



FICPI Position

On the „Future Patent Policy in Europe“

JURISDICTION

Dr. Daniel Alge
Chairman CET Group 4 (European Patents:
EPC and Community Patent Questions)

FICPI Position On the „Future Patent Policy in Europe“



- *FICPI (Fédération Internationale des Conseils en Propriété Industrielle; International Federation of Intellectual Property Attorneys) is an international association of intellectual property attorneys in private practice*
- *With members in more than 80 countries, i.a. in all EU and EPC countries*
- *Representing all kinds of users:*
 - *Large Industry*
 - *Small and Medium Enterprises*
 - *Universities*
 - *Free Inventors*
 - *Third Parties (“Passive Users”)*



FICPI Position

On the „Future Patent Policy in Europe“



- *Patents in Europe: Present*
- *Patent Application, Examination and Grant:
EPO and national patent offices (NPO)*
 - *works excellent*
 - *flexible (territory)*
 - *EPC is highly balanced between applicants, passive users and public*
- *Enforcement:*
 - *works excellent in some countries*
 - *pan-EU harmonisation not given*



FICPI Position

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- *Patents in Europe: Present*
- *Enforcement: pan-EU harmonisation lacking*
- *no EU civil/penal law, however:*
 - *“Brussels” Regulation (Council Regulation No. 44/2001 on on Recognition and Enforcement of Judgments)*
 - *IP Enforcement Directive (Directive 2004/48/EC on enforcement of intellectual property rights through civil procedures)*
 - *Rules for enforcement of EU Trade Marks and Designs*
 - *Articles 90 – 103 of Regulation (EC) No. 40/1994*
 - *Articles 79 – 96 of Regulation (EC) No. 6/2002*



FICPI Position

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- *Patents in Europe: Present: What works ?*
 - ✓ *Material Patent Law: EPC*
 - ✓ *EPC-system works in EU, although not (necessarily) covering EU as a whole*
 - ✓ *EPO (cf. USPTO, JPO)*
 - ✓ *EU Trade Mark and Design Enforcement*
 - ✓ *National Courts have power (IP-Enforcement-Dir.)*
 - ✓ *Judgements pan-EU possible (except nullity of IPR)*
 - ✓ *Some national courts are „IP competent“*
 - ✓ *pan-EU jurisdiction in fields where ECJ has final word (e.g. SPCs)*



FICPI Position

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- *Patents in Europe: Present: What's missing ?*
 - *EPC is not EU law → no ECJ jurisdiction with harmonisation effect on national courts; limited harmonisation by EPO appeal boards*
 - *not all countries have „patent competent“ senates, especially in first instance → legal uncertainty*
 - *Community Patent System → current proposals too expensive (too many languages) or not balanced*
 - *Different enforcement results in different Member States possible → legal uncertainty could raise costs*



FICPI Position

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- *Patents in Europe: FICPI Proposal*
 - *Future must be based on existing **working structures** and **competences***
 - *Future system must have the same **balance between all users** as in the system already working today*
 - *Future system must provide **efficient enforcement proceedings**, especially **competent national courts***
 - *Future system must have at least the same **flexibility** as the system already working today*
 - *Future system must provide **EU-wide legal certainty***



FICPI Position

On the „Future Patent Policy in Europe“



- *FICPI Proposal: Jurisdiction*
 - Use of the *court system* already working for *EU Trade Marks and Designs*
 - Requirement for Member States to establish „*Patent (IP)*“ *competent senates* of first instance (by EU Regulation) → forces all Member States to provide competent senates
 - „tighter“ rules for *referral to ECJ* (Art. 234 EU Treaty) → EU harmonisation
 - specialised „*Patent (IP) Chamber*“ at the ECJ → competent decisions by ECJ



FICPI Position On the „Future Patent Policy in Europe“



- *FICPI Proposal: Jurisdiction*
 - *The **judges (senates)** should be the „player“ with the best knowledge in patent (IP) law, not the patent attorneys or lawyers presenting their cases (no juries, no trial by ordeal, no flipping coins)*
 - *right of **full representation** (if party wishes) for **qualified patent attorneys** → flexible and competent representation of parties*
 - *EU-Patent-Enforcement Regulation for EU MS + „**Lugano-like**“ **Treaties** for EPC MS not being EU-MS (also for EU Design and Trade Marks possible)*



FICPI Position On the „Future Patent Policy in Europe“



- *FICPI Proposal: No „new animals“: EPLA:*
 - *based on a Diplomatic Conference*
 - *Constitutional Problems in each Member States*
(Jurisdiction is far more than power to grant patents (EPC))
 - *Difficult to change law* (no flexibility to respond to changing needs; see: EPC 2000 enters into force in 2007 !!)
 - *Not enough competences:* questions of ownership, interpreting (license) contracts, (transfer of) right to the patent, legal questions in connection with infringement excuses (exhaustion, contract law, etc.), right of information, legal costs, cost of publication,...



FICPI Position

On the „Future Patent Policy in Europe“



- *FICPI Proposal: No „new animals“: CPC:*
 - *based on 225a, 245 Nice Treaty*
 - *Constitutional Problems in each Member States*
(Jurisdiction is far more than power to grant patents (EPC)); Each Member State must accept
 - *Difficult to change law*
 - *Not enough competences: questions of ownership, interpreting (license) contracts, (transfer of) right to the patent, legal questions in connection with infringement excuses (exhaustion, contract law, etc.), right of information, legal costs, cost of publication,...*



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- *FICPI Proposal: Material Patent Law*
 - *EPC Art. 52-57 and 83/84 (and most articles of the proposed Community Patent Regulation): into an **EU-Regulation** (no problem, because already harmonised in all Member States (MS))*
 - ➔ *ECJ harmonisation in the European framework*
 - ***Community Patent (CP) = European Patent (eP)** for the MS for which the eP has been validated ➔ CP has same effect in each validated MS (guaranteed by ECJ)*
 - *EPO as granting authority*
 - *Link EPO Boards of Appeal ↔ ECJ*
 - *accept that CP does not necessarily cover the EU as a whole (which already works well today); ➔ political and financial incentives to motivate applicants to validate in all MS*



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- *FICPI Proposal: Jurisdiction*
 - *Take the good features of EPLA, etc.*
 - *Make the enforcement (and material patent law) falling under EU-law by EU-Regulations*
 - *Force the national courts to deliver questions to ECJ (→ Right of a party to let the ECJ check whether a court had had the duty to deliver a question to the ECJ; if it had: remedy: cancellation of the decision and referral to the ECJ)*



FICPI Position

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- *FICPI Proposal:*
- *Establish the Future System by combining excellent existing structures in a synergistic manner to achieve an efficient and balanced System with a maximum harmonisability potential in the EU to the benefit of all users*
- *and: steadily improving on the details*





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