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## Editorial

J. Gowshall . J. Kaden . E. Liesegang . T. Schuffenecker

This year *epi* reaches its twenty-fifth anniversary, a distinguished milestone. In that time *epi* has played an important role both in ensuring that its members are kept fully informed of developments in the European Patent system but, more importantly, of ensuring that its members' interests and views are fully aired in all debates surrounding the European Patent system.

There is no doubt that *epi* has been a major influence in its own field and for that all members should be both thankful and proud. There is also no doubt that the twenty-fifth anniversary of *epi* is a cause for celebration. To this end, and as is set out in greater detail later in this issue, the *epi* are arranging a twenty-fifth anniversary

seminar followed by a gala banquet in Warwick, England.

The seminar looks to be one of great interest and already a number of speakers of high renown have been confirmed.

Warwick Castle, where the evening's banquet will be held is a building full of history and grandeur and would seem to be a very suitable venue for what is certain to prove to be a very enjoyable evening.

We encourage as many of our readers as possible to attend both the seminar and the banquet, to meet fellow *epi* members, to celebrate fully this landmark date in our Institute's history.

### Redaktionsschluss für epi Information 2/2002

Redaktionsschluss für die nächste Ausgabe der *epi* Information ist der **10. Mai 2002**. Die Dokumente, die veröffentlicht werden sollen, müssen bis zu diesem Datum im Sekretariat eingegangen sein.

### Deadline for *epi* Information 2/2002

Our deadline for the next issue of *epi* Information is **10 May 2002**. Documents for publication should have reached the Secretariat by this date.

### Date limite pour *epi* Information 2/2002

La date limite de remise des documents pour le prochain numéro de *epi* Information est le **10 mai 2002**. Les textes destinés à la publication devront être reçus par le Secrétariat avant cette date.

## Ergebnisse der Wahl zum dreizehnten Rat

### Hinweis

Mitglieder des Instituts, die gegen das Wahlergebnis Einwände erheben möchten, müssen ihre schriftlichen Einwände bis spätestens **29. März 2002** beim Sekretariat des Instituts einreichen. Dies kann per Telefax geschehen. Später eingehende Einwände werden nicht berücksichtigt.

Ich danke den Mitgliedern des Wahlausschusses, den Herren H. Breiter, A. Parkes and J.J.H. Van kan für ihren Einsatz.

Februar 2002  
Generalsekretär  
R. Zellentin

## Results of the election to the thirteenth Council

### Notice

Members of the Institute wishing to object against the election results must submit their written objection to reach the Secretariat of the Institute by **29 March 2002** at the latest. Telefax will be accepted. Any objections reaching the Institute after this date will not be taken into consideration.

I thank the members of the Election Committee, Messrs. H. Breiter, A. Parkes and J.J.H. Van kan for their commitment.

February 2002  
Secretary General  
R. Zellentin

## Résultats de l'élection au treizième Conseil

### Note

Les membres de l'Institut désirant contester les résultats de l'élection doivent faire parvenir leurs objections par écrit au Secrétariat de l'Institut avant le **29 mars 2002** au plus tard. Les télécopies sont acceptées. Toute objection parvenant à l'Institut après cette date ne sera plus prise en considération.

Je remercie les membres de la Commission Electorale, MM. H. Breiter, A. Parkes and J.J.H. Van kan pour leur engagement.

Février 2002  
Secrétaire Général  
R. Zellentin

## Erläuterung · Legend · Légende

- |                                                                          |                                               |                                                         |
|--------------------------------------------------------------------------|-----------------------------------------------|---------------------------------------------------------|
| * haben erklärt, ihre Wahl nur als stellvertretendes Mitglied anzunehmen | * stood as substitute only                    | * éligible comme suppléant uniquement                   |
| ** Losentscheid bei gleicher Stimmenzahl                                 | ** tie vote position decided by lot           | ** classement par tirage au sort à égalité de voix      |
| *** alphabetische Reihenfolge bei gleicher Stimmenzahl                   | *** alphabetical order, equal number of votes | *** classement par ordre alphabétique à égalité de voix |

**Ausgeteilte Stimmzettel: 6.196**  
**Abgegebene Stimmzettel: 2.992**  
**Gültige Stimmzettel : 2.913**  
**Ungültige Stimmzettel : 79**

**Ballots sent : 6.196**  
**Received ballots : 2,992**  
**Valid ballots: 2,913**  
**Void ballots : 79**

**Bulletins envoyés : 6.196**  
**Bulletins reçus : 2.992**  
**Bulletins valables : 2.913**  
**Bulletins nuls: 79**

## AT – ÖSTERREICH

### Anderweitig Tätige

Abgegebene Stimmzettel: 20  
 Gültige Stimmzettel: 20  
 Ungültige Stimmzettel: 0

KRAUSE Peter 9  
 KUNZ Ekkehard 17  
 SCHWEINZER Friedrich 13  
 WIDTMANN Georg 13

### Sitzverteilung

*Ordentliche Mitglieder*

1. KUNZ Ekkehard 17  
 2. SCHWEINZER Friedrich\*\* 13

*Stellvertretende Mitglieder*

1. WIDTMANN Georg\*\* 13  
 2. KRAUSE Peter 9

### Freiberufler

Abgegebene Stimmzettel: 33  
 Gültige Stimmzettel: 33  
 Ungültige Stimmzettel: 0

BARGER Werner 15  
 BEER Manfred 20  
 GIBLER Ferdinand 17  
 HOLZER Walter 25

MÜLLNER Martin 10  
 PAWLOY Peter 10

### Sitzverteilung

*Ordentliche Mitglieder*

1. HOLZER Walter 25  
 2. BEER Manfred 20

*Stellvertretende Mitglieder*

1. GIBLER Ferdinand 17  
 2. BARGER Werner 15

## BE – BELGIQUE

### Autre titre

Bulletins reçus: 31  
 Bulletins valables: 27  
 Bulletins nuls: 4

DE CORTE Filip 21  
 JACQUES Philippe 18  
 LEYDER Francis 16  
 NARMON Gisèle 17  
 VAN OSTAEYEN Marc 21

### Répartition des sièges

*Membres titulaires*

1. DE CORTE Filip\*\*\* 21  
 2. VAN OSTAEYEN Marc\*\*\* 21

*Membres suppléants*

1. JACQUES Philippe 18  
 2. NARMON Gisèle 17

### Profession libérale

Bulletins reçus: 29  
 Bulletins valables: 27  
 Bulletins nuls: 2

LEHERTE Georges 7  
 OVERATH Philippe\* 12

QUINTELIER Claude 17  
 VAN MALDEREN Joëlle 13

### Répartition des sièges

*Membres titulaires*

1. QUINTELIER Claude 17  
 2. VAN MALDEREN Joëlle 13

*Membres suppléants*

1. OVERATH Philippe\* 12  
 2. LEHERTE Georges 7

## CH – SCHWEIZ

### Anderweitig Tätige/Autre titre

Abgegebene Stimmzettel/  
 Bulletins reçus: 77  
 Gültige Stimmzettel/  
 Bulletins valables: 73  
 Ungültige Stimmzettel/  
 Bulletins nuls: 4

BERNHARDT Wolfgang\* 33  
 BLÖCHLE Hans\* 25  
 GROS Florent\* 16  
 MAUÉ Paul Georg 62  
 PÖPPER Evamaria\* 21  
 SURMELY Gérard\* 17  
 WAVRE Claude-Alain 44

### Sitzverteilung/ Répartition des sièges

*Ordentliche Mitglieder/  
 Membres titulaires*

1. MAUÉ Paul Georg 62  
 2. WAVRE Claude-Alain 44

*Stellvertretende Mitglieder/  
 Membres suppléants*

1. BERNHARDT Wolfgang\* 33  
 2. BLÖCHLE Hans\* 25

### Freiberufler/Profession libérale

Abgegebene Stimmzettel/  
 Bulletins reçus: 96  
 Gültige Stimmzettel/  
 Bulletins valables: 93

Ungültige Stimmzettel/  
 Bulletins nuls: 3

BRAUN André 80  
 EDER Carl E.\* 61  
 FELBER Josef 31  
 FELDMANN Clarence Paul 52  
 SEEHOF Michel 79

### Sitzverteilung/ Répartition des sièges

*Ordentliche Mitglieder/  
 Membres titulaires*

1. BRAUN André 80  
 2. SEEHOF Michel 79

*Stellvertretende Mitglieder/  
 Membres suppléants*

1. EDER Carl E.\* 61  
 2. FELDMANN Clarence Paul 52

## CY – CYPRUS

<b>Unitary</b>		DEMETRIADES Achilleas	2	2. ARAZOUSOS Demetris Loui	4
Received ballots:	12	POETIS Phytos	1	<i>Substitute members</i>	
Valid ballots:	12	THEODOULOU Christos A.	6	1. CHRYSOSTOMIDES Eleni ***	2
Void ballots:	0	<b>Allotment of seats</b>		2. DEMETRIADES Achilleas ***	2
ARAOUZOS Demetris Loui	4	<i>Full members</i>			
CHRYSOSTOMIDES Eleni	2	1. THEODOULOU Christos A.	6		

## DE – DEUTSCHLAND

<b>Anderweitig Tätige</b>		2. BAUM Wolfgang	178	LEISSLER-GERSTL Gabriele	271
Abgegebene Stimmzettel:	334	3. STEILING Lothar	175	LEMPERT Jost	123
Gültige Stimmzettel:	330	<i>Stellvertretende Mitglieder</i>		RACKETTE Karl	153
Ungültige Stimmzettel:	4	1. EINSELE Rolf*	254	SPEISER Dieter K.	455
AHRENS Thomas*	146	2. DIRSCHERL Josef		VOELKER Ingeborg	232
BADER Martin	66	Franz-Georg*	157	ZELLENTIN Rüdiger*	373
BAUM Wolfgang	178	3. AHRENS Thomas*	146	<b>Sitzverteilung</b>	
DIRSCHERL Josef		<b>Freiberufler</b>		<i>Ordentliche Mitglieder</i>	
Franz-Georg*	157	Abgegebene Stimmzettel:	774	1. SPEISER Dieter K.	455
EINSELE Rolf*	254	Gültige Stimmzettel:	762	2. KEIL Rainer A.	445
HIRSCH Uwe T.	79	Ungültige Stimmzettel:	12	3. DABRINGHAUS Walter	343
LENDVAI Thomas	74	<i>Stellvertretende Mitglieder</i>		1. ZELLENTIN Rüdiger*	373
LINKENHEIL Dieter	58	BOCKHORN Josef	130	2. LEISSLER-GERSTL Gabriele	271
STEILING Lothar	175	COHAUSZ Helge	223	3. VOELKER Ingeborg	232
TEUFEL Fritz	268	DABRINGHAUS Walter	343		
<b>Sitzverteilung</b>		GODEMEYER Thomas	104		
<i>Ordentliche Mitglieder</i>		GÖRZ Ingo	96		
1. TEUFEL Fritz	268	KEIL Rainer A.	445		
		KOEPE Gerd L.	155		

