

# Industrial Property Rights Conference Strasbourg

16-17 October 2008

## Conclusions

### Day 1 – European Patent Jurisdiction and Community Patent

Ladies and Gentlemen, distinguished speakers,

Let me start by thanking the moderators, the panellists and those who took the floor from the audience, for an extremely interesting, highly relevant and important debate. The top quality contributions and statements, the variety of issues addressed and the broad range of views expressed, make it difficult to draw detailed and exhaustive conclusions. However, I would summarize the debate as follows:

1. There seems to be broad consensus on the **need for action**. The debate has clearly highlighted that the current fragmentation of the patent system, the costs and complexity, as well as the legal insecurities are all harmful to the competitiveness of European companies. They hamper access to the patent system for SMEs and create barriers for their internationalisation. As one participant stressed, in Europe today, every second invention is not protected because of the weaknesses of the patent system. Europe is lagging behind and this is even more evident at a time when countries such as China are making major efforts to create a robust patent system, including a centralised and specialised Patent Court. The global context, exacerbated by the economic crisis, underlines the urgency. Participants recalled that the debate has lasted far too long – over 40 years – and that it seemed easier to create the European Union than it does to create a unified patent system. Participants were unanimous in their calls for action.
2. There also seemed to be a broad consensus on the **objectives** of patent reform. Participants agreed that the creation of a patent litigation system and of a Community patent should not be pursued at any cost. Compared to the patent system as it is today,

both should bring real benefits to users, otherwise we should leave it. The awaited patent litigation system should deliver high-quality judgements and cost-effective, efficient and speedy procedures. It should also strike a fair balance between the interests of patent proprietors and alleged infringers, whilst having an overall beneficial effect on competition and innovation.

3. There appeared to be broad agreement on some of the **main features** of the patent litigation system as enshrined in the latest version of the Draft Agreement on the European Union Patent Court (Ref 11270/08 - 30<sup>th</sup> June 2008).  
Participants agreed, in particular, on a decentralized Court of first instance with local and regional divisions, and on the need for a multinational composition of the panels, although there was some divergence on the details. Participants were also broadly in agreement about the involvement of technical judges and on the concept of a pool of judges. This will allow for the most efficient use of resources and will ensure the participation of experienced judges in all local divisions. Again participants agreed on the desirable scope of jurisdiction for the new Patent Court. The Court should cover not only patent infringements but also all relevant defences brought forward by an alleged infringer, such as defences under competition law. Furthermore, with respect to remedies and sanctions, participants concurred that in cases of infringement, judges should not grant automatic injunctions, but should have the discretion to weigh the interests of both parties and refuse an injunctions where appropriate.
  
4. As regards **procedural rules**, participants felt that these are as important as organisational rules for the appropriate functioning of the new Court System. These should be addressed at the same time and should not be left to be drawn up by the Patent Court at a later stage. Procedural rules need to be specialised and tailor-made for patent litigation. They should build on the Venice-II-Resolution and on what is best practice in the different national systems, both under common law and continental traditions. However, we should bear in mind that we do not seek to harmonize national laws but aim at building a new and optimal system. Procedural rules should leave judges with some discretion to deal with cases in a proportionate way, while guaranteeing predictability and legal security for the parties. They should allow for effective case management, whilst not interfering with the freedom of the parties to present their case and the supporting evidence.

5. There also seemed to be broad support among participants for the creation of a **European Mediation and Arbitration Center**. Representatives of SMEs, in particular stressed, that although the creation of a European Patent Court would facilitate access to justice for SMEs, out-of-court Settlements would still be an attractive option, both in terms of costs and speed of proceedings. A European Center with tailor-made facilities for SMEs could further help SMEs to defend their rights more effectively.
6. Despite broad consensus on the main features of the new Patent Court, there are still some **areas of divergence or issues where further work is needed**. Firstly, this concerns the **exclusivity of jurisdiction**. Amongst the participants there was support for the possibility of holders of pre-existing European patents to opt out from the jurisdiction of the new Patent Court. Others suggested that parties by mutual agreement should be able to litigate before national courts, if they seek a judgement with effect only for their national territory. This certainly deserves further reflection.

Another area where further work is needed is on the **language issue**. While users argue in favour of a restricted language regime for reasons of efficiency, there was also awareness that this may not be politically feasible. However, there was a strong feeling that practical and pragmatic arrangements need to be found which will reduce costs and complexity for parties. One suggestion was to give parties the possibility to file first submissions in the language of the patent, pending a decision on the language of proceedings. As regards **representation of the parties**, there is a divide between those who support representation of the parties by patent attorneys and those who feel that representation should be reserved to lawyers. Finally, there is the issue of "**bifurcation**". It comes as no surprise that this an issue of "split" opinions. But as long as the divide between supporters and opponents of bifurcation cannot be overcome, there seems hardly any solution other than to provide flexibility in the system. Practice will determine what approach will work best.

