

Jurisdiction

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Do nothing?

An easy option for the European institutions at this stage would be to do precisely nothing about patents. We already have a European patent system. The current system works well. The examination and opposition procedures at the EPO mean that few trivial patents get through. Most of the complaints one hears about the patent system in the US, simply do not apply in the European patent system. There is not the need or political will to harmonise patent law further, as we saw with the CII spectacle last year.

Doing nothing is indeed a viable option. There are, however, a couple of very practical, achievable improvements that could be made, namely in the area of the cost of applications and litigation, and consistency in litigation over validity and infringement of patents.

Reducing cost through the London Agreement

Practical Step No. 1: The so-called London Agreement could substantially reduce the cost of patents in Europe, which would benefit small and large enterprises alike. As Mr Gargani described this morning, the average cost of getting a European patent granted through the EPO and validated in various national patent offices is about three times higher than cost in the US and twice as expensive as Japan. The Commission's own figures say that the average cost of a European patent is between €30,000 and €50,000, where in the US it's between €10,000 and €15,000 and in Japan between €15,000 and €20,000. The bulk of the difference is down to translation costs. Every EU member state requires the patent application to be translated into its own official language.

The London Agreement is a proposed protocol to the European Patent Convention that is meant only to require filing of an EPO-granted patent application in one of the three official languages of the EPO (English, French, or German) in order to validate it in a country that has joined the protocol. A full translation

of the patent would be required in the event of litigation in that Member State.

Seven countries including Germany and the UK have already ratified the London Agreement, and Denmark has voted to join. Eight countries including not only Germany and the UK but also France must ratify the London Agreement for it to come into effect. It is encouraging that the French National Assembly and the French Senate both have recommended that France join the London Agreement. Prompt ratification of the London Agreement, which the other member states and the Commission should wholeheartedly support, would benefit the entire patent system in Europe by making it more affordable and more accessible.

Let me make two very direct observations about this issue. First – nationals from all EU member states are ALREADY filing their EPO patent applications in French, German or English. Let's stop pretending that the patent system cannot deal with a limited number of languages. It can and it must.

Second, getting agreement around something like the London Agreement is necessary if the Community Patent is ever going to become a reality. Why would any business use the Community Patent when they would have to make 21 soon to be 23 mandatory translations, when they could get a European patent instead and pick and choose which translations they do?

Yes, the local language is near and dear to the heart of every politician, but let's be very clear, if the language issue cannot be fixed, the Community Patent is effectively dead.

Reducing cost and uncertainty through the EPLA

The second structural issue that needs prompt consideration is the **consistency of interpretation** in litigation, which is the direct result of having no common patent court system or appeals court. Once a European Patent is granted, it is "validated" as a set of national patents, subject only to the rules and interpretation of the respective national courts. In litigation, therefore, your European patent can be found valid in Germany but invalid in the UK, or infringed in Sweden but not infringed in Spain. This is not a problem with patent law as such, but rather that different judges can interpret specific facts differently, and there is no common court of appeal to resolve these differences.

The European Patent Litigation Agreement would promote legal certainty and reduce costs by fixing the litigation consistency issue. The EPLA envisages setting up a unified court system to judge the validity and infringement of European patents. These would be new courts, or national courts designated as European Patent courts, created under the European Patent Convention rather than the Community Treaties. Through the common appeal court, the EPLA would mean that patents could be declared valid or invalid, and that activities could be declared infringing or non-infringing, for all of Europe. There is simply no question that this would avoid duplicative litigation, reduce legal uncertainty, and reduce litigation costs in multi-jurisdiction cases.

Let me just clear up some misunderstandings that are being repeated about the EPLA:

1. **It is not a creature of the European Patent Office.** The EPLA has been developed by 11 European member states in the litigation working group.¹ It must be ratified by the national governments, not the EPO in order to go into effect. It is supported widely by national patent judges²—who would like to see greater consistency in patent decisions and like anyone else hate to reinvent the wheel when the same European patents come up for decisions in different member states.
2. **It will save costs for litigation in multiple jurisdictions.** The EPO's estimates that even for cases litigated in two countries, the EPLA system would reduce the overall cost. It is this very kind of litigation where costs and duplication need to be addressed.
3. **It is not mandatory to use the EPLA system.** It will still be possible to litigate national patents in a national court. Until the EPLA member states decide otherwise, it will still be possible to litigate European patents in national courts. There's nothing forcing anyone to use this system, but it can be used where it offers cost or litigation savings. That is simply what the EPLA is about.
4. **The EPLA courts will be independent.** Article 4 of the draft EPLA says that the Administrative Committee, which is made up of the Member State governments and not the

¹ <http://www.european-patent-office.org/epo/epla/pdf/intro.pdf>

² *Europe's top judges start campaign for a single court to hear patent cases*, Financial Times (4 Nov. 2005), <http://search.ft.com/searchArticle?id=051104000924&iabala=true>.

EPO, will appoint the EPLA judges.³ Article 5 of the EPLA requires that the judges and the registrar of the court shall enjoy judicial independence. They judges must be legally or technically qualified. This court system will not be an arm of the EPO or captive to the EPO in any way—it will be as independent as any court in the member states.

The European patent system works very well as it stands, apart from the areas of costs and litigation consistency. There is no need and no political will to reinvent or change the substance of patent law, but there are practical areas that can and should be fixed as structural rather than substance issues—that is, the issues of cost and litigation consistency which are the real needs—through the London Agreement and the EPLA. This would not only fix current problems, but also provide a good model and precursor for a workable and cost efficient Community Patent.

³ http://www.european-patent-office.org/epo/epla/pdf/agreement_draft.pdf.