## DK – DENMARK

<b>Other practice</b>		<i>Substitute member</i>		<b>Allotment of seats</b>	
Received ballots: 19		1. HEGNER Annette*	12	<i>Full members</i>	
Valid ballots: 18		<b>Private practice</b>		1. VINGTOFT Knud Erik	31
Void ballots: 1		Received ballots: 44		2. CHRISTIANSEN Ejvind	30
HEGNER Annette*	12	Valid ballots: 43		<i>Substitute members</i>	
JENSEN Bo Hammer	17	Void ballots: 1		1. NØRGAARD Ulrik*	28
STANLEY-MADSEN Ib	11	CHRISTIANSEN Ejvind	30	2. NIELSEN Leif	20
<b>Allotment of seats</b>		GREGERSEN Niels Henrik	5		
<i>Full members</i>		NIELSEN Leif	20		
1. JENSEN Bo Hammer	17	NØRGAARD Ulrik*	28		
2. STANLEY-MADSEN Ib	11	VINGTOFT Knud Erik	31		

## ES – SPAIN

<b>Unitary</b>			
Received ballots:	74	GIL-VEGA Victor	67
Valid ballots:	74	PONTI SALES Adelaida*	65
Void ballots:	0	SUGRAÑES MOLINE Pedro*	67
ARMIJO NAVARRO-REVERTER Enrique	64	<b>Allotment of seats</b>	
CURELL SUÑOL Marcelino	67	<i>Full members</i>	
DURAN MOYA Luis-Alfonso	64	1. CURELL SUÑOL Marcelino***	67
ELOSEGUI DE LA PEÑA Inigo*	66	2. GIL-VEGA Victor***	67
ELZABURU MARQUEZ Alberto*	61	3. ARMIJO NAVARRO-REVERTER Enrique***	64
		4. DURAN MOYA Luis-Alfonso***	64
		<i>Substitute members</i>	
		1. SUGRAÑES MOLINE Pedro*	67
		2. ELOSEGUI DE LA PEÑA Inigo*	66
		3. PONTI SALES Adelaida*	65
		4. ELZABURU MARQUEZ Alberto*	61

## FI – FINLAND

<b>Other practice</b>		<b>Allotment of seats</b>	
Received ballots:	36	<i>Full members</i>	
Valid ballots:	35	1. FINNILÄ Kim	27
Void ballots:	1	2. VALKONEN Pekka	22
FINNILÄ Kim	27	<i>Substitute members</i>	
KILPINEN Aarre	15	1. WECKMAN Arja	17
LEHTINEN Ossi*	16	2. LEHTINEN Ossi*	16
VALKONEN Pekka	22	<b>Private practice</b>	
WECKMAN Arja	17	Received ballots:	45
		Valid ballots:	43
		Void ballots:	2
		BRAX Matti	30
		HJELT Pia*	24
		LAX Monica	37
		<b>Allotment of seats</b>	
		<i>Full members</i>	
		1. LAX Monica	37
		2. BRAX Matti	30
		<i>Substitute member</i>	
		1. HJELT Pia*	24

## FR – FRANCE

<b>Autre titre</b>		<i>Membres suppléants</i>	
Bulletins reçus:	120	1. LE VAGUERÈSE Sylvain**	97
Bulletins valables:	117	2. LE PENNEC Magali	94
Bulletins nuls:	3	<b>Profession libérale</b>	
BAUVIR Jacques	100	Bulletins reçus:	189
DUPONT Henri	99	Bulletins valables:	186
GENDRAUD Pierre	97	Bulletins nuls:	3
LE PENNEC Magali	94	CALLON DE LAMARCK Jean-Robert	109
LE VAGUERÈSE Sylvain	97	CASALONGA Axel	151
<b>Répartition des sièges</b>		DAVID Daniel	109
<i>Membres titulaires</i>		LAGET Jean-Loup	131
1. BAUVIR Jacques	100	NUSS Laurent	154
2. DUPONT Henri	99	PORTAL Gérard*	107
3. GENDRAUD Pierre**	97	VIDON Patrice	89
		<b>Répartition des sièges</b>	
		<i>Membres titulaires</i>	
		1. NUSS Laurent	154
		2. CASALONGA Axel	151
		3. LAGET Jean-Loup	131
		<i>Membres suppléants</i>	
		1. CALLON DE LAMARCK Jean-Robert ***	109
		2. DAVID Daniel ***	109
		3. PORTAL Gérard*	107

## GB – GREAT BRITAIN

<b>Unitary</b>		MERCER Christopher P.	317	4. BURT Roger	279
Received ballots:	458	POWELL Timothy	281	5. DENERLEY Paul M.	268
Valid ballots:	449	SZABO George	210	6. JOHNSON Terence L.	258
Void ballots:	9	WRIGHT Simon	251	<i>Substitute members</i>	
BOFF James C.	223	<b>Allotment of seats</b>		1. WRIGHT Simon	251
BURT Roger	279	<i>Full members</i>		2. GOWSHALL Jonathan V.	240
DENERLEY Paul M.	268	1. MERCER Christopher P.	317	3. LAREDO Jack	235
GOWSHALL Jonathan V.	240	2. LYNDON -STANFORD		4. BOFF James Charles	223
JOHNSON Terence L.	258	Edward	296	5. SZABO George	210
LAREDO Jack	235	3. POWELL Timothy	281		
LYNDON-STANFORD Edward	296				

## GR – GREECE

<b>Unitary</b>		MARGELLOS Theophilos	8	2. OEKONOMIDIS Dimitris	9
Received ballots:	19	OEKONOMIDIS Dimitris	9	3. MARGELLOS Theophilos	8
Valid ballots:	19	PAPACONSTANTINOUS Helen	11	4. KILIMIRIS Tassos-Anastase	6
Void ballots:	0	PATRINOS-KILIMIRIS Anna *	4	<i>Substitute members</i>	
BAKATSELOU Vassiliki	3	<b>Allotment of seats</b>		1. PATRINOS-KILIMIRIS Anna *	4
DACORONIA Eugenia	1	<i>Full members</i>		2. BAKATSELOU Vassiliki	3
KILIMIRIS Tassos-Anastase	6	1. PAPACONSTANTINOUS		3. DACORONIA Eugenia	1
		Helen	11		

## IE – IRELAND

<b>Unitary</b>		McKEOWN Yvonne *	16	2. CASEY Lindsay ***	18
Received ballots:	22	RYAN Anne Mary	10	3. SHORTT Peter ***	18
Valid ballots:	22	SHORTT Peter B.	18	4. KELLY Peter	16
Void ballots:	0	WALSH Michael Joseph *	15	<i>Substitute members</i>	
CASEY Lindsay	18	<b>Allotment of seats</b>		1. LANE Cathal Michael */***	16
KELLY Peter	16	<i>Full members</i>		2. McKEOWN Yvonne */***	16
LANE Cathal Michael *	16	1. McCARTHY Denis A.	19	3. WALSH Michael Joseph *	15
McCARTHY Denis	19			4. RYAN Anne Mary	10

## IT – ITALY

<b>Other practice</b>		1. MACCHETTA Francesco	21	LOTTI Giorgio	19
Received ballots:	22	2. MURACA Bruno	11	MODIANO Guido	92
Valid ballots:	22	<i>Substitute members</i>		PEDERZINI Paolo	18
Void ballots:	0	1. DE CARLI Elda *	10	RAMBELLI Paolo	27
COLOMBO Stefano *	7	2. PIERACCIOLI Daniele	8	SPANDONARI Carlo	46
DE CARLI Elda *	10	<b>Private practice</b>		STAUB Gabriella	52
DINI Roberto *	5	Received ballots:		ZAMBARDINO Umberto	18
MACCHETTA Francesco	21	Valid ballots:		<b>Allotment of seats</b>	
MAZZINI Giuseppe *	7	Void ballots:		<i>Full members</i>	
MURACA Bruno	11	CHECCACCI Giorgio	46	1. MODIANO Guido	92
PANOSSIAN Stefano *	2	DRAGOTTI Gianfranco	51	2. FARAGGIANA Vittorio	63
PIERACCIOLI Daniele	8	FARAGGIANA Vittorio	63	<i>Substitute members</i>	
<b>Allotment of seats</b>		FIAMMENGHI Carlo	48	1. STAUB Gabriella	52
<i>Full members</i>		GERLI Paolo	38	2. DRAGOTTI Gianfranco	51

## LI – LIECHTENSTEIN

<b>Einheitlich</b>		KLEIN Ernest *	4	<i>Stellvertretende Mitglieder</i>	
Abgegebene Stimmzettel:	9	ROSENICH Paul *	5	1. ROSENICH Paul *	5
Gültige Stimmzettel:	8	WILDI Roland	7	2. KLEIN Ernest *	4
Ungültige Stimmzettel:	1				
HASLER Erich *	3	<b>Sitzverteilung</b>			
KAMINSKI Susanne	7	<i>Ordentliche Mitglieder</i>			
		1. KAMINSKI Susanne ***	7		
		2. WILDI Roland ***	7		

## LU – LUXEMBOURG

<b>Autre titre</b>		<b>Répartition des sièges</b>		BEISSEL Jean	4
Bulletins reçus:	2	<i>Membre titulaire</i>		KIHN Pierre	4
Bulletins valables:	2	1. DEARLING Bruce	2	WAXWEILER Jean *	8
Bulletins nuls:	0	<i>Membre suppléant</i>		WEYLAND Pierre	8
DEARLING Bruce	2	1. LEITZ Paul *	2	<b>Répartition des sièges</b>	
LEITZ Paul *	2	<b>Profession libérale</b>		<i>Membre titulaire</i>	
		Bulletins reçus:	12	1. WEYLAND Pierre	8
		Bulletins valables:	12	<i>Membre suppléant</i>	
		Bulletins nuls:	0	1. WAXWEILER Jean *	8

