



EUROPEAN PATENT JURISDICTION: PROCEEDINGS & RULES of PROCEDURE

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Background



On EICTA



EICTA, founded in 1999 is the voice of the European digital technology industry



It includes large and small companies in the Information and Communications Technology and Consumer Electronics Industry sectors



EICTA is composed of 61 major multinational companies and 40 national associations from 28 European countries



In all, EICTA represents more than 10,000 companies all over Europe with more than 2 million employees and over EUR 1,000 billion in revenues



On EICTA's IPR Group



Total R&D investments in Europe: over 20 % go into ICT/CE




This is reflected in the prominence of IPR issues within the EICTA IPR Group's work engagement



EICTA's IPR Group comprises leading patent specialists and further stakeholders from ICT/CE industries active on the European market place

EU Patent Judiciary Reform and ComPat - General



The User Perspective: Why does it substantially matter to EICTA members?

-  To be able to more uniformly protect, enforce and defend their innovative power Europe-wide, **to succeed in a global market environment**, while making the system more accessible and affordable, in particular for SMEs

Comment on the progress

-  EICTA actively followed this dossier, in particular since the **impressive progress it took with the present DG Internal Market Directorate in charge**

Comment on the current state

-  Users' general concerns remain concentrated on **quality, efficiency and cost competitiveness** of the projected new system, which further needs to be **balanced** and bring **legal certainty and reliability**
-  From overall user perspective, **the new system must bring significant improvements over the system we have today**, otherwise industry can live with the existing system

Procedural Issues (1)

- ➔ **Striking the “fair balance”**
 - ➔ Innovative companies are on the one hand patentees, on the other hand they can be alleged infringers
 - ➔ A fine-tuned litigation system which balances out the different interests is therefore crucial to us
- ➔ **In terms of procedural issues, EICTA discussions focused more critically on languages of the proceedings, and on remedies**
 - ➔ These procedural issues are being discussed along with other general issues concerning the new judiciary, including allocation of cases/split jurisdiction, scope of competence, opt-out solutions, ECJ review, composition of panels
- ➔ **Other discussions focused on specific procedural provisions, at rather technical level**
 - ➔ This is being shared with the Presidency and the Commission, along with all detailed comments on the current Patent Jurisdiction draft, and the ComPat draft
 - ➔ All details cannot be included in this short presentation, but are open to be shared
- ➔ **Further procedurally important aspects in the current draft, like the rules on securing evidence, were generally well received**

Procedural Issues (2)



In particular: Languages of the proceedings



This is important not only as a stand-alone issue, but in its implications with other general (non-procedural) issues discussed

- ➔ Language issues are in a tension field between practicability/feasibility aspects (language barriers from users' and courts' perspective), and efficiency/cost aspects (translations)
- ➔ Which language of proceedings regime is practicable/feasible for future, *truly multinational* judge panels?
- ➔ May an opt-out solution mitigate subsisting language barriers, so that users can continue choosing the national courts, still fully proceeding in their local language of proceedings?



More or less far-reaching positions for a uniform language regime have been discussed for the future system

- ➔ Such positions may also suggest approaches to optimise language flexibilities currently provided in the Patent Jurisdiction draft



Compromise position

- ➔ An EICTA compromise position includes, for the future system, each party's right to submit all *documents* in the language of the patent without translations being necessary

Procedural Issues (3)



In particular: Remedies (injunctions and damages)



In the discussions, users with pertinent experience in overseas' jurisdictions take a critical look on the injunctions and damages regime

- Main background is misuse of injunctions and damages as known from the US system, mostly in context with "patent trolls"



Suggestions re. (preliminary and permanent) injunctions include a certain range of arguments, including that...

- ...courts should have discretion to weigh the interest of the parties and take into account the potential harm caused to both parties

- ...both preliminary and permanent injunctions need a balancing test including adequacy of monetary damages, irreparable harm, the public interest, etc.

- ...however, if applied to deny a *permanent* injunction in Europe, would such a balancing test from the U.S. "*eBay decision*" lead to a de facto compulsory license, since the European legal system only allows for compensatory damages?



Suggestions re. damages include

- Considerations to calculate damages from the harm suffered by the patent owner, whether they be lost profits or reasonable royalty

- A proposal to incorporate the concept of apportionment (i.e. measurement by the actual contribution made by the inventors)

CONCLUSIONS



Main challenges are to be overcome in an extremely complex landscape

- ➔ Steep differences in patent experience between MS
- ➔ Related quality issues of the patent system at stake
- ➔ Language and translation issues
- ➔ Practicability and feasibility issues
- ➔ Political power play



Very impressive progress has been achieved in 2008



It is hoped that the French Presidency will carry this on