

UNIFORM PATENT LITIGATION IN THE EUROPEAN UNION: AN ANALYSIS OF THE VIABILITY OF RECENT PROPOSALS AIMED AT UNIFYING THE EUROPEAN PATENT LITIGATION SYSTEM

The European patent system has undergone many significant changes¹ since international intellectual property rights were first recognized among European countries in 1883.² While many of these changes have reduced the costs associated with obtaining patent rights throughout Europe,³ none of the changes have successfully addressed one of the biggest problems still plaguing the European patent system today: inefficient and fragmented patent litigation.⁴ In recent years, the European Union and the European Patent Organization have made several proposals to resolve these issues.⁵ None of these proposals, however, have been successful,⁶ and recent opinions expressed by the Advocates General of the Court of Justice of the European Union and the Court of Justice of the European Union suggest that these proposals, in their current form, are destined to fail.⁷ This Note assesses the viability of the recent proposals to reform the patent system aimed at unifying patent litigation throughout Europe and suggests that an agreement between the members of the European Patent Organization is the most efficient solution.

1. See, e.g., DOMINIQUE GUELLEC & BRUNO VAN POTTELSBERGHE DE LA POTTERIE, *THE ECONOMICS OF THE EUROPEAN PATENT SYSTEM: IP POLICY FOR INNOVATION AND COMPETITION* 25–26 (2007) (summarizing significant developments since the late nineteenth century).

2. See *id.* at 25 (“The first outcome [of the international exposition of Vienna in 1873] was the Paris Convention of 1883, initially signed by 10 countries (Belgium, France, Guatemala, Italy, Netherlands, Portugal, San Salvador, Serbia, Spain, and Switzerland).”).

3. See *infra* Part I.

4. GUELLEC & VAN POTTELSBERGHE DE LA POTTERIE, *supra* note 1, at 221–22.

5. See *infra* Part III; see also James Forrester, James Killick & Anthony Dawes, *Obstacle to the Creation of EU-Wide Patent Court*, <http://www.bnai.com/EUWidePatentCourt/default.aspx> (last visited Apr. 7, 2012) (providing brief summary of the different attempts by different European bodies to reform the patent system).

6. See *id.*

7. See Press Release, The Draft Agreement on the Creation of a European and Community Patent Court is Not Compatible with European Union Law (Mar. 8, 2011), *available at* <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-03/cp110017en.pdf> (summarizing reasons as to why proposals were incompatible with current European Union Law).

I. HISTORY OF THE EUROPEAN PATENT SYSTEM

To understand the nature of the current problems with patent litigation in the European Union, one must first understand the historical framework of the European patent system. The Paris Convention of 1883⁸ was one of the earliest international agreements on intellectual property rights.⁹ Although patent law was not the main focus of the Paris Convention,¹⁰ the resulting international relationships set the stage for future cooperation in developing a European patent system.¹¹

Aside from international cooperation, two notable results grew out of the Paris Convention of 1883. First, the Paris Convention introduced the principle of national treatment: citizens of a signatory state would receive the same protection in a foreign country as the foreign country's citizens.¹² Second, the Paris Convention presented the notion of "priority application"—where an applicant can use the application date in one country to establish priority in other signatory states to the Paris Convention if the applicant files in the other countries within a specified time period.¹³ These two principles were seen as imperative to reliable international intellectual property protection.¹⁴

The Paris Convention of 1883 has been amended six times since its inception,¹⁵ granting more protection with each revision.¹⁶ However, the

8. Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference, July 14, 1967, 21 U.S.T. 1583; 828 U.N.T.S. 303.

9. GERALD PATERSON, *THE EUROPEAN PATENT SYSTEM: THE LAW AND PRACTICE OF THE EUROPEAN PATENT CONVENTION* 11 (1992).

10. *Id.*

11. Michael LaFlame, Jr., *The European Patent System: An Overview and Critique*, 32 HOUS. J. INT'L L. 605, 608 (2010) (citing PATERSON, *supra* note 9, at 11) The Paris Convention is the first instance of international cooperation in patent law. *Id.* at 609. The ten original signatory countries of the Paris Convention were Belgium, France, Italy, the Netherlands, Portugal, Spain, and Switzerland. GUELLEC & VAN POTTELSBERGHE DE LA POTTERIE, *supra* note 1, at 25. The United Kingdom and Germany subsequently acceded to the Paris Convention in 1884 and 1903, respectively. *Id.*

12. Robin Cowan, Wim Van der Euk, Francesco Lissoni, Peter Lotz, Geertrui Van Overwalle & Jens Schovsbo, *Policy Options for the Improvement of the European Patent System*, IP/A/STOA/ST/2006-020 at 6 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1720086. The principle of national treatment has its foundation in what is today known as the *telle quelle* (French for "as is") provision of the Paris Convention, which provides that foreign citizens of any signatory country shall be treated the same way as nationals. *See id.*; Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference, art. 6quinquies § A(1), July 14, 1967, 21 U.S.T. 1583; 828 U.N.T.S. 303.

13. GUELLEC & VAN POTTELSBERGHE DE LA POTTERIE, *supra* note 1, at 25. The time period was originally six months, later amended to be one year. *Id.*

14. *Id.*

15. *Id.*

16. LaFlame, *supra* note 11, at 609.

Paris Convention has not been revised since 1967.¹⁷ In the late 1960s and early 1970s (and even as early as 1959),¹⁸ various countries and international communities discussed several new international agreements on intellectual property rights.¹⁹ These new discussions generated new international agreements, making amendments to the Paris Convention unnecessary.

The first treaty resulting from these talks was the Strasbourg Convention on the Unification of Certain Points of Substantive Law on Patents for Invention (“Strasbourg Convention”), signed in 1963.²⁰ The Strasbourg Convention was the result of discussions within the Council of Europe.²¹ The main purpose of the Strasbourg Convention was to create uniform procedural and substantive requirements for obtaining patent rights throughout Europe,²² which were to be applied by the national courts of the Convention’s member states.²³

At the conclusion of the Strasbourg Convention, European nations were also discussing the possibility of not only a uniform procedure for granting patents, but also a centralized granting procedure for all European nations.²⁴ The Council of Europe recommended the creation of a European

17. GUELLEC & VAN POTTELSBERGHE DE LA POTTERIE, *supra* note 1, at 25.

18. *Id.* at 25, 27.

19. John B. Pegram, *An American View of the Patent System in Europe in 2009*, 91 J. PAT. & TRADEMARK OFF. SOC’Y 594, 595 (2009). Interestingly, it was during these discussions in the late 1960s and early 1970s that the idea of a uniform patent litigation system was first introduced (albeit in the form of a community patent). *Id.*

20. GUELLEC & VAN POTTELSBERGHE DE LA POTTERIE, *supra* note 1, at 27. Although the Strasbourg Convention was signed in 1963, it did not enter into force until August 1, 1980. The Council of Europe Convention on the Unification of Certain Points of Substantive Law on Patents for Invention, *opened for signature* Nov. 11, 1963, C.E.T.S. No. 047 (1980), <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=047&CM=8&DF=12/10/04&CL=ENG> (last visited Apr. 13, 2012).

21. GUELLEC & VAN POTTELSBERGHE DE LA POTTERIE, *supra* note 1, at 27. The Council of Europe, established in 1949, is an international organization distinct from the European Union. *Council of Europe in Brief*, COUNCIL OF EUROPE, <http://www.coe.int/aboutCoe/default.asp> (last visited Dec. 5, 2011). The Council of Europe, originally founded by ten European countries, now consists of 47 European countries. *Id.* The goal of the Council of Europe is focused on preserving human rights and democracy throughout Europe. *Id.*

22. LaFlame, *supra* note 11, at 611.

23. *Id.* Outside of Europe, the Patent Cooperation Treaty was signed in Washington, D.C. on June 19, 1970. GUELLEC & VAN POTTELSBERGHE DE LA POTTERIE, *supra* note 1, at 26, 156. Under the Patent Cooperation Treaty, a patent applicant can file an application with the World Intellectual Property Organization (“WIPO”) and designate in which countries he or she would like to later validate the patent once the patent applicant’s home country has granted the patent. *Id.* at 26.