## MC – MONACO

<b>Circonscription à collège unique</b>		COLLINS Geoffrey	1	<b>Répartition des sièges</b>	
Bulletins reçus:	2	CURAU José	1	<i>Membres titulaires</i>	
Bulletins valables:	2	SCHUFFENECKER Thierry	1	1. CURAU José ***/**	1
Bulletins nuls:	0			2. SCHUFFENECKER Thierry ***/**	1
				<i>Membre suppléant</i>	
				1. COLLINS Geoffrey **	1

## NL – NETHERLANDS

<b>Unitary Constituency</b>		KRIJGSMAN Willem *	83	2. SMIT Frederik Jan	93
Received ballots:	163	LAND Addick A.G. *	57	3. DIETZ Frans Anton	91
Valid ballots:	151	SMIT Frederik J.	93	4. JORRITSMA Ruurd	80
Void ballots:	12	STEENBEEK Leonardus *	84	<i>Substitute members</i>	
DIETZ Frans Anton	91	<b>Allotment of seats</b>		1. STEENBEEK Leonardus *	84
HOOGSTRATEN Willem C.R.	97	<i>Full members</i>		2. KRIJGSMAN Willem *	83
HUYGENS Arthur V.*	63	1. HOOGSTRATEN Willem	97	3. HUYGENS Arthur V. *	63
JORRITSMA Ruurd	80			4. LAND Addick A.G. *	57



## PT – PORTUGAL

<b>Unitary</b>		FRANCO Isabel	22	3. PEREIRA DA CRUZ Joao ***	22
Received ballots:	28	MOREIRA Rato Gonalo *	19	4. PISSARRA DIAS	
Valid ballots:	27	PEREIRA DA CRUZ Joao	22	MACHADO A. ***	22
Void ballots:	1	PISSARRA DIAS MACHADO A.	22	<i>Substitute members</i>	
ALVES MOREIRA Pedro *	24	<b>Allotment of seats</b>		1. ALVES MOREIRA Pedro *	24
ARNAUT Jos� Luis	24	<i>Full members</i>		2. CRUZ Nuno *	23
CRUZ Nuno *	23	1. ARNAUT Jos� Luis	24	3. FERREIRA MAGNO	
FERREIRA MAGNO		2. FRANCO Isabel ***	22	Fernando A. *	20
Fernando A. *	20			4. MOREIRA RATO Gonalo *	19

## SE – SWEDEN

<b>Other practice</b>		<i>Substitute members</i>		<b>Allotment of seats</b>	
Received ballots:	41	1. NORIN Klas	25	<i>Full members</i>	
Valid ballots:	38	2. BORNEGARD Annette *	24	1. LETTSTR�M Richard	57
Void ballots:	3	<b>Private practice</b>		2. ONN Thorsten	48
BORNEGARD Annette *	24	Received ballots:	68	<i>Substitute member</i>	
LINDEROTH Margareta	26	Valid ballots:	64	1. ERIXON Bo	12
NORIN Klas	25	Void ballots:	4		
SCH�LD Zaid	30	ERIXON Bo	12		
<b>Allotment of seats</b>		LETTSTR�M Richard	57		
<i>Full members</i>		ONN Thorsten	48		
1. SCH�LD Zaid	30				
2. LINDEROTH Margareta	26				

## TR – TURKEY

<b>Unitary</b>		DERICIOGLU Ekin	15	<b>Allotment of seats</b>	
Received ballots:	44	DERIS Aydin	21	<i>Full members</i>	
Valid ballots:	41	D�NDAR Kazim	32	1. D�NDAR Kazim	32
Void ballots:	3	D�NDAR T�lin	21	2. AYLI H�lyla	28
AKYOL M�serref	6	�ZBAY Cenk	4	3. ARKAN Selda	24
ARKAN Selda	24	SEVINC Secil	3	4. DERIS Aydin **	21
B�Y�K�NAL Mehmet G�rcan	7	SEYITHANOGLU M. Teoman	4	<i>Substitute members</i>	
AYLI H�lyla	28	YALTIRIK Apti	8	1. D�NDAR T�lin **	21
CORAL N�khet Serra Yardimci	12	YAVAN Nuriye	9	2. YURTSEVEN Tuna	20
		YURTSEVEN Tuna	20	3. DERICIOGLU Ekin	15
				4. CORAL N�khet Serra	
				Yardimci	12

## 25<sup>th</sup> Anniversary of the *epi* Seminar : The Next Twenty Five Years

In the course of the recent Revision of the European Patent Convention the *epi* has been anchored in the Convention as the representative body of all European patent attorneys. With the development of the European Patent Organisation the *epi* has witnessed a profound change of the patent system in Europe during the past 25 years. More changes lie ahead with the accession of a great number of new countries to the EPC, the proposed Community Patent and the setting up of European Patent Courts. These changes will shape the profile of the patent system over the next 25 years. The *epi* Seminar will endeavour to deal with the challenges ahead. You are cordially invited to participate.

Walter Holzer

### Place

Ettington Chase Conference Centre  
Ettington Chase, Ettington  
Stratford-upon-Avon  
GB – Warwickshire CV37 7NZ

### Date

Saturday October 26, 2002  
14.00 – 17.30

### Programme

The Next 25 Years

#### First Session

- Opening address
- The expectations of the EPO
- The position of National Patent Offices
- IP Protection in the EU
- Tea break

#### Second Session

- IP Litigation in Europe
- The future of the *epi*
- Panel Question and Answer Session
- Closing remarks
- Close

The language of the Seminar will be English.

The Seminar will be followed by a **Gala Banquet** in the Great Hall of Warwick Castle.

Further details, including information on registration fee, accommodation and airport transfers, will be circulated and published in *epi* Information No. 2/2002.



## epi-Tutorien 2002

Das *epi* bietet 2002 wieder Tutorien zur Vorbereitung auf die europäische Eignungsprüfung (EEP) 2003 an.

Dieses Jahr werden Tutorien für alle oder Teile der Prüfungsaufgaben von 2000 und/oder 2001 angeboten. Der letzte Anmeldetermin ist der 7. Juni 2002.

Die Tutorien sind sowohl für Kandidaten gedacht, die die EEP (vollständig oder in Modulen) erstmals 2003 ablegen werden, als auch für Kandidaten, die ein Tutorium für nicht bestandene Prüfungsaufgaben wünschen. Kandidaten, die sich für die Aufgaben beider Jahre anmelden, wird empfohlen, die Aufgaben von 2000 und 2001 nacheinander zu bearbeiten, um von den Kommentaren zu ihren Antworten auf die Aufgaben von 2000 für die Aufgaben von 2001 zu profitieren.

Die Daten für die Tutorien sind wie folgt:

Anmeldung bis spätestens:	07.06.2002	
Angebotene Prüfungsaufgaben:	<u>2000</u>	<u>2001</u>
Versand der Prüfungsaufgaben an die Kandidaten bis:	28.06.2002	28.06.2002
Eingang der Antworten auf die Prüfungsaufgaben bis:	30.08.2002	08.11.2002
Kommentare zu den Prüfungsaufgaben bis:	04.10.2002	13.12.2002
Besprechung:	Februar 2003	

Im Sinne eines reibungslosen Ablaufes der Tutorien werden die Kandidaten gebeten, sich an die angegebenen Fristen zu halten.

Die Kandidaten werden gebeten, sich sobald wie möglich, spätestens jedoch bis zum 7. Juni 2002 durch Rücksendung des auf Seiten 14-15 abgedruckten, ausgefüllten Formulars an das *epi*-Sekretariat (Fax Nr. +49 89 2021548) anzumelden.

Für weitere Auskünfte wenden Sie sich bitte an das *epi*-Sekretariat (Tel. +49 89 201 70 80).

## epi Tutorials 2002

In 2002 the *epi* will again offer tutorials for candidates wishing to prepare for the European qualifying examination (EQE) in the year 2003.

This year we offer tutorials with the options of doing all or some of the papers of 2000 and/or 2001. The enrolment deadline is 7 June 2002.

The tutorials are open to candidates who are going to sit the EQE in the year 2003 for the first time (either in full or in modular form) as well as candidates who wish to have tutorials for those papers they failed. Those enrolling for the papers of both years are encouraged to do the 2000 and 2001 papers in sequence, to benefit from the comments on their 2000 answers to improve their answers to the 2001 papers.

The tutorials will run according to the following timetable:

Enrolment:	07.06.2002	
Papers offered:	<u>2000</u>	<u>2001</u>
Papers sent to the candidates by:	28.06.2002	28.06.2002
Scripts by:	30.08.2002	08.11.2002
Comments by:	04.10.2002	13.12.2002
Meeting:	February 2003	

Candidates are reminded to be ready to stick to the indicated deadlines to allow a smooth progressing of the course.

Candidates are encouraged to enrol as soon as feasible, and by 7 June 2002 at the latest, by filling in and sending the form printed on pages 14-15 to the *epi* Secretariat (Fax No. +49 89 202 15 48). For further information, please contact the *epi* Secretariat (Tel. +49 89 201 70 80).

## Tutorat *epi* 2002

L'*epi* propose cette année de nouveau un tutorat destiné aux candidats qui souhaitent se présenter à l'examen européen de qualification (EEQ) en 2003.

Ce tutorat couvre toutes les épreuves, ou partie des épreuves des années 2000 et/ou 2001. La date limite d'inscription est le 7 juin 2002.

Le tutorat s'adresse aux candidats qui se présenteront à l'EEQ pour la première fois en 2003 (soit à l'ensemble des épreuves, soit par modules), de même qu'aux candidats qui souhaitent un tutorat pour les épreuves auxquelles ils ont échoué. Il est recommandé aux candidats qui s'inscriront aux épreuves des deux années de traiter en premier les épreuves 2000 afin de mettre à profit les commentaires de leur tuteur pour améliorer leurs réponses aux épreuves 2001.

Le tutorat se déroulera selon le calendrier suivant:

Inscription:	07.06.2002	
Epreuves proposées:	<u>2000</u>	<u>2001</u>
Envoi des épreuves aux candidats le:	28.06.2002	28.06.2002
Envoi des réponses le:	30.08.2002	08.11.2002
Commentaires retournés le:	04.10.2002	13.12.2002
Réunion:	février 2003	

Il est demandé aux candidats de respecter les dates indiquées afin d'assurer le bon déroulement du cours.

