have not engaged in any nefarious or unprincipled behaviour but need to use patented invention(s), for example, inventions essential for software interoperability, essential for Internet use, for telecommunication projects where interoperability is a must-have, or for Open Source projects.

Patent law already recognises the concept of the "innocent infringer - one who did not know of the patent or could not reasonably be expected to have known of the patent. The "Soft IP" concept would extend the notion of the innocent infringer. One context within which this has been discussed is the European Community Patent where the cost of the patent would be prohibitive if translation into all the languages of the European Community were required, and yet those potential infringers in countries not using the language of filing of the patent application will be vulnerable to being an innocent infringer simply because the patent is not in their own language. We want to consider the Soft IP concept in relation to the Community Patent, but equally it could apply in relation to the European patent as a whole (a single patent covering all EPC Contracting States).

The European Community Patent would be a valuable right with wide geographic spread; covering the whole of the Community of 27 countries (with more to join). The long term problem to implementing the European Patent has been languages, with translations being required of the whole specification or the claims (or both) into all the languages of the Community, thereby making the cost prohibitive and legal scope uncertain. Proposals have been made for a single or three language solution to solve the cost problem for applicants; however, as indicated above, infringers are vulnerable if they cannot understand the language of the patent.

Under the Soft IP proposal, the Community Patent route would be optional, and the alternative European (bundle of national patents) and National routes to patents would remain. The language of these granted national patents would remain as now, subject to the London Agreement on translations when it comes into force.

The opportunity, therefore, is to provide an alternative patent system. The Community Patent system would be a different route to those presently available - a new system in addition to the existing systems.

The Community Patent would not be translated into all the Community languages but would in be in the language of filing with the EPO **and** it would be automatically endorsed Licenses of Right.

The License of Right endorsement means that injunctions to stop infringement would not be available. Instead the patent owner would acknowledge that some form of compensation for infringement would be acceptable - the compensation could be monetary with perhaps a cross license being taken into account if appropriate. The fact that Licenses of Right are available greatly assists innocent infringers since they would be assured of obtaining a license, and would not be faced with the prospect of their business being disrupted or closed down.

As with the existing License of Right systems in the UK, and Germany, if parties cannot agree on terms, terms would be decided by the courts. The court system currently proposed for the Community Patent would be perfectly capable of dealing with the Licenses of Right requests in addition to handling normal infringement and validity questions.

An important consideration, as indicated above, is that the proposed Community Patent would be an optional system and an additional system, therefore full cost national patents obtained directly or through the EPO would still be available.

The proposal would require that the applicant for the patent applies via the EPO in an official language as at present. On grant, the applicant would choose whether it wants a Community Patent automatically endorsed Licenses of Right or whether it wants to use the existing routes to national patents.

The Community Patent would not need to be translated and renewal fees would be payable to a single body, whereas the national patents would still need to be translated, the translations filed with national patent offices and renewal fees paid to the national offices. If national patents are selected, injunctions would be available before national courts.

An advantage of the proposal is that it removes vulnerability of innocent infringers to injunctions because there is a certainty that licenses will be available. In the case of disputes over license terms, the terms and royalty would be settled by the courts under reasonable and non-discriminatory terms.

Another advantage is that, because it is an optional system and leaves the existing system in place, there is no disruption to existing businesses, and valuable business models such as those for the pharmaceutical industry would not be adversely affected.

It might be expected that new business models would be developed to take advantage of the "reward" based system of the Community Patent. In effect the patent would be a Non-exclusionary Community Patent, open for all in the community to be able to obtain a license - it would thus be a true community patent.

Perhaps there could be other advantages for the Non-exclusionary Community Patent with standards bodies or similar bodies directing technology adoption to those inventions covered by the Community Patent where Licenses of Right are therefore available.

National patent offices and national patent attorneys would play an important role in providing the infringement and validity opinions essential for the potential infringers. National patent offices would have the advantage of their close working relationship with the EPO giving them access to information and examiner resources with the required language skills, where necessary, to assist with preparation of the opinions. It would be hoped that the national patent offices would provide

low cost high quality infringement and validity opinions such as those currently available from the UK Intellectual Property Office.

There are serious concerns that EPLA as currently proposed will be favourable to patent trolls on the one hand and a poor forum for consideration of highly valuable patents on the other. The USA Supreme Court in the eBay case reduced the power of trolls by introducing the discretion for courts not to grant injunctions if the equity of the situation indicates otherwise - in Europe, there would be no such protection against trolls under EPLA. Rather than pursue an unsatisfactory EPLA, efforts should be put into the Community Patent of the type proposed under a Soft IP regime and keep the current EPO/national system as an option.

National states should perceive the Community Patent proposal as less of an attack on the sovereignty of their courts; it reduces the Community Patent Court to a more administrative and technical tribunal role (along the lines of the EPO Boards of Appeal) because it can only decide validity, infringement and license terms. National courts could be asked to grant a prohibition on use of the patented invention if the infringer failed to pay under the agreed terms of the license. Most importantly, injunctions are left to national courts alone and directed to those patent owners that really need injunctions and are willing to use the current patent system for the privilege.

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