24. *Id.* at 27. The Strasbourg Convention simply created uniform procedural and substantive requirements that would be applied by the national courts of each country that was a member of the Strasbourg Convention. *Id.* The idea behind a European Patent Office was to provide a centralized body that would apply these requirements in issuing patents, although the resulting patents would still technically be issued by the individual nations. *Id.*

Patent Office, a centralized body with a unitary procedure for acquiring patent rights throughout Europe.²⁵ To achieve this objective, the Convention on the Grant of European Patents (“European Patent Convention”),²⁶ took place between September 5 and October 5, 1973.²⁷ The main purpose of the European Patent Convention was to establish a single, centralized procedure for the granting of patents throughout Europe.²⁸ The European Patent Convention established the European Patent Office,²⁹ which became the executive body and “operating arm”³⁰ of the European Patent Organization.³¹

The European Patent Organization is not an “organ” of, nor is it legally bound by, the European Union.³² Rather, it is a stand-alone organization governed by an administrative body consisting of representatives of the European Patent Convention member states.³³ The task of the European Patent Organization is to grant “European patents,”³⁴ which are carried out by the European Patent Office.³⁵ A European patent has the same effect in each member country as it would if it were a national patent granted by that country.³⁶ Thus, the European Patent Convention provided a “unitary application and examination procedure resulting in the grant of a bundle of

25. *Id.*

26. Convention on the Grant of European Patents, Oct. 5, 1973, 1065 U.N.T.S. 199 [hereinafter European Patent Convention].

27. R. Singer, *The Future European Patent System: An Outline of the Main Elements of the System*, in THE NEW EUROPEAN PATENT SYSTEM 1, 5 (Seminar Servs. Int’l, 1976).

28. European Patent Convention, *supra* note 26, pmb1. The European Patent Convention was intended to complement the Patent Cooperation Treaty in terms of acquiring patent rights throughout Europe. See GUELLEC & VAN POTTELSBERGHE DE LA POTTERIE, *supra* note 1, at 27. According to Guellec and van Pottelsberghe de la Potterie, “[t]he [European Patent Convention] was negotiated in parallel with the [Patent Cooperation Treaty], as countries wanted to ensure consistency between the two, and to make clear that the [European Patent Office] would be a major pillar of the emerging worldwide system.” *Id.* The Patent Cooperation Treaty and the European Patent Convention were also both implemented on the same day, June 1, 1978. *Id.* at 26.

29. GUELLEC & VAN POTTELSBERGHE DE LA POTTERIE, *supra* note 1, at 27.

30. Pegram, *supra* note 19, at 596.

31. *Id.* at 596; GUELLEC & VAN POTTELSBERGHE DE LA POTTERIE, *supra* note 1, at 27.

32. Pegram, *supra* note 19, at 596.

33. GUELLEC & VAN POTTELSBERGHE DE LA POTTERIE, *supra* note 1, at 27. When the European Patent Organization entered into force in 1977, only Belgium, Germany, France, Luxembourg, the Netherlands, Switzerland, and the United Kingdom were members. *Member States of the European Patent Organization*, EUROPEAN PATENT OFFICE, <http://www.epo.org/about-us/organisation/member-states.html> (last visited Nov. 22, 2011). Today, the European Patent Organization has thirty-eight member states, including all of the European Union member states. *Id.*

34. European Patent Convention, *supra* note 26, art. 4(3).

35. *Id.*

36. The European Patent Convention provides, “The European patent shall, in each of the Contracting States for which it is granted, have the effect of and be subject to the same conditions as a national patent granted by that State, unless otherwise provided in this Convention.” *Id.* art. 2(2).

national patents valid in countries selected by the patentee.”³⁷ Because European patents issued by the European Patent Office are treated as domestic patents in any member states, only the courts of the individual countries have the authority to enforce the rights of the patent holder.³⁸ The European Patent Office has no authority to hear infringement actions or enforce a patent-holder’s rights in any country.³⁹

As the conclusion of the European Patent Convention drew near, the then nine members of the European Union⁴⁰ were aware of the European Patent Office’s limited ability to enforce patent-holders’ rights.⁴¹ The members of the European Union began discussing potential solutions to the problem, and one of the main topics of discussion was a community patent system for members of the European Union⁴²—the same goal as the proposals currently under consideration in the European Union.⁴³ The discussions culminated in the signing of the Convention for the European Patent and Common Market (“Community Patent Convention”) at the Luxembourg Conference in 1975.⁴⁴ Many practitioners at that time believed that the Community Patent Convention, combined with the European Patent Convention, would establish a unified patent system for

37. GUELLEC & VAN POTTELSBERGHE DE LA POTTERIE, *supra* note 1, at 27. *See also* ANDREW RUDGE, GUIDE TO EUROPEAN PATENTS § 1.2 (2012) (“[W]hilst during the grant proceedings the application is unitary, on grant it fragments into a series of national patents. . . . This bundle of patents is largely indistinguishable from a set of national patents that have been granted independently by the national patent offices [of each individual country] . . .”).

38. European Patent Convention, *supra* note 26, art. 2(2); *see also* Stacey J. Farmer & Martin Grund, *Revision of the European Patent Convention & Potential Impact on European Patent Practice*, 36 AM. INTEL. PROP. L. ASS’N Q.J. 419, 423–24 (2008).

39. Farmer & Martin, *supra* note 38, at 423. The European Patent Office does retain some authority over patents once they are granted. Specifically, the European Patent Office has the authority to hear opposition proceedings. European Patent Convention, *supra* note 26, art. 99. Under recent amendments to the European Patent Convention, the European Patent Office also has the authority to hear limitation or revocation proceedings initiated by the patentee. *See* Convention on the Grant of European Patents (European Patent Convention), art. 105a, Oct. 5, 1973, 1065 U.N.T.S. 199 (as amended Nov. 29, 2000) [hereinafter Amended European Patent Convention].

40. At the time the European Patent Convention was signed (1973), the European Union was known as the European Community. *See* Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1 [hereinafter Maastricht Treaty]. The term “European Union” replaced the “European Community” with the signing of the Treaty on European Union. *Id.* art. A. To avoid confusion throughout this Note, the term “European Union” is used to refer to the European Community as it existed prior to 1992 as well as the European Union after its creation in 1992. In 1973, the European Union was comprised of nine member states—Belgium, Denmark, France, Germany, the United Kingdom, Ireland, Italy, Luxembourg, and the Netherlands. Singer, *supra* note 27, at 30.

41. Singer, *supra* note 27, at 30.

42. Pegram, *supra* note 19, at 595.

43. *See infra* Parts III.A, III.B.

44. Convention on the European Patent for the Common Market, Dec. 15, 1975, 19 O.J. (L 17) 1 (1976) [hereinafter Community Patent Convention]; *see also* Pegram, *supra* note 19, at 595–96.

both the granting of patents and the enforcement of patent-holders' rights throughout the European Union,⁴⁵ although this proposition is questionable.⁴⁶ Even though the Community Patent Convention was a product of, and restricted to, members of the European Union,⁴⁷ the Community Patent Convention was based on the European Patent Convention and only members of the European Patent Convention could be parties to the Community Patent Convention.⁴⁸ Thus, only countries that were members of both the European Patent Convention and the European Union could accede to the Community Patent Convention.