Les candidats sont invités à s'inscrire le plus rapidement possible, au plus tard le 7 juin 2002. Ils sont priés de retourner le questionnaire imprimé pages 14-15, dûment rempli, au Secrétariat de l'*epi* (Fax no. +49 89 202 15 48). Pour tous renseignements, prière de s'adresser au Secrétariat de l'*epi* (Tel. +49 89 201 70 80).

### *epi* Home Page

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We want to provide information quickly and unofficially, particularly

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- national decisions,
- other news of interest to *epi* members

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 in rtf (rich-text)-format or as plain ASCII-text-file.

## epi Tutorials, Summer 2002

7 June 2002

Please return by →  
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Address:.....  
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.....

Telephone No.: ..... Fax No.: .....

Preferred language:      English                       German                       French

Fields of interest:              Electricity/Mechanics                       Chemistry

– I should like to enrol for the following papers:

2000	A	B	C	D	2001	A	B	C	D
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

– I need a copy of all the examination papers relating to the tutorial requested above

I am a Student of the **epi**

I am not a Student of the **epi**

<u>Fees</u>	<u>non-epi Student</u>	<u>epi Student</u>	<u>Fees due</u>
any single paper	60 EUR	35 EUR	
2 papers (2001)	100 EUR	50 EUR	
4 papers (2001)	175 EUR	100 EUR	
2 papers (2000)	75 EUR	40 EUR	
4 papers (2000)	150 EUR	75 EUR	
8 papers (2000 and 2001)	300 EUR	150 EUR	
2+2 papers (2000+2001)	150 EUR	75 EUR	

Total:                      EUR

Tutorial fees are halved for each Paper that the candidate declares he/she does not need a copy from the **epi** Secretariat.

Previous courses attended on intellectual property: (CEIPI, QMW, previous preparatory courses etc.):

.....  
.....

If you have already sat one or both of the following examinations, please indicate its date(s):

– a national examination .....

– the European Qualifying Examination: .....

Years of professional experience: .....

Would you be willing to travel to meet your tutors?

.....

Date of fee payment into the following **epi** account, and its amount:

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Please note that **epi** tutorial fees **cannot** be debited from accounts held with the European Patent Office

Date: .....

Signature: .....

Name: .....



## Advance Information

### Seminar Eindhoven, 6 May 2002

A one day seminar will be held on Monday 6 May 2002 in Eindhoven  
(9.30 a.m. to 5 p.m)

**Topic: Facts and experiences about Oral Proceedings at the EPO**

A mock Oral Proceedings in Opposition will be held to give the participants an opportunity to see how to prepare such an event and what can actually happen.

Daniel X. Thomas, Director in DG 2, EPO will chair this seminar. He will act as chairman of the Opposition Division as well as moderator in the discussions.

This seminar will also give experienced members of the profession a possibility of a direct exchange of views with a member of the EPO.

Invitations and enrolment forms will be sent to members from the Netherlands and Belgium, who will be given priority. Please make a note in your diary!

**Registration fee:** EUR 200, incl. morning coffee, lunch and afternoon coffee

#### THEMED EDITION

epi Information 2/2002

The epi information issue 2/2002 will be another in our infrequent series of themed editions. The chosen theme for this edition will be:

"The recent changes to the EPC and PCT prosecution practice at the European Patent Office and the measures and reasons for the European Patent Office current policy of reducing the workload at that Office".

All contributions to the Edition will be gratefully accepted and we look forward to receiving contributions from our members by the deadline of

10 May 2002.

Editorial Board, c/o epi Secretariat  
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## Jahresgebühren- Verfallsmitteilungen DPMA/EPA

K. Rupprecht (DE)

Bei der Zusammenarbeit mit professionellen Einzahlungsunternehmen zur Einzahlung von Patent- Jahresgebühren kommt es immer wieder zu Rechtsverlusten, die allerdings – entgegen der landläufigen Fachmeinung – in den überwiegenden Fällen gar nicht durch das Einzahlungsunternehmen verursacht wurden. Tatsächlich arbeiten diese Unternehmen nämlich äußerst effizient und zuverlässig.

Deutlich macht das zunächst eine Analyse, welchen Weg die von den Ämtern herausgegebenen Verfallsmitteilungen (DPMA derzeit noch gemäß § 17(3); EPA: freiwillige Mitteilung innerhalb der 6- monatigen Nachfrist gemäß Art. 86(2) EPÜ) wirklich nehmen und insbesondere warum jene Verfallsmitteilungen nicht die von den Ämtern beabsichtigte Wirkung haben. Der Weg läuft ja, sofern ein professionelles Einzahlungsunternehmen der Einzahlung der Jahresgebühren betraut ist, so, daß die Mitteilung zunächst an den Inlandsvertreter geschickt wird, der sie an seine ausländischen Korrespondenzanwälte (nämlich die lokalen Anwälte der Schutzrechtsinhaberin) sendet, von wo die Mitteilung an die Schutzrechtsinhaberin geht, die damit meistens nur wenig anfangen kann. In den meisten Fällen ist es nämlich so, daß sich bei der Datenübernahme des Schutzrechts durch die Schutzrechtsinhaberin oder aber bei der Weitergabe der Daten durch die Schutzrechtsinhaberin an das Einzahlungsunternehmen ein Fehler einschleicht, sei es beispielsweise ein Anmeldedatum „1991“ anstelle „1990“, oder z. B. ein Zahlendreher im Aktenzeichen. Die Folge solcher Fehler ist beispielsweise, daß die Schutzrechtsinhaberin im Glauben ist, die neunte Jahresgebühr sei einzuzahlen gewesen, was dann auch geschah, während aber tatsächlich – wegen des Fehlers im Anmeldedatum – die achte Jahresgebühr einzuzahlen gewesen wäre.

Bei einem Zahlendreher ist es noch einfacher: die Schutzrechtsinhaberin weist das Einzahlungsunternehmen mit einer Liste an, die korrekte Jahresgebühr für ein vermeintlich korrektes, aber dennoch wegen des Zahlendrehers inkorrektes Aktenzeichen einzuzahlen, weshalb die Schutzrechtsinhaberin sich bei Eingang der Verfalls-

mitteilung sicher ist, daß es sich nur um eine versehentlich falsche Mitteilung handeln könne, da ja eigentlich das Einzahlungsunternehmen mit der Einzahlung beauftragt worden war und von dort auch eine Vollzugsmeldung in Form einer Rechnung kam. Hier geht wieder einiges an Zeit bei der Klärung der Ursachen für die Verfallsmitteilung ins Land, weshalb bei der überwiegenden Zahl derart gelagerter Fälle die Jahresfrist gemäß § 123(2) PatG bzw. Art. 122(2) EPÜ längst abgelaufen ist.

Die Ämter stellen sich in Unkenntnis der geschilderten tatsächlichen Abläufe und aus amtlicher Sicht nachvollziehbar auf den Standpunkt, daß eine Verfallsmitteilung die Schutzrechtsinhaberin ja „wachrütteln“ müßte. Vor dem geschilderten Hintergrund, der zugegebenermaßen nicht für alle Schutzrechtsverluste durch fehlende Einzahlung einer Jahresgebühr zutreffen mag, aber dennoch den Sachverhalt für eine große Anzahl von Wiedereinsatzfällen darstellt, ist aber das Gegenteil der Fall: die Verfallsmitteilung führt bei der Schutzrechtsinhaberin – und nur bei dieser – in solchen Fällen ausschließlich zur Verwirrung. Denn Sie hat ja den Einzahlungsauftrag vermeintlich korrekt und zeitgerecht an das Einzahlungsunternehmen gegeben.

Eine Abhilfe könnte darin bestehen, daß die Ämter eine Zweitschrift oder Kopie der Verfallsmitteilung *an den Einzahler bzw. das Einzahlungsunternehmen* senden, von dem in aller Regel sofortige Maßnahmen zur Klärung und Schadensbegrenzung ergriffen werden. Eine solche Maßnahme würde sich auch für die Ämter in mehrerer Hinsicht lohnen: zum einen würde sich die – nicht unerhebliche! – Zahl von Rückzahlungen von falsch eingezahlten Jahresgebühren reduzieren, womit eine Reduzierung der personellen Belastung einhergeht. Zum zweiten würde sich die Anzahl der Wiedereinsatzanträge reduzieren, die bekannterweise bei den Prüfern zu einer nicht unerheblichen Mehrbelastung beitragen. Schließlich aber erhalten die Ämter für jedes „gerettete“ Schutzrecht auch weiterhin Jahresgebühren, was als Einnahmequelle nicht ganz unbeachtlich ist.

# The Community Patent in Litigation

by U. Dreiss and C. Keussen\*

## 1. Background.

Under the European Patent Convention (EPC), patents of contracting states „designated“ in a European patent application are subject to a single examining procedure. Leaving aside the extent of protection granted<sup>1</sup> the common nature ends with the grant of the patent. The effect of the European patent in the designated states is that of a national patent<sup>2</sup>. The same applies as regards the court system and procedural law. Uniformity in these areas has not been achieved as yet. After a first attempt had failed in 1975<sup>3</sup> and a second one did not meet with success in 1989<sup>4</sup>, a draft which had been revised especially with regard to translation requirements, the European Commission reverted to this topic, publishing a Green Paper<sup>5</sup> in 1997. As a consequence of the ensuing discussion, a Proposal for a Council Regulation on the Community Patent<sup>6</sup> was published in the fall of 2000 (briefly referred to here as Community Patent Regulation, CPR).

In parallel with the development of events concerning the Community Patent, an intergovernmental conference held in Paris on June 24/25, 1999 by the contracting states of the European Patent Organisation, appointed two working groups which were assigned the tasks of preparing proposals for cost reduction, on the one hand, and for harmonizing litigation<sup>7</sup> involving European patents for designated states („bundled patents“) granted by the European Patent Office (EPO) under the European Patent Convention. Following a proposal by the Working Party on Cost Reduction, the required number of states –

among them Great Britain, Germany, and lately also France – signed an agreement<sup>8</sup> which provides for a waiver of the option of contracting states, under Article 65 EPC, to request submission of a translation of the patent into the official language of the respective contracting state. However, an exception<sup>9</sup> to this waiver was allowed, and the consequences which that may have are difficult to foresee. The agreement remains to be ratified. The Working Party on Litigation submitted a proposal for a European Patent Litigation Protocol (EPLP)<sup>10</sup>. Progress of the work of this group will depend largely on the future fate of the Community Patent Regulation (CPR).