7. As for the **Community patent**, participants reiterated that it should be cost-effective, legally secure and reduce complexity for companies. It should also allow for more efficient enforcement of rights in the European Union and its external borders. In particular, it should allow for the seizure of all products that violate patents of European companies, by customs authorities, wherever they enter the European single market.

There seemed to be broad consensus amongst participants that automated translations would be the right way forward to address the language issue. This has been a major stumbling block to the creation of the Community patent for many years. It was stressed that machine translations would be helpful for patent information, but these should hold no legal value. Once again the main issues for participants were cost-effectiveness and legal security. Or, as one participant put it: "The creation of a Community patent should allow companies not to hire more lawyers but more engineers."

8. Finally participants also expressed their views on **what we should do if this patent reform project fails** – once again!

In fact participants suggested that we should consider alternative approaches such as enhanced co-operation. Some pointed to the creation of the EURO and the Schengen Agreement as examples which demonstrate that sometimes the "willing" have to move ahead first. However, we are not yet there. For the time being, we are still working on "plan A" and as long as there is a chance of success, we should not even speculate on "plan B". Or, as another participant said: "Europe should act as a European Union and not as a Union of European countries."

## Day 2- Enforcement of Intellectual Property Rights

Ladies and gentlemen, distinguished speakers,

First of all I would like to thank all of our moderators, panelists and other participants who jointly contributed, once again, to making the second day of conference a lively forum, in which we exchanged views, shared our experiences and ultimately proposed ways forward for enforcement, to help combat this dangerous phenomenon.

As participants stressed, the **current financial crisis** is likely to aggravate the problem of counterfeiting and piracy as companies and consumers alike, seek to find low priced goods and services. Counterfeiters recognize opportunities and favorable conditions extremely quickly and are likely to expand their illegal activities. Participants also recalled that counterfeiting is a serious and organized criminal activity that affects almost all economic sectors and a large variety of products. As one participant stressed you can find counterfeit products in your bathroom, bedroom, living room, kitchen, car and even in the sky above us.

**1.** Much reference has been made to the **Internet**. It is true that that on the one hand it facilitates the sale of counterfeit goods. However, on the other hand the presence and sale of fake goods undermines consumer trust in internet selling. Therefore, stakeholders, brand owners and internet sellers alike have an intrinsic interest in stopping counterfeit sales. For this reason inter-industry agreements would appear to be an extremely promising way forward. As a result, it seems to be worthwhile placing effort into exploring this issue and launching stakeholder dialogues.

**2.** IPR infringements appear everywhere and no sector is exempt from the danger. In this respect some participants stressed that **all Intellectual Property Rights are equal and merit equal protection**. The fight against IP violations should not be limited to trademark infringements. Infringements of trademarks can be easy and more straightforward to establish.

However, the willful infringement of patents and the copying of patent protected products have equally serious consequences.

**3.** Amongst the participants there was overwhelming support for the **European Observatory** on Counterfeiting and Piracy. Despite a growing general awareness of the dangers of counterfeiting and piracy, facts and figures firmly establishing the scope and scale of the problem have been difficult to generate. Through an observatory we have the opportunity to support enforcement through detailed assessments of existing data on trends and the overall extent of the problem.

**4.** Participants also felt that **Administrative cooperation** between the National authorities, responsible for the fight against counterfeiting within Member States, needs to be improved. It was generally felt that cooperation between customs in Member States functions very well and similar efforts should be encouraged in other areas. This should promote Europe-wide actions.

**5.** There was a consensus that **Raising public awareness about the dangers of counterfeiting** needs to be better focused. In this regard we welcomed the BASCAP Intellectual property Guidelines for Businesses which were launched that morning. However, participants felt that a "lighter", reader-friendly version of these guidelines should be produced for SME's, this would engage a wider audience. We were also reminded that most consumers are also employees. Therefore, the message that buying counterfeit products puts employees jobs at risk should become part of every company's IP culture.

**6.** Finally participants felt that more effective use should be made of **new technologies** in the fight against counterfeiting. Innovative technologies can greatly improve the tracking and tracing of original goods and the identification of counterfeit products. Unfortunately, in the search to develop such tools, at present most companies are working on their own technological solutions. We need to think about how we might bring the industries together to promote common platforms.

To sum up participants felt that there had been enough debate in all of these areas and that there is an urgent need for action. We now need to assume our common responsibilities and get things done.

Thank you for your attention and for a most stimulating debate.

Margot Froehlinger