The Community Patent Convention called for patents granted by the European Patent Office to be "unitary."⁴⁹ This concept means a patent granted by the European Patent Office would receive the same treatment throughout the entire European Union.⁵⁰ For example, if the patent were revoked or invalidated in one country, it would be revoked or invalidated with respect to all European Union countries.⁵¹ Additionally, the translation costs required by the Community Patent Convention likely would have been prohibitively costly.⁵²

45. "By concluding the European Patent Convention at the Munich Diplomatic Conference on 5 October 1973, and by signing the Community Patent Convention in Luxembourg on 15 December 1975 the fundamental principles of the future European [patent] system have been established." K. Haertel, *Introduction to THE NEW EUROPEAN PATENT SYSTEM* (Seminar Servs. Int'l 1976). Haertel also makes reference to "the new regulations [referring to the Community Patent Convention] on enforcement of rights in infringement proceedings effective throughout the territory of the [European Union]." *Id.*

46. Whether or not the Community Patent Convention would have achieved its ultimate purpose is questionable. Infringement proceedings under the Community Patent Convention would have been governed by the Convention on Jurisdiction and Enforcement, Sept. 27, 1968. Singer, *supra* note 27, at 40. This convention was in fact the predecessor of the modern day regulation governing jurisdiction and judgments throughout the European Union. Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 [hereinafter Brussels Regulation]. As a result, the 1968 Convention contained provisions nearly identical to those contained in the Brussels Regulation. Thus, while the rights of the patent holder may have been "unitary" throughout the European Union, enforcing these rights would likely have suffered from the same problems as those caused by the Brussels Regulation today. See discussion *infra* Part II.

47. Singer, *supra* note 27, at 30. The Community Patent Convention provided an exception for countries that were "closely connected" to the European Union. Community Patent Convention, *supra* note 44, art. 96.

48. Singer, *supra* note 27, at 30.

49. *Id.* at 31.

50. *Id.*

51. *Id.* Despite being signed by all nine members of the European Union, the Community Patent Convention was never ratified because of political reasons. PATERSON, *supra* note 9, at 21. In order to take effect, the Community Patent Convention required all signatory states to ratify the convention. Singer, *supra* note 27, at 30. The United Kingdom failed to ratify the Community Patent Convention. PATERSON, *supra* note 9, at 21.

52. Pegram, *supra* note 19, at 596. In addition to translating the patent claims into English,

Ten years later, in 1985, after it was apparent the Community Patent Convention would not get unanimously ratified, the member states of the European Union met again in Luxembourg to attempt to implement the community patent system.⁵³ This conference was essentially an attempt to revive the earlier Community Patent Convention, which the European Union failed to ratify.⁵⁴ Although the new convention, the Agreement Relating to Community Patents,⁵⁵ was supported and signed by all the European Union members,⁵⁶ it never came into effect because it was not ratified by all the member states.⁵⁷ Despite this failure, the Luxembourg conference set the stage for the judicial system necessary for the community patent.⁵⁸

II. NATURE OF THE PROBLEM: THE BRUSSELS I REGULATION

As previously discussed, patents issued by the European Patent Office are issued as a “bundle of national patents.”⁵⁹ While this “bundle” in theory provides protection for the patent holder throughout Europe, such protection is meaningless without the ability to enforce the rights that come with a patent.

French, and German as required by the European Patent Convention, Articles 14(7) and 97(5), the Community Patent Convention required the patentee to translate the patent claims into Danish, Italian and Dutch. Community Patent Convention, *supra* note 44, art. 35, European Patent Convention, *supra* note 26, arts. 14(7), 97(5), rule 51(4). The costs associated with such translation requirements are often cited as the “kiss of death” for the Community Patent Convention. *See, e.g.,* Vincenzo Di Cataldo, *From the European Patent to a Community Patent*, 8 COLUM. J. EUR. L. 19, 28 (2002).

53. PATERSON, *supra* note 51, at 21. At the time of this conference (1985), the European Union consisted of twelve member states. *The History of the European Union*, EUROPA.EU, http://europa.eu/abc/history/1980-1989/index_en.htm (last visited Oct. 28, 2010). Since the signing of the Community Patent Convention, Greece, Portugal, and Spain joined the European Union. *Id.*

54. Pegram, *supra* note 19, at 596.

55. Agreement Relating to Community Patents, Dec. 15, 1989, 1989 O.J. (L 401) 1.

56. Pegram, *supra* note 19, at 596.

57. *Id.* All members of the European Union were required to ratify the agreement for it to come into force. *Id.* Only seven of the twelve members ratified the agreement. *Id.* The European Union’s failure to fully ratify the agreement is attributed in large part to the same problems the original Community Patent Convention had—“politically sensitive issues of language and jurisdiction.” RUDGE, *supra* note 37, § 6.2.

58. PATERSON, *supra* note 9, at 21. Early during the conference at Luxembourg, members of the European Union completed the Single European Act, with the general goal of more fully integrating the European market. *Summary of the Single European Act*, EUROPA.EU, http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_singleact_en.htm (last visited Oct. 28, 2010). Paterson notes that the Single European Act “enabled general recognition of the political problems [with the community patent] before the [other] objectives would be achieved.” *Id.*

59. *See* discussion *supra* note 37 and accompanying text.

The Brussels Regulation⁶⁰ governs a patent holder's ability to enforce his or her rights under the European patent granted by the European Patent Office.⁶¹ Under the Brussels Regulation, the principal basis of jurisdiction is the defendant's domicile.⁶² Thus, under Article 2(1) of the Brussels Regulation, if a defendant domiciled in France infringes a European patent in another European Union country, the patent holder must bring his patent infringement claim in France.⁶³

Article 5(3) of the Brussels Regulation provides an additional forum for jurisdiction, allowing an infringement suit to be brought in the country where the infringement occurred.⁶⁴ Thus, if the defendant in the above example infringed the patent in Germany, the patent holder could bring an infringement claim in either Germany or France. A national court exercising jurisdiction under Article 5(3), however, is limited to passing judgment only on acts of infringement that have occurred or are likely to occur within the country in which that court sits.⁶⁵ Thus, if the patent holder from the above example were to bring his infringement suit in Germany, he could only sue for acts of infringement that took place within Germany. If the defendant had infringed that patent in more than one European Union country, the patent holder would have to sue in multiple countries if jurisdiction is based on Article 5(3).

Under the law, patent holders can avoid multiple lawsuits by bringing the infringement claim in the country where the defendant is domiciled. A court which sits in the same country in which the defendant is domiciled can not only rule on acts of infringement which occur within that country, but also on acts of infringement which the defendant committed in other

60. Brussels Regulation, *supra* note 46.

61. The Brussels Regulation governs the allocation of jurisdiction and enforcement of foreign judgments in international disputes involving "civil and commercial" matters. Brussels Regulation, *supra* note 46, art. 1(1). Thus, the Brussels Regulation governs patent infringement suits within the European Union.

62. The Brussels Convention provides: "Subject to this regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State." Brussels Regulation, *supra* note 46, art. 2(1).

63. *Id.*

64. Article 5(3) of the Brussels Regulation states, in relevant part, "A person domiciled in a Member State may, in another Member State, be sued . . . in matters relating to tort, *delict*, or *quasi-delict*, in the courts for the place where the harmful event occurred or may occur." *Id.* art. 5(3). The phrase "matters relating to tort, *delict*, and *quasi-delict*" has been interpreted to cover all actions seeking to establish the liability of the defendant and not related to contract matters under article 5(1) of the Brussels Regulation. *See* Case 189/87, *Kalfelis v. Bankhaus Schroeder, Muenchmeyer, Hengst und Co.*, 1988 E.C.R. 05565 (interpreting the phrase "matters relating to tort, *delict*, or *quasi-delict*" from Convention on Jurisdiction and Enforcement, Sept. 27, 1968).