The CPR provides for a unitary and autonomous patent valid in the entire European Union to be granted by the European Patent Office (EPO) for the whole territory of the Community<sup>11</sup>. For that to be done, the EU intends to accede to the EPC as soon as a corresponding amendment to the EPC will have established the proper basis for such accession<sup>12</sup>. The European patent for the territory of the European Union (Community Patent), once granted by the EPO, is to be subject to a system<sup>13</sup> of its own created by the CPR. A diplomatic conference is to take place in the middle of the coming year to revise the EPC, as required.

In its Article 30, the CPR provides for a Community intellectual property court which is to have exclusive jurisdiction in matters of nullity actions, infringement actions, actions for declaration of non-infringement, requests for limitation, and counterclaims for invalidity<sup>14</sup>,

\* Professor Dr.jur. Dipl.-Ing. Uwe Dreiss, M.Sc., patent attorney, Stuttgart, president of the German Patentanwaltskammer;

Dr.rer.nat. Dipl.-Chem. Christof Keussen, Hamburg, member of the board of the German Patentanwaltskammer, chairman of dept. V of the board (intellectual property).

Revised and supplemented version of a paper by both authors published in GRUR 2001, vol. 10-11, p. 891, as a contribution to the Festschrift für Rüdiger Rogge.

1 Article 69 EPC and the Protocol of Oct. 5, 1973 on the Interpretation of Art. 69, regarding the extent of protection under the aspect of equivalence of Art. 69 as supplemented by Revision Act of Nov. 29, 2000; MR/3/00 rev.1.

2 see Articles 2 and 64 EPC.

3 see Community Patent Act of July 26, 1979, BGBl. I 1979, page 1269.

4 Law on the Agreement of December 21, 1989 about Community patents etc. (second Community Patent Act) of December 20, 1991, BGBl. 1991 II, page 1354. On amendments see Memorandum of the Federal Government, Bundestagsdrucksache 12/632, page 69; on litigation see Bruchhausen, Die Rolle des Berufungsgerichts für Gemeinschaftspatente im Verletzungsprozess, GRUR 1985, 620 et seqq.; by the same author, Die Institutionen und Verfahren, die Gemeinschaftspatente betreffen, GRUR Int. 1985, 497; Stauder, Die Vereinbarung über Gemeinschaftspatente, das Streitregelungsprotokoll und das Änderungsprotokoll, GRUR Int. 1986, 302; Schäfers and Schennen, Die Lissabonner Konferenz über das Gemeinschaftspatent, GRUR Int. 1992, 638.

5 Promoting innovation through patents, Green Paper by the European Commission on the Community patent and patent protection system in Europe, COM(97) 314 final, of June 24, 1997.

6 Proposal for a Council Regulation on the Community patent (briefly: Community Patent Regulation – CPR), COM(2000) 412 final, of August 1, 2000.

7 see the report in the Official Journal of the EPO 1999, 545 et seqq.

8 Document WPR/6/00 rev. 1.

9 see Article 1, paragraph 2 according to which a contracting state whose official language is not English, French or German, may prescribe that European patents be translated into one of those three languages.

10 The most recent version is contained in: Second Proposal for an EPLP, document WPL/SUB 13/01 of May 22, 2001; see also the reports by Schade, GRUR 2000, 101 et seqq. and 827 et seqq.. It is contested whether the EU member states still are authorized to work out a treaty on litigation since the EU took the legislative initiative in this field by Council Directive (EC) no. 44/2001 of December 22, 2000 (Official Journal of the European Communities of January 16, 2001, L 12).

11 Article 2 of the Proposal for a CPR.

12 see working document of EU Commission offices: Community strategy for introducing the Community patent when revising the EPC, of May 7, 2001, SEC (2001) 744.

13 Proposal of the working document (footnote 11) for revision of Articles 1 and 2 EPC.

14 Article 30 of the Proposal for a CPR reads:

„Actions and claims relating to the Community patent – exclusive jurisdiction of the Community intellectual property court

(1) The Community patent may be the subject of invalidity or infringement proceedings, of an action for a declaration of non-infringement, of proceedings relating to the use of the patent or to the right based on prior use of the patent, or of requests for limitation, counterclaims for invalidity, or applications for a declaration of lapse. It may also be the subject of actions or claims for restitution of damages.

(2) The Community patent may not be the subject of actions in respect of threatened infringement.

(3) The actions and claims referred to in paragraph 1 come under the exclusive jurisdiction of the Community intellectual property court. In the first instance, they are brought before the Chamber of First Instance of that court.

(4) Subject to the provisions of the EC Treaty and of this Regulation, the

among others. The Treaty of Nice<sup>15</sup> of the end of 1999 paved the way for this court within the existing court system under the Treaty of the European Communities<sup>16</sup> (EC Treaty).

The Treaty of Nice includes a new Article 225a permitting the establishment of judicial panels for certain special fields, such as intellectual property. According to the new version of Article 225, paragraph 2, the Court of First Instance of the European Communities will have jurisdiction in respect of appeals against decisions by the new judicial panels<sup>17</sup>. General acceptance of the Treaty of Nice, albeit delayed, is expected in spite of the negative outcome of the referendum in Ireland<sup>18</sup>.

As was to be expected after the experience of 1975 and 1989, debates in the working groups about the Proposal for a Council Regulation on the Community Patent revealed fundamental differences of opinion concerning the question of languages, the share of annuities to be received by national patent offices and the extent of their participation in the granting of Community patents, as well as the patent litigation system. On May 31, 2001, therefore, the Single Market Council adopted a Common Approach to serve as the guideline for further work on the Community Patent while, at the same time, determining that the system of jurisdiction be modelled in accordance with Articles 225a and 229a of the EC Treaty in its Nice version<sup>19</sup>.

The Court of First Instance is to be competent to hear appeals against the decisions handed down by judicial panels to be created pursuant to Articles 225a. These two instances are to form one organisational unit<sup>20</sup> following, for instance, the pattern of association of the Court of First Instance with the European Court of Justice<sup>21</sup>, the first instance in this case being a judicial panel while the second instance would be the Court of First Instance itself<sup>22</sup>. This will amount to an extension of

terms and procedures relating to the actions and claims referred to in paragraph 1 and the rules applying to the judgments given shall be established in the statute or rules of procedure of the Community intellectual property court."

15 see the text of the Treaty of Nice in the Federal Government bill of February 26, 2001, Bundesratsdrucksache 200/01 of March 9, 2001.

16 The Commission had already made it clear on page 15 of the Green Paper (footnote 5 above) that a European patent court could not be established outside of the legal system based on the EC Treaty; see also the Opinion 1/91 of the Court of Justice of December 14, 1991 on the draft of an agreement between the Community and the EFTA relating to the institution of a European economic convention EuGHE I 1991, 6079 et seqq.

17 see annex.

18 Declaration made by the heads of state in Gothenburg on June 6, 2001.

19 Council of the EU, document SN 2778/01(PI) of June 1, 2001. The section concerned with the court system reads as follows:

"A system of jurisdiction according to Articles 225a and 229a of the EC Treaty, in the version of the Treaty of Nice, should be established for the Community patent. When instituting the Chamber of First Instance the need for uniform application of Community law as well as factors, like the cost:benefit ratio, demand and national language(s), nearness to users, and utilization of existing local infrastructure and expertise should be taken into account. Appeals should fall under the jurisdiction of the Court of First Instance."

20 see Article 225 EC Treaty.

21 see Article 225(2) EC Treaty, Nice version (annex).

22 A purely European system comprising two instances, in principle, was proposed already by Rau, *Wie soll ein gerichtliches Patentschutzsystem in Europa neben den nationalen Gerichten unter besonderer Berücksichtigung des „Grünbuch-Gemeinschaftspatents EU“ aussehen?*, Mitt. 1998, page 241 et seqq.; and also Sedemund-Treiber, Mitt. 1999, page 1 et seqq.; furthermore Sydow, *Die Ausdifferenzierung des Gerichtssystems der EU*, Zur

jurisdiction in matters of intellectual property of the Court of First Instance which already is in charge of settling legal actions against decisions by the Appeal Boards of the Office for Harmonization of the Internal Market (OHIM)<sup>23</sup>.

## 2. More than one Regional Chamber.

In the first communication by the EU Commission<sup>24</sup> following publication of the Green Paper it was still assumed that the best solution would be to have but a single court in the first instance. However, it became evident in subsequent discussions that one court alone hardly would be able to handle the approximately one thousand cases expected to be dealt with in the first instance per year. The Common Approach now envisages uniform application of Community law when a chamber of first instance is established. The following four factors must be taken into account:

- cost:benefit ratio
- demand and national language(s)
- nearness to users
- utilization of existing local infrastructure and expertise<sup>25</sup>.

Member states of the EU in which intellectual property rights play an important part, indeed, have a legitimate interest in seeing their infrastructure and experience made use of in the formation of such a court. The very least to be ensured, in particular, is the nearness to the parties, existing demand for such an institution in the respective member state, and at least also the use of the national languages of the member states.

For this reason, it must be assumed that there will be a number of regional chambers<sup>26</sup> entering into action as courts of first instance. Their decisions then will be appealable to the Court of First Instance which would enter into action as the second instance – contrary to what the name suggests. Whether or not regional chambers will be able to function properly and become accepted will depend on the setup to be chosen for them. As this is untrodden legal territory, a number of fundamental questions must be answered first.

## 3. Forum of tort.

Instituting more than one regional chamber raises the question of where local jurisdiction should reside. The most likely place would seem to be the forum of the defendant's residence or place of business and, where

Struktur der künftigen europäischen Patentgerichtsbarkeit,, GRUR 2001, 689 et seqq.

23 Article 63 of the Council Regulation on the Community Trademark (CTM).

24 Promoting innovation through patents. The follow-up to the Green Paper on the Community patent and the patent system in Europe. Communication from the Commission to the Council, the European Parliament, and the Economic and Social Committee, document COM(99) 42, 1998, page 11.

25 see footnote 19.

