

Conference on Industrial Property Rights
in the
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Panel 2

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1.- First of all, I should say that I personally believe that a unified Pan European jurisdictional patent system will be sooner or later not only convenient but necessary. Even in the present situation, when European patents but not Community patents exist, which means that not a unique right but a bundle of national rights derive from a single patent application, it seems to be reasonable to establish a system appropriate to issue a single answer when the questions are:

- is the right valid?
- how far does the right extend?

2.- According to the draft, the Patent Judges will be expert in Patent Law and also in general fields of technology, which must drive to decisions with high degree of legal and technical accuracy. It is therefore reasonable to expect an improvement of the certainty and predictability of those decisions, which is one of the most important demands from both the industry and the practitioners.

3.- Also, the Pan European jurisdiction of the Court would make that one single decision sufficient (instead of decisions country by country), which will avoid contradictory decisions for identical situations.

4.- The cost of the actions is another important issue. Those so called users of the system, that is, those companies that normally use the European patent system, file applications, are granted patents and enforce these patents against third parties will very likely save money since (if the calculations are correct) a European action would have a cost equivalent to three national actions, not taking into account the cost of an action in the United Kingdom, which is much higher than in the rest of Europe.

5.- However, I wonder whether we can consider users of the European patent system only those who file, are granted and enforce patents.

In my particular view, any European company, any company based in the European Union or any person living in the territory of the Union is a user of the patent system, since we all are affected by the consequences of the application of the rules that regulate such system.

6.- This is specially important for those companies that are what I could call "passive users" of the system or "marginal users" of the system in as much as they either never file patent applications or do it very seldom most of them are small and medium sized companies.

7.- I neither represent Spain nor Spanish associations or companies in this panel, but I can not hide that since in my professional circle it has been known that I have been invited to participate in the sessions of the group composed by Judges and Lawyers, I have received a number of input and comments about the draft European Union Judiciary, and I must say that most of them have been disfavorable.

One of the reasons is the view of the draft as a potential tool to make easier and cheaper for the patent system users to sue local companies. According to statistics published in 2006, Spanish companies applied for only a 0.81% of European Patent Applications and were granted only a 0.58% of European Patents.

It is not difficult to guess that for an average Spanish company the likelihood of being the defendant in a European patent process is extremely higher than being the plaintiff.

Furthermore, in Spain are most usual small and middle sized companies. Even for those who are European patent owners it is extremely infrequent to be involved as plaintiffs in Pan-European patent litigations.

8. To my knowledge, this is not a specific problem of Spain. According to the statistics, the situation is similar or even worse in many countries in the European Union, which is not strange at all, taken into account that about 50% of the patents granted by the European Patent Office belong to non-European applicants, mainly from Japan and the U.S.

9.- A number of reasons are generally given to oppose, totally or partially, the proposed system, for example,

- Difficulty or impossibility of matching the draft with national constitutional legislation.
- Excessive (unaffordable) costs of the litigation for the defendants when they are small or medium sized companies.
- Linguistic discrimination especially in cases of nullity or declaration of non-infringement actions, since the central division will only use the patent language, and there are only three possible patent languages, according to the EPO rules.
- Difficulties in accepting Technical Judges mainly since the panels in which they will seat would decide on strictly legal issues.

There are other more specific problems but perhaps it would take too long to mention each of them.

10. As I said in the beginning, I believe that sooner or later a unified European judiciary system will be necessary for litigation related to European and/or Community patents all over Europe.

However, I have felt it necessary to remember some of the objections raised by companies or even countries less developed and less users of the present patent system, just to call everybody's attention under the necessity of finding formulas that prevent that the adoption of a Pan European system goes beyond its natural goal, that is, the fair protection of the intellectual property, and become an instrument in the hands of a very mighty institutions (very often non European institutions) to limit the competition possibilities for small and medium sized companies.