65. *Kalfelis*, 1988 E.C.R. 05565.

countries within the European Union.⁶⁶ Thus, in the above example, if the patent holder brought his infringement claim in France, where the defendant is domiciled, the French courts could hear claims for the acts of infringement which took place in Germany as well as those in France.

In these types of infringement suits, however, the defendant can create a roadblock to the plaintiff's recovery by challenging the validity of the patent at issue. Article 22(4) of the Brussels Regulation grants exclusive jurisdiction to the courts of the country that issued the patent in determining the validity of the patent.⁶⁷ This requirement includes situations where the issue of validity is raised as a defense to an infringement suit.⁶⁸ This jurisdictional requirement begs the question of which country is considered to have issued the patent when the patent is obtained through the European Patent Office?

As previously discussed, European patents granted by the European Patent Office are issued as a "bundle of national patents."⁶⁹ Thus, each patent that comprises this "bundle" is viewed as having been issued from a distinct country.⁷⁰ For example, if the European Patent Office issues a patent which provides the patent holder rights in Germany, France, and Spain, the patent holder's rights in France are governed by a French patent, his rights in Germany are governed by a German patent, and his

66. See Peter Hendrick & Bas Berghaus van Woortman, *Confusion Over Cross-Border Decision*, MANAGING INTELLECTUAL PROPERTY (Dec. 1, 2006), <http://www.managingip.com/Article.aspx?ArticleID=1321264>.

67. Article 22 provides:

The following courts shall have exclusive jurisdiction regardless of domicile: . . .

. . .

(4) in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place. Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, . . . the courts of each Member State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State.

Brussels Regulation, *supra* note 46, art. 22(4).

68. Case C-4/03, *Gesellschaft für Antriebstechnik mbH & Co. KG v. Lamellen und Kupplungsbau Beteiligungs KG*, 2006 E.C.R. I-06509, I-06531-32 [hereinafter *GAT v. LuK*]. Under the direct effects and supremacy doctrines, the *GAT v. LuK* decision is binding on the national courts of all European Union member states. See Stefan Enchelmaier, *Supremacy and Direct Effect of European Community Law Reconsidered, or the Use and Abuse of Political Science for Jurisprudence*, 23 OXFORD J. LEGAL STUD. 281 (2003).

69. See discussion *supra* notes 36–37 and accompanying text.

70. The term "European patent" has been accurately described as "nothing more than a subtly misleading term which serves as a moniker for the multiple . . . national patents." Cataldo, *supra* note 52, at 20.

rights in Spain are governed by a Spanish patent.⁷¹ Thus, the national courts of each country that issued the patent have exclusive jurisdiction to determine the validity of the patent within that country. Once the validity of the patent is challenged, the court presiding over the original infringement claim no longer has jurisdiction⁷² to resolve claims based on acts of infringement occurring outside of the country in which that court sits until the validity of the patent is determined.⁷³ Because the validity of a patent is almost always challenged in a patent infringement suit,⁷⁴ the result is often fragmented litigation in multiple countries across the European Union.⁷⁵

Aside from the monetary costs and additional time consumed by parallel litigation in multiple countries, another major problem with the European patent litigation system is that different national courts provide inconsistent results.⁷⁶ A recent illustrative example of this problem arose out of a dispute between the European Central Bank and Document Security Systems (DSS), a U.S. company that originally brought a patent

71. This example is used only for illustrative purposes. Under the original European Patent Convention, the patent applicant had the responsibility to designate the countries in which protection was sought. European Patent Convention, *supra* note 26, art. 79. Thus, it was possible to obtain a patent from the European Patent Office which did not provide protection in every country that was a party to the European Patent Convention. Under the current version of the European Patent Convention, every country that is a party to the convention is, by default, “deemed to be designated” as a country in which protection is sought. Amended European Patent Convention, *supra* note 39, art. 79.

72. Article 25 of the Brussels Regulation states, “Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction.” Brussels Regulation, *supra* note 46, art. 25.

73. *Id.*

74. See *GAT v. LuK*, 2006 E.C.R. I-06509, I-6530 (“In practice . . . the issue of a patent's validity is frequently raised as a [defense] in an infringement action, the defendant seeking to have the claimant retroactively denied the right on which the claimant relies and thus have the action brought against him dismissed . . .”).

75. Despite the European Court of Justice's decision in *GAT v. LuK*, some national courts have used Article 31 of the Brussels Regulation to grant preliminary injunctions having cross-border effects. See *Bettacare Ltd./H3 Products B.V., Arrondissementsrechtbank [Rb.]* (court of first instance), Hague, 21 Sept. 2006, <http://www.boek9.nl/getobject.php?id=2698>. An English translation is available at http://www.ie-online.nl/backoffice/uploads/file/IEForum/Book9.nl/Bettacare%20vs_%20H3.pdf. Article 31 of the Brussels Regulation states, “Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.” Brussels Regulation, *supra* note 46, art. 31.

76. RUDGE, *supra* note 37, § 6.1 (“Not only is this parallel litigation expensive, but the outcome also often varies from country to country, depending on the way the same claims and prior art are interpreted according to different legal traditions.”); see also GUELLEC & VAN POTTELSBERGHE DE LA POTTERIE, *supra* note 1, at 221 (noting that “common rules that are applied in similar, but not necessarily identical ways in all countries” and “differentiated rights across countries”).

infringement suit against the European Central Bank.⁷⁷ After the Court of First Instance of the European Union declined to accept jurisdiction of DSS's infringement claim,⁷⁸ the European Central Bank filed a series of declaratory actions in national courts across the European Union, seeking a declaratory judgment that DSS's patent was invalid.⁷⁹ Among the countries where the European Central Bank sought cancellation of DSS's patent were the United Kingdom, France, Germany, Belgium, the Netherlands, Austria, Spain, and Italy.⁸⁰ To date, the patent has been invalidated in the United Kingdom, France, Belgium, and Austria, yet upheld in Germany and the Netherlands.⁸¹

III. RECENT ATTEMPTS TO MODIFY THE EUROPEAN PATENT SYSTEM

In the last decade, both the European Union and the member states of the European Patent Convention have pushed for new proposals and regulations aimed at remedying the problems with the European patent litigation system.⁸² The European Patent Litigation Agreement and the Unified Patent Litigation System represent the two dominant approaches that emerged.

A. *The European Patent Litigation Agreement (EPLA)*

Following the Community Patent Convention of 1975 and the subsequent attempt to resuscitate the Community Patent in 1989,⁸³ it was clear that the creation of a centralized patent court with exclusive

77. See Emma Barraclough, *Judge Calls for European Patent Litigation System*, MANAGING INTELLECTUAL PROPERTY (Mar. 20, 2008), <http://www.managingip.com/Article/1895148/Judge-calls-for-European-patent-litigation-system.html>.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* The declaratory actions in Spain and Italy are still pending. The European Central Bank has appealed both decisions upholding the validity of the patent. The appeal decisions in Germany and the Netherlands are still pending. Under a community patent system, one finding of invalidity by any European Union member state would invalidate the patent throughout the entire European Union. See discussion *supra* Part II. In the United Kingdom Court of Appeals decision invalidating the patent, Lord Justice Jacobs opined that the dispute between the European Central Bank and DSS "illustrates yet again the need for a one-stop patent shop." *European Central Bank v. Document Security Systems Inc.*, [2008] EWCA Civ 192, [2008] All ER (D) 277 (Mar). Specifically, Lord Justice Jacob called for a "one-stop patent shop (with ground floor department for first instance and a first floor department for second instance) for those who have Europe-wide businesses." *Id.* For another well-known, illustrative example of courts reaching differing results in identical cases, see Cataldo, *supra* note 52, discussing the "Epilady cases."