26 Paper read by Thierry Stoll (EU Commission) at the European Law Conference in Stockholm on June 12, 2001; see also the draft report on the Proposal for a CPR, submitted by the Committee for Law and the Single Market of the European Parliament, document 2000/0177 (preliminary) of September 5, 2001, request for amendment of consideration 7a.

there is no such place, that of the plaintiff's instead. That is what was assumed in the litigation protocol on the Community Patent Convention (CPC) of 1989<sup>27</sup> too. What needs to be decided, however, is the extent to which a regional chamber should have jurisdiction also when infringing acts were committed in the member state where the regional chamber has its seat (forum of tort). Many reasons can be listed in favor of such competence. Fairness, above all, demands it. After all, it is the infringer whose acts interfere with the right of the patent proprietor at a specific place, a right which the patent proprietor was granted by an act of national sovereignty. At this place of jurisdiction there is the „close relationship“ between the damage suffered and the factual conditions for liability, a relationship which the European Court of Justice always took into account in their international civil law decisions on the European Civil Jurisdiction Convention<sup>28</sup>.

The same must be applicable where several places are involved. If reasons exist to have disturbance eliminated by filing suit at several places simultaneously this is occasioned by the infringer, not by the patentee. Moreover, in the first place the patentee is the user of the system in the sense of the „nearness to users“ mentioned in the Common Approach. If the possibility of prosecuting a claim for the common market as an economic entity is desirable it would be unreasonable to confront the patent proprietor with the requirement to follow the infringer. Rather, the patent proprietor, who actually represents the „demand“ for legal protection in the sense of the Common Approach<sup>29</sup>, should have the choice to select the forum among those whose jurisdiction is established by the acts of tort. In judgments involving Article 5, no. 3 of the European Civil Jurisdiction Convention, the European Court of Justice permits the plaintiff to choose between various fora of tort, such as the forum of the damage incurred and the forum of the cause of the occurrence, because „each of the two may open a particularly helpful way for taking evidence and managing the lawsuit, depending on the case at issue“<sup>30</sup>. The same applies to the reminder of the order to prepare „a logical summary of solutions which have become recognized in most of the participating states“<sup>31</sup>, indicated in decisions by the European Court of Justice. There have been quite a few instances where this consideration has influenced also the decisions taken by the German Federal Court of Justice<sup>32</sup>.

It would be contrary to the system of a uniform patent for the entire economic area of the EU to restrict the forum of tort as proposed, for instance, in the litigation protocol on the Community Patent Convention 1989<sup>33</sup>

27 Article 17, paragraphs (1) and (2) EPLP; see Stauder, op. cit. (footnote 4), 305.

28 see European Court of Justice, judgment of January 11, 1990 (Dumez France / Hess. Landesbank), NJW 91, 631, 632.

29 see footnote 18.

30 see European Court of Justice, judgment of November 11, 1976 RS 21/76 (Mines de Potasse), NJW 77, 493 et seqq.

31 see European Court of Justice, op cit. (footnote 30), page 494.

32 see BGH „Formstein“ GRUR 86, 803 et seqq. and „Tollwutvirus“, GRUR 87, 231 et seqq.

33 Article 14, paragraph 5 in combinatin with Article 17, paragraph 2.

and the Community Trademark Regulation<sup>34</sup>. According to those earlier proposals a judgment passed by a court by virtue of its competence as the forum of tort should and did embrace nothing but acts which had been committed in that respective member state. It would be especially adverse if the judgment were to be handed down by a European court. It would contravene one of the most important aims of a European patent litigation system, namely the EU-wide prosecution of a claim in a single legal procedure. Unless specified otherwise, both the litigation protocol on the CPC 89 and the Community Trademark Regulation specifically do not start from uniformly applied European law. Instead, they make provision for the application of national law, particularly procedural law<sup>35</sup>. Therefore, they cannot serve as models for the settlement of litigation relating to the Community patent. If an analogous regulation were applied, the Community patent would lose a lot of its attraction in comparison with a European patent held by its proprietor in only a few countries which are the centers of his business activities.

The relationship between the regional chambers, therefore, should be governed by the same rules as the relationship between the member states according to Regulation (EC) no. 44/2001<sup>36</sup> which, essentially, is identical in content with the European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters<sup>37</sup>.

Article 5, no. 3 of Regulation (EC) no. 44/2001 provides for unlimited local jurisdiction of the court at the location where the damaging event occurred.

Furthermore, the choice thus offered among a number of possible fora will allow the plaintiff to take his decision in consideration of the expertise and efficiency of the various regional chambers. That is no disadvantage of the system. On the contrary it will prove to be advantageous, especially so in the initial phase. Those countries afraid that, upon adoption of such regulation, the acts of patent litigation in Europe might be played in regional chambers outside of their realm, could see to it that their regional chambers are equipped in the best possible way to meet the new challenges, provided they have enough influence to do that. That applies above all to the appointment of judges and the language regime offered.

34 Article 93, paragraph 5 in combination with Article 94, paragraph 2. In this respect the autonomy of the Community trademark is not fully guaranteed, see. von Mühlendahl/Ohlgart, Die Gemeinschaftsmarke (1998), 8.

35 According to the Litigation Protocol on the Community Patent Convention (CPC '89), national courts were to act as „Community patent courts“ deciding according to national law of procedure, cf. Articles 1 and 32, paragraph 2 of the Litigation Protocol on the CPC '89 and Article 98, paragraph 1, sentence 2 and paragraph 2 of the Council Regulation on the Community Trademark (CTM).

36 Official Journal of the EC L 12 et seqq. of January 16, 2001.

37 see Neuhaus, Das bereinkommen über die gerichtliche Zuständigkeit und Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen vom 27. September 1968 und das Luganer Abkommen vom 16. September 1988, soweit hiervon Streitigkeiten des gewerblichen Rechtsschutzes betroffen werden, Mitt. 96, page 257 et seqq.

#### 4. Nomination of judges.

The members of the regional chambers will be appointed by the Council<sup>38</sup>. That does not mean that the member state in which a regional chamber has its seat, or the member states for which it has jurisdiction, should not be given the right to propose or nominate judges. In that event it should be up to the respective member state to make sure, by proper selection of experienced patent judges, that „its“ regional chamber is adequately staffed to fulfill all the requirements<sup>39</sup> to make it work. Nevertheless it is also conceivable to have judges from other member states on the bench of such a regional chamber – perhaps in a kind of revolving system. In this way the so-called „torpedo“ problem, too, would be resolved almost automatically because, in the long run, no regional chamber could afford to be resorted to for the only reason that it was unable to settle litigation within a reasonable period of time<sup>40</sup>.

#### 5. Technical judges.

For a European court system to be effective, it must include technical judges sitting on the bench<sup>41</sup>. In revocation and infringement proceedings this has the advantage of permitting expert discussions of the subject matter at issue during a hearing between judges on the one side and patent attorneys and lawyers on the other side, without an expert having to be called in by the court. Even where such a possibility should not be given because, by training and experience, a technical judge might not correspond to the notional person of average skill in the art within the meaning of patent law, a judge with a technical background still would be in a position to assess and form an opinion about the statements of a technical expert. By the way, having technical judges cooperate in patent litigation is far more common practice than generally believed, also in countries other than Germany<sup>42</sup>, for instance, in Austria<sup>43</sup>, Italy<sup>44</sup>, Sweden<sup>45</sup>, Norway<sup>46</sup>, Great Britain<sup>47</sup>, the U.S.A.<sup>48</sup>, and Japan<sup>49</sup>.

38 Article 225a, paragraph 4 EC Treaty (Nice version), see annex.

39 Pagenberg, *The First Instance European Patent Court. A Tribunal without Judges and Attorneys?*, IIC 2000, page 481 et seqq., already drew attention to the problem of finding enough qualified judges.

40 As regards more recent developments in Belgium, Italy, and France see Pilz, *Torpedo unter Beschuss*, GRUR Int. 2001, 33.

41 see Sedemund-Treiber, *Braucht ein europäisches Patentgericht den technischen Richter?*, GRUR 2001, September volume; Stauder, *Aspekte der Durchsetzung gewerblicher Schutzrechte: Fachkundige Richter, schnelles Verfahren und europaweites Verletzungsverbot, Aktuelle Herausforderungen des geistigen Eigentums*, Festschrift für Beier (1996) 619 et seqq.; Bierbach, *Probleme des Patentverletzungsprozesses aus der Sicht des Richters*, GRUR 1986, 201 et seqq.; Neuhaus, *Der Sachverständige im deutschen Patentverletzungsprozess*, GRUR 1987, 483 et seqq.; and from the Swiss point of view, for example, Brunner, *Die Verwertung von Fachwissen im handelsgerichtlichen Prozess*, Schweizer Juristen-Zeitung 1992, page 22 et seqq.

42 for German law see § 63 of the Patent Law.

43 see § 74 of the Austrian Patent Law; cf. Holzer, *Kein Patentverletzungsprozess ohne Patentanwälte (Das österreichische Modell)*, Mitt. 2000, page 211.

44 see Bosotti, *Die Rolle italienischer Patentanwälte in Patentrechtsstreitigkeiten*, Mitt. 2000, pages 213, 214.

45 § 66 of the German Patent Law.

If a sufficient number of technical judges is to be won, the rules of procedure should allow regional chambers to cooperate with experienced courts having specialized members, such as the German Federal Patent Court or the Technical Boards of Appeal of the European Patent Office where technical judges are permitted to be called in from case to case<sup>50</sup>. That would also meet the conditions of the Common Approach as regards utilization of the existing infrastructure<sup>51</sup> of the member states and the principle of subsidiarity<sup>52</sup>.

It should be noted here that proceedings focussed on validity and infringement of a patent will differ in important aspects from conventional German proceedings as we know them. Questions of valuation of technical facts in view of relevant prior art will gain quite some weight. The court no longer can accept a patent as it stands and interpret it<sup>53</sup>. It is conceivable that the court, having to rule on a nullity action or a request for limitation, must define a restricted claim for the patent<sup>54</sup> and, in choosing the language for such a claim, will largely decide the question of infringement at the same time. Moreover, if a patent is valid, the court, in subsequently delimiting the extent of protection, cannot leave aside a decisive definition of a term used. This is all the more reason why technical expertise on the judges bench is indispensable.

If agreement on a uniform court composition cannot be reached on the European level it should be left to the member states to find the solution best suitable in their view. That would give Germany the chance to make sure that technical judges will be included in the German regional chamber or chambers, thereby guaranteeing that efficient work will be done.