82. See Forrester, Killick & Dawes, *supra* note 5.

83. See discussion *supra* Part I.

jurisdiction over infringement and invalidity claims would solve many of the problems resulting from the fragmented nature of European patents.⁸⁴ The inability of the European Union to establish a community patent and the “frustration engendered by such failure”⁸⁵ led the European Patent Organization to begin exploring a solution based on the already well-established European Patent Convention.⁸⁶ In 1999, the European Patent Organization created a Working Party on Litigation for the purpose of “harmonising patent litigation” throughout Europe.⁸⁷ In furtherance of this purpose, the Working Party was directed to, among other things, “present a draft text for an optional protocol to the [European Patent Convention] which . . . would commit its signatory states to an integrated judicial system, including uniform rules of procedure and a common appeal court.”⁸⁸ After several meetings and various proposals,⁸⁹ the Working Party submitted a finalized proposal in 2003, known as the European Patent Litigation Agreement (“EPLA”).⁹⁰

The primary goal of the EPLA was to improve the European patent system by making the European patent litigation system more efficient.⁹¹

84. See RUDGE, *supra* note 37, § 6.1.

85. *Id.*

86. *Id.*; see also GUELLEC & VAN POTTELSBERGHE DE LA POTTERIE, *supra* note 1, at 223 (describing the European Patent Organization’s proposals as “complement[ing]” and “expand[ing]” upon the European Patent Convention).

87. *Intergovernmental Conference of the Member States of the European Patent Organisation on the Reform of the Patent System in Europe*, 1999 OFFICIAL J. OF THE EUROPEAN PATENT OFFICE 545, available at http://archive.epo.org/epo/pubs/oj_index_e.htm. In fact, the Intergovernmental Conference mandated two working parties—one for the purpose of harmonizing patent litigation, and one for the purpose of reducing translation-related costs. *Id.* at 546–48. The latter working party was chaired by France, Portugal, and Sweden. *Id.* at 546. The former, the Working Party on Litigation, was chaired by Germany, Luxembourg, and Switzerland. *Id.* at 548.

88. *Id.* at 548. Such a protocol would apply only to the contracting states of the European Patent Convention that are willing to commit to the proposed integrated judicial system. RUDGE, *supra* note 37, § 6.1. One advantage to this optional approach is that the terms of the integrated judicial system would be negotiated only by those European Patent Convention contracting states who are willing to move forward with such an approach. *Id.*

89. The Working Party met five times between October 2000 and November 2003. RUDGE, *supra* note 37, § 6.1. Draft proposals were prepared by Dutch Judge Jan Willems and the European Patent Organization acting as secretariat for the sub-group. Pegram, *supra* note 19, at 601.

90. Pegram, *supra* note 19, at 601. The bulk of the work done on the EPLA was performed by a sub-group of the Working Party on Litigation, created in October of 2000. EPO—European Patent Litigation Agreement, <http://www.epo.org/law-practice/legislative-initiatives/epl.html> (last updated Apr. 3, 2009). The sub-group was comprised of Germany, the United Kingdom, France, the Netherlands, Switzerland, Sweden, Denmark, Finland, Monaco, and Luxembourg. *Id.*

91. EUROPEAN PATENT OFFICE, ASSESSMENT OF THE IMPACT OF THE EUROPEAN PATENT LITIGATION AGREEMENT ON LITIGATION OF EUROPEAN PATENTS 8 (2006), available at [http://documents.epo.org/projects/babylon/eponet.nsf/0/CFCE3624CD11025AC125795700511874/\\$File/impact_assessment_2006_02_v1_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/CFCE3624CD11025AC125795700511874/$File/impact_assessment_2006_02_v1_en.pdf) [hereinafter EPLA ASSESSMENT]. Additional purposes of the EPLA are to “enhance legal certainty and predictability by ensuring harmonised interpretation of the

To achieve this goal, the EPLA called for the creation of a new international organization, the European Patent Judiciary (“EPJ”), to be comprised of the European Patent Court and an administrative committee.⁹² Additionally, the EPLA would establish a system of law applicable to European patents common to all states that are a party to the agreement.⁹³ The proposed European Patent Court, which would consist of a court of first instance and a court of appeal,⁹⁴ would have exclusive jurisdiction⁹⁵ over actions involving the infringement and revocation of European patents.⁹⁶ The Court of First Instance would consist of a Central Division, located at the seat of the EPJ,⁹⁷ and one or more Regional Divisions, located in the various contracting states of the EPLA, based on the needs of the various contracting states.⁹⁸ Decisions from the Court of First Instance would be appealable to a centralized Court of Appeal,⁹⁹ located at the seat of the EPJ.¹⁰⁰ Both the Court of First Instance and the

scope of protection conferred by a European patent and its validity,” and to “significantly reduce the number of cases where multiple litigation is necessary to enforce a European patent and thus bring down the costs for all parties involved.” *Id.* at 8–9.

92. DRAFT AGREEMENT ON THE ESTABLISHMENT OF A EUROPEAN PATENT LITIGATION SYSTEM art. 3(2) (Feb. 16, 2004), available at [http://documents.epo.org/projects/babylon/eponet.nsf/0/B3884BE403F0CD8FC125723D004ADD0A/\\$File/agreement_draft_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/B3884BE403F0CD8FC125723D004ADD0A/$File/agreement_draft_en.pdf) [hereinafter EPLA DRAFT AGREEMENT].

93. *Id.* art. 2. This “common law” is analogous to the Community Patent proposals from 1975 and 1989—i.e., a European patent would receive the same treatment in all contracting states of the EPLA. *Id.*; see discussion *supra* Part I.

94. EPLA DRAFT AGREEMENT, art. 3(2)(a).

95. During a seven year transitional period, national courts of contracting states to the EPLA would retain jurisdiction parallel to that of the European Patent Court. *Id.* art. 85(1). Additionally, under the EPLA, national courts would retain jurisdiction to order provisional or protective measures as provided for by their national laws. *Id.* art. 45(1). National courts would also have jurisdiction to order the provisional seizure of goods as security for any damages, compensation, costs or any other payment resulting from proceedings before the European Patent Court. *Id.* art. 46(1).

96. *Id.* art. 41. Specifically, Article 41 provides, “The Court of First Instance shall have civil jurisdiction in respect of: (a) any action for actual or threatened infringement or for a declaration of non-infringement of a European patent effective in one or more of the Contracting States; (b) any action or counterclaim for revocation of a European patent effective in one or more of the Contracting States; . . . (d) any other action concerning a European patent if and to the extent the parties have so agreed.” *Id.*

97. *Id.* art. 10.

98. See *id.*; Draft Statute of the European Patent Court, arts. 19, 20(1), available at [http://documents.epo.org/projects/babylon/eponet.nsf/0/885CCB85F5CC33ABC125723D004B15F9/\\$File/statute_draft_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/885CCB85F5CC33ABC125723D004B15F9/$File/statute_draft_en.pdf); see also RUDGE, *supra* note 37, § 6.1.

99. EPLA DRAFT AGREEMENT, *supra* note 92, art. 76(1). Decisions could be appealed based on the grounds that the facts of a case were not correctly established or that the law was not correctly applied. *Id.* art. 79.

100. *Id.* art. 11. In addition to hearing appeals from decisions of the Court of First Instance, the Court of Appeal would also act as the Facultative Advisory Committee, whose sole duty is to issue non-binding opinions on points of law concerning European or harmonized national patent law. *Id.* arts. 1(h), 83a, 83b.

Court of Appeal would be comprised of a panel of international technically and legally qualified judges.¹⁰¹ The drafters of the EPLA boasted numerous benefits for participating member states, including access to specialized courts,¹⁰² increased expertise,¹⁰³ more fully developed precedent for national courts,¹⁰⁴ and reduced litigation costs.¹⁰⁵ In addition to these numerous benefits, the EPLA has garnered support from judges,¹⁰⁶ academia,¹⁰⁷ expert groups,¹⁰⁸ and practitioners.¹⁰⁹

Despite the numerous benefits and widespread support of the EPLA, the proposed draft has encountered several obstacles. Opponents of the EPLA argue that patent litigation costs would increase, rather than decrease, under the EPLA.¹¹⁰ Additionally, some of the “important” contracting states of the European Patent Convention, most notably France, have insisted that the establishment of the EPLA occur through the

101. See Draft Statute of the European Patent Court, *supra* note 98, arts. 3, 4(1), 26(1), 27. Article 26 specifically provides: “[T]he Court of First Instance shall sit in panels comprising an odd number of judges. At least one of these shall be a technically qualified judge and at least two shall be legally qualified judges. The legally qualified judges shall be of at least two different nationalities.” *Id.* art. 26(1). Article 26(1) applies *mutatis mutandis* to the Court of Appeal. *Id.* art. 27. The terms “technically qualified” and “legally qualified” are not defined in either the Draft Statute of the European Patent Court or the Draft Agreement on the Establishment of a European Patent Litigation System. See Draft Statute of the European Patent Court, *supra* note 98; EPLA DRAFT AGREEMENT, *supra* note 92.

102. EPLA ASSESSMENT, *supra* note 91, at 8.

103. *Id.*

104. *Id.*

105. *Id.* at 9.

106. See Resolution Passed by the Named Judges Specialising in Patent Law at the Judges’ Forum Held in San Servolo, Venice—October 14–16, 2005, available at <http://www.eplaw.org/Downloads/Venice%20Resolution.pdf> (Twenty-four judges from ten different countries, all of which are member states of both the European Union and the European Patent Convention, supporting EPLA).

107. EPLA ASSESSMENT, *supra* note 91, at 9 n.9 (citing Mario Franzosi, *A Community Patent: Three Suggestions for Two Difficulties*, IIC 2004, 416 (419); Joseph Straus & Michael Schneider, *Probleme des europäischen und internationalen Patentrechts, Tätigkeitsbericht 2004*, Max-Planck-Gesellschaft, 233).

108. EPLA ASSESSMENT, *supra* note 91, at 9 n.10 (citing CREATING AN INNOVATIVE EUROPE, REPORT OF THE INDEPENDENT EXPERT GROUP ON R&D AND INNOVATION (Jan. 2006) (following the Hampton Court Summit), available at http://www.eua.be/Libraries/Page_files/aho_report.sflb.ashx).

109. *European Commission Public Hearing on Future Patent Policy in Europe*, at 4 (July 12, 2006), available at http://ec.europa.eu/internal_market/indprop/docs/patent/hearing/report_en.pdf. According to the report, the majority of practitioners supported the EPLA because it struck the “right balance between simple access to courts (regional divisions) and legal certainty through centralization (second instance)” *Id.* Practitioners also cited the language regime and the specialized technical judges, which would provide high quality decisions, as reasons for supporting the EPLA. *Id.*

110. See Xavier Buffet-Delmas & Laura Morelli, *Modifications to the European Patent System*, 8 INTELL. PROP. & TECH. L.J. 18, 21 (2008); Kerry J. Begley, *Multinational Patent Enforcement: What the “Parochial” United States can Learn from Past and Present European Initiatives*, 40 CORNELL INT’L L.J. 521, 559 (2007).

European Union.¹¹¹ France has also raised constitutional and institutional compatibility concerns between the EPLA, the European Union, and the European Community treaties.¹¹² However, the Working Party on Litigation never addressed these issues because work on the draft EPLA stopped in December of 2005.¹¹³ Since that time, work on an integrated judicial system has continued through the European Union.¹¹⁴

B. The Unified Patent Litigation System (“UPLS”)

The European Union had started work on a proposal similar to the EPLA in the late 1990s¹¹⁵ as a follow-up to the Lisbon Special European Council.¹¹⁶ In 1999, the European Commission¹¹⁷ began drafting a proposal for a regulation, as opposed to a convention,¹¹⁸ for the creation of

111. RUDGE, *supra* note 37, § 6.1. Specifically, France has insisted that the EPLA not be established as an extension of the European Patent Convention. *Id.* France, as well as other contracting states, takes the position that the European Court of Justice should have a role in European patent litigation. *Id.* If the EPLA were established as an international agreement, rather than a European Union initiative, the European Court of Justice would not have jurisdiction to hear infringement or invalidity suits as such jurisdiction would be vested in a separate international body, the European Patent Judiciary. *See* discussion *supra* Part II.

112. Begley, *supra* note 110, at 559. Specifically, “France has highlighted constitutional concerns for the [European Union], arguing that it is unacceptable to create a non-[European Union] legal system with a non-[European Union] court.” *Id.* France has also raised “concerns regarding possible contradictions between the EPLA’s proposed intergovernmental court and the judicial order established by European Community treaties.” *Id.*

113. EPO—*European Patent Litigation Agreement*, EUROPEAN PATENT OFFICE, <http://www.epo.org/patents/law/legislative-initiatives/epl.html> (last updated Apr. 3, 2009). The Working Party on Litigation ceased work on the EPLA in light of the efforts of the European Union to establish a Community patent with a judicial system of its own. *Id.* According to the European Patent Organization’s website, the Working Party on Litigation recognized that “the establishment of a litigation system for European patents has to be paused, in view of the work being done by the European Union to introduce a Community patent with a judicial system of its own.” *Id.*

114. *Id.*

115. *Id.*

116. The Lisbon Special European Council “outlined a ten year plan to make the [European Union] more competitive.” *Community Patent*, EURACTIV (Dec. 8, 2006), <http://euractiv.com/en/innovation/community-patent/article-117529>.

117. The European Commission is a body of the European Union which proposes legislation for the European Union and ensures that such legislation is applied properly throughout the European Union. *See* Treaty Establishing the European Community, Nov. 10, 1997, arts. 211–219, 1997 O.J. (C 340) 3 [hereinafter EC Treaty].

118. International conventions, like the European Patent Convention and the Community Patent Conventions of 1975 and 1989, are generally more difficult to negotiate and typically require a unanimous consensus among member states to amend the text of the convention. *See* Di Cataldo, *supra* note 52, at 22–23. The European Union opted for a convention on a community patent in the 1970s and 1980s because it “considered itself too weak” to enact a regulation on community patent law. *Id.* at 26. The European Union feared it would not be able to garner the political support if it issued a regulation on patent law. *Id.*

a Community Patent system (“Proposal on Community Patent”).¹¹⁹ The idea behind the Proposal on Community Patent was very similar to the Community Patent Convention of 1975 and the Agreement Relating to Community Patents of 1989 in that the proposed regulation sought to establish community-wide law on patents, applicable to all patents granted by the European Patent Office.¹²⁰

The Proposal on Community Patent provided a comprehensive body of law applicable to patents granted by the European Patent Office¹²¹ referred to as “Community patents.”¹²² The body of law provided in the Proposal on Community Patent was to be applied by a centralized court, referred to as the “Community intellectual property court,”¹²³ which would have exclusive jurisdiction over infringement and invalidity claims.¹²⁴

In 2003, the Competitiveness Council¹²⁵ reached an agreement on a “common political approach” for the adoption of such a centralized

119. Proposal for a Council Regulation on the Community Patent, Nov. 28, 2000, 2000 O.J. (C 337 E) 278 [hereinafter Proposal on Community Patent].

120. *Id.* art. 1. *Compare* Proposal on Community Patent art. 2(1) (“The community patent shall have a unitary character . . . shall have equal effect throughout the Community and may only be granted, transferred, declared invalid or lapse in respect to the whole of the Community.”), *with* Community Patent Convention, *supra* note 44, art. 2(2) (“Community patents shall have a unitary character . . . [shall] have equal effect throughout the territories to which this Convention applies and may only be transferred or allowed to lapse in respect of the whole of such territories.”).