#### 6. Patent attorneys' right of representation.

The rules of procedure for the settlement of litigation relating to the Community patent should include provisions for an independent right of representation of patent attorneys. That will promote and warrant that also the parties to the proceedings have the opportunity to take part in the technical discussion which usually takes place in patent litigation matters due to the typical and very special combination of technical and legal problems<sup>55</sup>.

46 §§ 223 and 324 of the law on legal procedure in civil cases (Tvistemalsloven) of August 13, 1915, no. 6.

47 In addition to their law degree, the – relatively few – patent judges in Great Britain all hold a degree in sciences.

48 Five of the judges of the US Court of Appeals for the Federal Circuit have a college degree either in sciences or engineering. That, among others, is a result of the system of university education in the U.S.A. Graduation from no matter what kind of college after four years (B.Sc., B.A.) is a condition for admission to post graduate law studies at a Law School. Many of the jurists working in the field of patent law, therefore, will have studied sciences or engineering in college.

49 Rahn, *Neuere Entwicklungen bei Patentverletzungsklagen in Japan*, Mitt. 2001, page 199 et seqq. (202).

50 Dreiss, GRUR 2001, 549.

51 footnote 17.

52 Article 5 EC Treaty.

53 Of course, we do not fail to realize that the so-called „Formstein“ objection already is an exception to this rule based, by the way, on very succinct „European“ reasoning. BGH GRUR 1986, 803.

54 see Proposal for a CPR, Article 28, paragraph 2.

Because of their education<sup>56</sup> and professional experience, patent attorneys are able to study and present a well founded assessment of facts which are decisive in infringement and nullity proceedings. Often they have accompanied the invention protected by a patent in suit over a period of many years from the origination of the application and clarification of possible collisions all the way through the examining proceedings up to the grant of the patent. As a rule, they are the ones in all the contracting states of the EPC who do the decisive work in preparing the facts for patent litigation, both as regards validity and infringement.

In addition, most of them, having passed the European Qualification Examination<sup>57</sup>, also are professional representatives before the EPO and have gained a quite a lot of experience in oral proceedings before Boards of Appeal of the EPO, proceedings which are those of a court. – This proposal by no means is meant to renounce the proven and successful cooperation which exists between patent attorneys and attorneys-at-law who are specialized in the field of intellectual property right<sup>58</sup>. Rather it is intended to confirm this in the interest of the parties and on the basis of an equal rights partnership.

Another noteworthy aspect is to be seen in the fact that German patent attorneys and other persons entitled to representation and consultation in the field of patent law enjoy the so-called attorney-client privilege under jurisdiction in the United States. This privilege is granted with the express indication that, in view of their education and right of representation, they exercise a profession manifesting itself as a „substantive lawyering process“ which is functionally an „equivalent of an attorney“<sup>59</sup>.

55 for more detail, see Dreiss, Zehn Gründe für eine Vertretungsbefugnis der Patentanwälte in Europa vor einem künftigen europäischen Patentgericht, Mitt. 2000, page 475 et seqq.; also FICPI (Fédération Internationale des Conseils en Propriété Industrielle) Resolution on the patent attorney profession in the single market, published in FICPI Information 1999, page 6 et seqq. (8); lecture of Dr. Eugen Popp, Secretary General of CNIPA (Committee of National Institutes of Patent Agents) at the CIPA Conference in London on November 3, 2000 on „IP a New Europe“; welcome address by professor Dr. K. Hiller, president of VPP, at the spring meeting in Bremen on May 4 and 5, 2000, VPP-Rundbrief no. 2/2000, pages 35/36.

see also Tilmann, Fortsetzung der bewährten Zusammenarbeit auch vor einem zentralen europäischen Patentgericht – Erwiderung auf Dreiss, Mitt. 2000, page 475 – Mitt. 2001, page 163 et seqq.; Beier, Bewährte Zusammenarbeit zwischen technischen Richtern und rechtskundigen Richtern auch bei einem zentralen europäischen Patentgericht – Erwiderung auf Tilmann, Mitt. 2001, page 329 et seqq.; Gesthuysen, Fortsetzung der bewährten Zusammenarbeit auch vor einem zentralen europäischen Patentgericht, für mündige Mandanten, mit verantwortungsbewußten Patentanwälten – Erwiderung auf Tilmann, Mitt. 2001, page 332 et seqq.; and Knig, Richter, Patentanwälte, Rechtsanwälte und die zentrale europäische Gerichtsbarkeit, Mitt. 2001, pages 340 et seqq.

56 College or university education in engineering or sciences is a condition for becoming a patent attorney. It is followed by 26 months of training in the field of intellectual property at a patent attorney's office, and a total of 8 months at the German Patent and Trademark Office and the Federal Patent Court. Moreover, studies of general law are required. This requirement usually is met by taking correspondence or open university courses. See § 7 Patentanwaltsordnung (Patent Attorney Code).

57 see Articles 133 and 134 EPC.

58 Ultimately, presumably sharing the same opinion Tilmann, Fortsetzung der bewährten Zusammenarbeit auch vor einem zentralen europäischen Patentgericht – Erwiderung auf Dreiss, op. cit. (footnote 52), Mitt. 2001, page 163 et seqq.

59 Heidelberg, Harris, Inc. vs. Mitsubishi Heavy Industries Ltd., N.D. III (1996), 1996 U.S. Dist. LEXIS 19274; see also Beier, Die Anwendbarkeit des ame-

What this means, the other way around, is that the functionality test of US courts might turn out to be less favorable in future if a new European patent court system were to deprive patent attorneys in Europe of their existing<sup>60</sup> right of representation. That might pose a risk to the relationship of confidentiality which exists as a matter of course in our understanding of the work we do and the legal position we hold, to the detriment of European industry. In any case, it would not give the envisaged European settlement of litigation a good start.

## 7. The language arrangement.

In the event of the accession of the EU to the EPC, the language arrangement of the EPC according to Article 14 will be applicable to the examining proceedings which lead up to the grant of the Community patent. The language of the proceedings will be one of the three official languages<sup>61</sup> of the EPO (English, French, German). The official language will also be the language of the European patent specification. The claims will be translated into the respective other two official languages. The option of contracting states to request a translation of the patent into their official language, as provided in Article 65 EPC, is to be dropped for the Community patent<sup>62</sup>.

It is more difficult to arrive at a suitable language arrangement for the regional chambers. First of all, it would appear that the mentioning of the national language in the Common Approach – made so as to meet a demand of various EU member states whose national language is not one of the official languages of the EPC – must be understood as implying that a regional chamber should use as its language of proceedings at least also the national language(s) of the member state in which it has its seat. A party which cannot use this language would have to be enabled to carry on the proceedings in the official language of that state by way of translation.

The present language arrangement of the European Court of Justice (including the Court of First Instance of the European Communities) which cannot be dwelt on in detail here for reasons of space<sup>63</sup> is extremely costly. At the present time it accounts for approximately 43 % of the court budget. Moreover, it cannot be transferred easily to patent litigation between private parties. For the time being, i.e. without the extension of the EU, there are theoretically 121 combinations of languages. The costs of providing corresponding translation services are enormous.

Furthermore, it may not be expected that the possibility of resorting to the Court of Justice in civil lawsuits of the kind in question will continue to be offered for free. At least part of the costs will have to be covered by fees

rikanischen „Attorney-Client Privilege“ auf den deutschen Patentanwalt, Mitt. 2000, pages 216, 221 et seqq.

60 see Dreiss, op. cit. (footnote 52).

61 Rule 51(6) Implementing Regulations of the EPC.

62 see the proposal by the EU Commission for a new Article 65(2) EPC in the working document mentioned in footnote 12.

63 see information in the internet on legal counsel before the Court of Justice, <http://www.curia.eu.int>, and the further references given there.

to be paid by the parties. A language arrangement of the kind mentioned or a similar one requiring such extraordinary translation expenditure, therefore, would be ineffective and not useful. It would not meet the demand of an adequate cost:

benefit ratio specifically mentioned in the Common Approach<sup>64</sup>.

If the regional chambers were to conduct proceedings exclusively in the national language of the state of their seat patent proprietors would encounter difficulties in practice when prosecuting their claims. Therefore, the acceptance of such a system definitely would be at risk<sup>65</sup>. Nor would such a requirement be in the interest of those states having a seat of a regional chamber if they had to expect that patent proprietors would shun proceedings before their chamber.

In the interest of a better cost:benefit ratio, therefore, it is imperative to look for a simpler regulation. That might be achieved by enabling regional chambers to offer at least one of the three official languages of the EPC, in addition to their own national language, as language of proceedings. If that language were chosen by the plaintiff, translations into the other two official languages could be provided, if so requested by a party to the proceedings, in analogy to current practice of the Appeal Boards of the EPO<sup>66</sup>. In contracting states whose national language is not one of the official languages of the EPC the knowledge of various languages often is very good. For them, this proposal would offer an interesting opportunity to develop the notion of European intellectual property. It would appear to be advantageous for Germany as well to staff the regional chambers with people able to have proceedings conducted in English. That would make German regional chambers attractive also to parties who do not speak German. Besides, many of those working in the field of intellectual property are accustomed to take part in proceedings conducted in English and/or French, including oral hearings. An example already mentioned above are opposition and/or appeal proceedings in the EPO but also court proceedings in foreign countries in which German patent attorneys and lawyers take part.

## 8. Remedies for decisions by Boards of Appeal of the EPO.

According to the proposed Community Patent Regulation there shall be no means of addressing appeals to a Community organ of judgment, including the European Court of Justice and the Court of First Instance, against decisions by the Appeal Boards of the European Patent Office which will be the body granting the Community patent if the Community is designated. Instead, the decisions shall not be appealable. It is stated that this solution was adopted with a view to retaining for as long as possible the unified treatment of the Community

64 footnote 17.

65 see Rau, *op. cit.* (footnote 18); on the question of languages from the point of view of industry, see Krber, VPP-Rundbrief 1/2001, 8.

66 Rule 2 Implementing Regulations of the EPC.

patent and the European patent and also in order to avoid burdening the court competent for Community patents<sup>67</sup>.

The Technical Boards of Appeal are regarded as being an organ of the judiciary having a legal status comparable to that of a court. The same view is expressed in jurisprudence by the German Federal Constitutional Court on Articles 19(4) and 24 of the Basic Law<sup>68</sup>. It is provided that the European Patent Office, including of course its Boards of Appeal<sup>69</sup>, will acknowledge the so-called *acquis communautaire*<sup>70</sup> once the EU accession to the EPC has been accomplished.