121. *See* Proposal on Community Patent, *supra* note 119.

122. *Id.* art. 1. Under this proposal, the distinguishing characteristic between a Community patent and a European patent is the applicable body of law. European patents would still be subject to the laws of the nation in which the action was brought. On the other hand, the body of law provided in the Proposal on Community Patent would be the exclusive law applicable to Community patents. *Id.* Because the Proposal on Community Patent relied on the European Patent Office for the issuing of Community patents, all member states of the European Union would have to “accede to the European Patent Convention.” Commission of the European Communities, *Proposal for a Council Decision Conferring Jurisdiction on the Court of Justice in Disputes Relating to the Community Patent*, at 4 COM (2003) 827 final (Dec. 23, 2003) [hereinafter *Proposal for Conferring Jurisdiction on Court of Justice*].

123. Proposal on Community Patent, *supra* note 119, art. 30.

124. “The actions and claims referred to in paragraph 1 [i.e., invalidity and infringement claims, and counterclaims for invalidity] come under the exclusive jurisdiction of the Community intellectual property court.” *Id.* art. 30(3). As discussed earlier, such a centralized court with exclusive jurisdiction would avoid the problems caused by national courts applying “community law” inconsistently. *See* discussion *supra* Part II and note 91 and accompanying text.

125. The Competitiveness Council is a “configuration” of the Council of the European Union, charged with the duty of “ensuring an integrated approach to the enhancement of competitiveness and growth in Europe.” *Competitiveness Council*, COUNCIL OF THE EUROPEAN UNION, <http://www.consilium.europa.eu/policies/council-configurations/competitiveness%lang=en> (last visited June 10, 2012). The Council of the European Union is the European Union’s legislative body, which exercises its legislative power in conjunction with the European Parliament. *Frequently Asked Questions: Council of the European Union-European Council-Council of Europe*, COUNCIL OF THE EUROPEAN UNION, <http://www.consilium.europa.eu/contacts/faq.aspx?lang=en&faqid=2> (last visited June 10,

court.¹²⁶ Based on this common political approach, the European Commission presented two proposals in December 2003: the Proposal for Conferring Jurisdiction on the Court of Justice¹²⁷ and the Proposal for Establishing Community Patent Court.¹²⁸ The proposals outlined the details of a Community intellectual property court,¹²⁹ referred to as the Community Patent Court.¹³⁰ Under the two proposals, the European Court of Justice would be vested with exclusive jurisdiction over actions involving Community patents.¹³¹ These actions would be heard in the first instance by a “judicial panel”—the Community Patent Court.¹³² Decisions from the Community Patent Court would be appealable to a special patent appeal chamber within the Court of First Instance,¹³³ made up of judges with expertise in patent law.¹³⁴ Because decisions from the Community Patent Court would be effective throughout the European Union,¹³⁵ the “expense, inconvenience, and confusion” resulting from fragmented

2012). A “configuration” of the Council, such as the Competitiveness Council, is analogous to a committee or sub-committee of the United States Congress.

126. *Results of the Competitiveness Council of Ministers, Brussels, 3rd March 2003*, EUROPA (Mar. 4, 2003), <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/03/47&format=HTML&aged=0&language=EN&guiLanguage=en>.

127. *See Proposal for Conferring Jurisdiction of Court of Justice*, *supra* note 122.

128. Commission of the European Communities, *Proposal for a Council Decision Establishing the Community Patent Court and Concerning Appeals before the Court of First Instance*, COM (2003) 828 final (Dec. 23, 2003) [hereinafter *Proposal for Establishing Community Patent Court*].

129. *See id.*; *Proposal for Conferring Jurisdiction on Court of Justice*, *supra* note 122.

130. *See Proposal for Establishing Community Patent Court*, *supra* note 128.

131. *See Proposal for Conferring Jurisdiction on Court of Justice*, *supra* note 122, art 1. Specifically, the Court of Justice would have exclusive jurisdiction over:

- (a) infringement or validity of a Community patent . . . ;
- (b) the use of the invention after the publication of the Community patent application or the right based on prior use of the invention;
- (c) interim and evidence-protection measures in connection with the subject matters conferred;
- (d) damages or compensation in the circumstances set out in points (a), (b), and (c);
- (e) the ordering of a penalty payment in case of non-compliance with a decision or order constituting an obligation to act or to abstain from an act.

Id.

132. *Proposal for Establishing Community Patent Court*, *supra* note 128, at 6–7. Under Article 225a of the Treaty Establishing the European Community, the European Council can create judicial panels which can hear and decide certain classes of cases in the first instance. *See EC Treaty*, *supra* note 117, art. 225a. However, the conditions for establishing such a judicial panel are stringent—“The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Court of Justice or at the request of the Court of Justice and after consulting the European Parliament and the Commission, may create judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas.” *Id.*

133. *Proposal for Establishing Community Patent Court*, *supra* note 128, at 9.

134. *Id.*

135. *Industrial Property: Commission Proposes Establishing Community Patent Court*, EUROPA (Feb. 2, 2004), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/137&format=HTML&aged=0&language=EN&guiLanguage=en>.

litigation would be avoided.¹³⁶ Despite these promising advantages, disagreement over the extent and legal effect of translations prevented a consensus on the proposals.¹³⁷

Notwithstanding these setbacks, the European Commission again set out to establish a unified patent litigation system in 2006.¹³⁸ The European Commission performed a public consultation, receiving input from industry professionals and practitioners as to their views on future patent policy in Europe.¹³⁹ The results of the consultation showed that a majority of the respondents favored the Community Patent approach set forth under the Community Patent Proposal.¹⁴⁰ The consultation, however, also showed that a large majority of respondents supported the unified litigation system under the EPLA, rather than the Community Patent Court proposed by the European Commission in 2003.¹⁴¹

In light of these findings, the European Commission suggested a European Union-wide jurisdictional system for patent litigation that would have jurisdiction over both European patents and Community patents.¹⁴² Such a system, which later became known as the UPLS,¹⁴³ would integrate features from both the earlier proposed Community Patent Court and the EPLA's European Patent Court.¹⁴⁴ In March 2009, the European Commission prepared a draft agreement for the UPLS and formally recommended that the Council of the European Union provide the European Commission with negotiating directives such that the European Commission could conclude an agreement creating the UPLS.¹⁴⁵ Shortly

136. *Id.*

137. Begley, *supra* note 110, at 556.

138. Press Release, European Comm'n, Patents: Comm'n Sets out Vision for Improving Patent System in Europe (Apr. 3, 2007), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/463&type=HTML&aged=0&language=EN&guiLanguage=fr>.

139. *Id.*

140. *European Commission Public Hearing on Future Patent Policy in Europe*, *supra* note 109, at 4–5.

141. *Id.*

142. Communication from Commission to the European Parliament and the Council—Enhancing the Patent System in Europe, at 10–11, COM (2007) 165 final (Apr. 3, 2007) [hereinafter *Commission Communication*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0165:FIN:en:PDF>.

143. Press Release, European Comm'n, Patents: Comm'n Sets Out Next Steps for Creation of Unified Patent Litigation System (Mar. 24, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/460&type=HTML&aged=0&language=EN&guiLanguage=fr>. Recently, the UPLS has increasingly been referred to as the European and European Union Patents Court (EEUPC). See European Patent Office—Unitary Patent/EU Patent, <http://www.epo.org/law-practice/legislative-initiatives/eu-patent.html> (last updated July 28, 2011).

144. Commission Communication, *supra* note 142, at 10–11.

145. Press Release, *supra* note 143.

thereafter,¹⁴⁶ the Council of the European Union filed a request for an opinion by the European Court of Justice on the compatibility of the UPLS with European Union law.¹⁴⁷

In July 2010, the Advocates General (“AG”) of the European Court of Justice issued an opinion to the court that the draft agreement of the UPLS was incompatible with European Union treaties: “[a]s it stands at present, the envisaged agreement creating a unified patent litigation system is incompatible with the treaties.”¹⁴⁸ The AG cited several reasons why the draft agreement was incompatible with European Union treaties,¹⁴⁹ most notably that the language regime of the draft agreement would be incompatible with rights of a defendant, “as proceedings could be conducted against a defendant in a language which would be neither that of its country of origin nor of the country where it carries out its commercial activities.”¹⁵⁰

On March 8, 2011, the European Court of Justice issued its opinion on the draft agreement of the UPLS.¹⁵¹ In addition to the concerns raised by the AG, the March 8 opinion noted that the draft agreement of the UPLS would “deprive courts of Member States of their powers in relation to the interpretation and application of European Union law”¹⁵² Ultimately, the European Court of Justice adopted the position of the AG, finding the

146. It is not clear exactly when the Council of the European Union filed the request. Compare Pegram, *supra* note 19, at 603 (stating the Council filed the request in July 2009), with Forrester, Killick & Dawes, *supra* note 5 (stating the Council filed the request in April 2009).

147. *Id.*

148. Forrester, Killick & Dawes, *supra* note 5. The Advocates General (“AG”), comprised of eight members, assist the European Court of Justice in disposing of the cases that come before it. See *Presentation*, COURT OF JUSTICE, http://curia.europa.eu/jcms/jcms/Jo2_7024/ (last visited Feb. 17, 2011). The AG present opinions to the European Court of Justice and, although these opinions are not binding, they are generally followed by the Court. *Id.*

149. Forrester, Killick & Dawes, *supra* note 5. The reasons why the AG believed the draft of the UPLS was inconsistent with European Union treaties include:

the draft agreement does not make clear that the patent court would be required to take into account, in its judgments, the EU Treaties, the fundamental rights and general principles guaranteed by EU law, and relevant secondary EU legislation. . . . The draft agreement does not refer to the primacy of the EU Treaties over international agreements and secondary EU law. . . . The draft agreement does not provide sufficient remedies in cases where the future patent court were either to infringe its obligation to make a reference to the [European Court of Justice] or were to breach its obligation to observe EU law.

Id.

150. *Id.*

151. Opinion Avis 1/09, Draft agreement—Creation of a unified patent litigation system—European and Community Patents Court—Compatibility of the draft agreement with the Treaties (Mar. 8, 2011), available at <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=1/0&td=ALL&dates=%2524type%253Dpro%2524mode%253Don%2524on%253D2011.03.08>.

152. *Id.* ¶ 89.

current draft of the UPLS to be incompatible with European Union treaties.¹⁵³

IV. MOVING FORWARD: THE BEST APPROACH TO A UNIFIED PATENT LITIGATION SYSTEM

In analyzing the best route to a unified litigation system, it is important to note at the outset that the question is not *what* needs to be done, but rather, *how* it needs to be done. Both the EPLA and the most recent draft of the UPLS illustrate that the best solution to a unified patent litigation system in Europe is to establish a centralized court with exclusive jurisdiction over infringement and invalidity claims. Thus, the question becomes how should European nations go about establishing such a centralized court?

In light of the recent opinion from the European Court of Justice, the EPLA is the most promising approach for a future unified patent litigation system throughout Europe since the opinion likely marks the end of the UPLS. One of the biggest issues raised by the opinion was that the language regime of the UPLS was inconsistent with European Union treaties.¹⁵⁴ In order to make the draft agreement of the UPLS compatible with European Union treaties, the European Commission would likely have to reinsert the translation provisions which made the 2003 proposal of the Community Patent Court so undesirable.¹⁵⁵ Thus, given the European Court of Justice's recent opinion, making the UPLS compatible with European Union treaties is a formidable task.

On the other hand, the approach taken by the EPLA avoids the conflicts caused by the UPLS. Because the EPLA would be adopted as an international agreement, the EPLA does not need to comport with European Union law. This point is particularly relevant in light of the European Commission's prior suggestion that involvement of the European Union was required for member states of the European Union to enact the EPLA because it "touches on subjects which are already covered by EC legislation."¹⁵⁶ In their opinion, the AG expressed a contradictory opinion, stating that EU law is not opposed to an "international agreement providing for its own judicial system"¹⁵⁷ Thus, contrary to the

153. *Id.*

154. See discussion *supra* Part III.

155. See discussion *supra* Part I.

156. Commission Communication, *supra* note 142, at 9–10.

157. JOCHEN PAGENBERG, INT'L ASS'N FOR THE PROTECTION OF INTELLECTUAL PROP., REPORT OF COMMITTEE Q 165: OPTIONAL PROTOCOL TO THE EPC WITH REGARD TO LITIGATION CONCERNING

suggestion of the European Commission, the member states of the European Union are competent to enter into an international agreement such as the EPLA. Similarly, the constitutional and incompatibility concerns raised by France would be a non-issue if the EPLA were implemented through an international agreement. In fact, the problems raised by France only arise as a result of implementing the EPLA through the European Union, which is what France, as well as several other contracting states of the European Patent Convention, insisted upon.¹⁵⁸

Additionally, the EPLA would likely be a more cost-effective approach to a unified patent litigation system than the UPLS. Some opponents of the EPLA have suggested that implementing the EPLA would actually increase, rather than decrease, patent litigation costs.¹⁵⁹ However, the EPLA merely provides an alternative forum for patent litigation. Potential plaintiffs would only bring a claim under the EPLA if it was more cost effective than filing the claim in a national court. Therefore, at worst, the EPLA would have no effect on the current costs of patent litigation. Additionally, the most recent assessment suggests that the EPLA would in fact decrease litigation costs.¹⁶⁰ Thus, suggestions that the EPLA would increase litigation costs are unsupported by the most recent estimates as well as the optional judicial forum provided by the EPLA.

V. CONCLUSION

In light of the recent opinions of the AG and the European Court of Justice on the draft agreement of the UPLS, the eventual implementation of the UPLS is highly unlikely. Even if the current draft agreement was amended such that it was compatible with European Union treaties, the resulting translation costs would make such an option unattractive from a

EUROPEAN PATENTS 5 (2010) [hereinafter AIPPA REPORT] (referencing the Opinion Avis 1/09, *supra* note 151, ¶ 58). The AG's opinion specifically provides:

With regard to the legality of creating the [Patent Court] as an international court, situated outside the judicial system of the European Union and enjoying sole competence for certain types of appeal, one should first recall that Union law is not in principle opposed to an international agreement providing for its own judicial system

AIPPA REPORT, at 5. The AG opinion went on to cite an earlier opinion of the European Court of Justice which provides support for this position. *Id.* at 6.

158. See discussion *supra* Part III.

159. See discussion *supra* Part III.

160. EPLA Assessment, *supra* note 91, at 10–12 (2006). Specifically, the Assessment estimates that litigation of a medium-scale patent case would be more cost-effective in the European Patent Court as compared to parallel litigation before two or more national courts. *Id.* Similar reports on the UPLS indicate that the predicted costs resulting from implementing the UPLS are “unrealistic” and would in fact be much higher than those previously published. AIPPA Report, *supra* note 157, at 2–3.

practical standpoint. Rather, the EPLA represents the best approach to a future unified patent litigation system throughout Europe. As an international agreement, the EPLA avoids many of the problems encountered by the UPLS and would likely result in a more cost efficient litigation system than the UPLA. The draft EPLA, therefore, represents the better starting point as European nations move towards a unified patent litigation system.

*Patrick Coyle**

* J.D. (2012), Washington University School of Law; B.S. (2009), Materials Science and Engineering, University of Illinois at Urbana-Champaign. The author would like to thank the editorial board and staff of the *Washington University Global Studies Law Review* and his wife Amanda, for her constant support and encouragement.