Still, one wonders if it would not be advisable in the interest of uniformity of substantive and procedural law to allow decisions handed down by Boards of Appeal of the EPO to be reviewed, at least in fundamental matters, by the Court of First Instance of the European Communities. Otherwise a split in jurisdiction might develop between the legal practice of the EPO in examination and opposition proceedings and the practice of the Court of First Instance in revocation and limitation proceedings. The risk of such divergent development stems from the fact that decisions on specific questions decided by Appeal Boards in proceedings of grant and opposition, in general, become available sooner and more often than decisions on validity. The need for remedy may become imperative in the implementation of EU directives, for example, in the field of biotechnology or protection of software-based inventions. The patent proprietor's interest in legal protection in examining proceedings is another argument in favor of such means of redress, at least in those cases where the denial of a patent is final and no possibility of appeal to a court of the Community is left. If some form of redress were allowed, moreover, equal opportunities would exist for the patent proprietor and a third party attempting to destroy the patent and still having the nullity action at its disposal after having lost in opposition proceedings<sup>71</sup>.

Thus it is worth reconsidering whether it would not be better indeed to provide some form of redress from decisions by the Technical Boards of Appeal, for instance, by way of an appeal on a point of law, at least when fundamental issues are at stake<sup>72</sup>.

## 9. Principles of procedure.

A single, uniform law of procedure for patent litigation involving the Community patent now is required for states having very diverse legal traditions. The differences are particularly acute in the practice of Civil Law and Common Law. The essential aspects of rules of

67 Proposal for a CPR (footnote 6), reasoning, 15.

68 most recently the Federal Constitutional Court on April 4, 2001 – 2 BvR 2368/99 – as yet unpublished, with further references.

69 Article 15 EPC.

70 That is to be guaranteed by introducing new Articles 24a and 149c EPC. See the document cited in footnote 6.

71 Beier, Die Rechtsbehelfe des Patentanmelders und seiner Wettbewerber im Vergleich, GRUR Int. 1989, 1.

72 see also Schäfers, Anmerkungen zu einem gemeinschaftsrechtlichen Gemeinschaftspatent. GRUR 1999, 820.

procedure presented below are intended to promote expeditious and cost-effective proceedings, easily understood by the parties.

*(a) Filing suit.*

A traditional legal system of Civil Law is desirable. It requires an action (statement of claim) for proceedings to be instituted. Such legal action should fulfill the minimum requirements listed below:

- clear and unambiguous naming of the parties to the proceedings,
- a statement of request(s) (particulars of claim) spelling out the language of the decision desired to be taken by the court,
- a precise designation of the subject matter of the litigation,
- a statement of facts which in the plaintiff's (claimant's) opinion justify the request(s) made.

The above is preferred over the traditional custom in Common Law countries where proceedings can be instituted by simply providing a precise identification of the parties and stating that the plaintiff sues the defendant.

The requirement of having to specify the request and clearly describe the facts makes it easier for the parties as well as the court to focus proceedings from the very beginning on the decisive aspects. On the European level, experience has shown that the need for substantiation is helpful in opposition proceedings against European patents. It is an absolute requirement for receivability under Article 99 EPC, as well as 59 of the German Patent Law which follows the same lines, that a notice of opposition must be filed as a written reasoned statement. The rules of procedure of the Court of First Instance contain similar minimum requirements which must be met by a legal action<sup>73</sup>.

*(b) Notifications.*

The defendant must be served the action quickly and reliably. The rules of procedure should include provisions for notification within the Community which make it superfluous for national authorities of the state addressed to intervene. The EPC includes rules of procedure which regulate notifications in the entire territory of the contracting states. For this reason the European Patent Office is in a position to effect by far the majority of all notifications by registered letter with advice of delivery.

According to Rules 77 to 82 EPC effective communications, summons, and decisions incurring a time limit for appeal may be served by registered letter with advice of delivery. This type of notification is used not only for notifying parties already involved in pending proceedings but also for serving documents which initiate proceedings, such as a notice of opposition. Rule 82 EPC protects

<sup>73</sup> According to Article 99 EPC and 59 of the German Patent Law, of similar content, it is an indispensable requirement for receivability of an opposition that it be filed as a written reasoned statement. Article 44 § 1 of the rules of procedure of the Court of First Instance of the European Communities (ABl.L 136 of May 30, 1991, last amendment in ABl.L 322 of December 19, 2000).

the recipient from irregularities in the notification by registered letter. The onus of proof of the notification lies with the European Patent Office so that any deficiency in the notification will not be at the expense of the addressee.

Ever since the EPC entered into force in 1978, a vast number of documents initiating proceedings, summons, decisions, and other kinds of documents have been served in this manner. Deficiencies or shortcomings of this notification system have not become known. For this reason the provisions for notification of the European Community patent jurisdiction should closely follow the lines of Rules 75 to 82 EPC. The procedural rules of the Court of First Instance (Art. 100, 1) likewise provide for notification by registered letter with advice of delivery. Furthermore, certain documents may be notified by telefax and other technical means of communication, provided the parties have given their consent (Art. 100, § 2 in combination with Art. 44, § 2).

*(c) Declaration of defense.*

The rules of procedure should oblige the defendant to respond quickly whether he intends to join the issue and mount a defense. Therefore, the notification of the action should be accompanied by the setting of a rather short period, typically one month, within which the defendant must declare his intention of defense<sup>74</sup> by filing a formal response (statement of defense). Failing a response from the defendant within the period set, a default judgment will be passed. The judgment in default should be preceded by an examination of the sufficiency of the pleadings to establish a cause of action.

*(d) Written pre-proceedings.*

The rules of procedure should invite the parties to an early and complete submission of pleadings covering all the facts and offers of proof which, in their opinion, are decisive for the decision sought<sup>75</sup>. The bench or chamber in charge of the case will nominate a rapporteur as quickly as possible who then will manage the written pre-proceedings. Upon receipt of the formal notice of response to the action, the rapporteur will grant the defendant adequate time within which to substantiate the response and file a counteraction (counterclaims), if desired, (especially a counteraction for invalidity of the patent in suit). In case a counteraction is filed, the plaintiff, who is the respondent to the counteraction, will be granted adequate time for responding. In prin-

<sup>74</sup> It is required under Article 46 § 1 of the rules of procedure of the Court of First Instance of the European Communities that a reasoned response to the action be filed within a period of one month (extendable). In view of the typical complicated nature of patent litigation a system is to be preferred which separates the formal response to the action from the substantive response.

<sup>75</sup> It would not appear to be reasonable to take over provisions from the rules of procedure of the Court of First Instance according to which statements of facts and the naming of evidence, in principle, are allowed only in the action and response to the action, respectively, (Article 44 § 1 and Article 46 § 1), while new means of attack or defense as well as new evidence are admissible in exceptional cases only (Article 48 §§ 1 and 2). This does not meet the conditions for inter partes proceedings and might lead to difficulties as regards the right to due process of law which is a fundamental principle of Community law, cf. European Court of Justice of September 21, 1989 „Nachprüfung Hoechst“ RS 46/87 and 227/88 Slg. 1989, 2919.



ciple, each submission of facts by either party should be accompanied by an adequate offer of evidence. Pan-European law of evidence is laid down already in the EPC. Article 117 EPC lists the following as means of evidence: hearing the parties, requests for information, the production of documents, hearing witnesses, opinions by experts, inspection, and sworn statements in writing. Essentially the same evidence<sup>76</sup> is named in the rules of procedure of the Court of First Instance.

During the written pre-proceedings it is to be left to each party to introduce new statements of fact and new evidence<sup>77</sup> without any restriction. There is to be no limit to the number of submissions each party may file.

The written pre-proceedings may closely follow the practice of written pre-proceedings in oppositions before the European Patent Office (Rule 57 EPC). If considered expedient, the court thus may expressly ask the parties to file specific comments on certain statements of facts, offers of evidence, or other things which may be important for the decision sought.

*(e) Principle of production.*

Proceedings before a European patent court should be governed entirely by the principle of production. The principle of authorities investigating of their own motion should not even be applied when a defendant files a counterclaim for nullity of the patent in question<sup>78</sup>. In his „Second proposal for an EPLP“<sup>79</sup> Willems argues that an EPLP court should be allowed to base its decision on facts not produced by the parties if these are „generally well known facts“. That must not be allowed since there is no way of defining the expression „generally well known facts“, especially not in technical context. It may be entirely open to debate, especially when examining the validity of a patent, whether or not a certain technical fact is known in general. An example of a „generally well known fact“ cited by Willems, namely that water freezes at a temperature of 0 °C, goes to show how problematic this expression is. The statement is wrong. At a temperature of 0 °C water may be solid, liquid, or gaseous, depending the prevailing pressure. Therefore, the principle of production should be valid without restriction.

*(f) Oral proceedings.*

Upon termination of the written pre-proceedings the court invites the parties to oral proceedings. The summons, in principle, should contain the preliminary opinion of the court on the matter at issue and the status of proceedings, mentioning in particular questions which the court believes should be discussed at the hearing. The items below should be indicated specifically:

- insufficiency of a party's statement of facts, especially when lacking conclusiveness or relevance, -
- insufficient offer of evidence to corroborate facts which may be important for the decision sought, -
- orders to take evidence, where applicable, -
- any substantive and legal questions requiring discussion should be stated explicitly.

This comprehensive obligation of information on the part of the court is indispensable in order to enable the parties with their very diverse legal backgrounds and traditions to prepare properly for oral proceedings and protect them from unpleasant surprise decisions. A corresponding comprehensive duty of explanation, at the same time, should contribute to rooting a coherent paneuropean legal system without further delay and, what is more, to allow a sense of justice to grow.

When summoning the parties to oral proceedings a time limit should be set as well by which any new facts and evidence must be submitted. The court should not be obliged to take into account any facts or offers of evidence filed after the deadline. That is not applicable, of course, to legal arguments. The acceptance of such rules of procedure for the preparation of oral proceedings should be certain beyond doubt as they would closely follow corresponding provisions in the EPC. In preparation of oral proceedings in matters of opposition before the European Patent Office, the Opposition Division is obliged, under Rule 71a EPC, when issuing the summons to the hearing, to draw attention to the points which need to be discussed. At the same time, a final date must be set for new facts and evidence to be filed. This provision makes proceedings more transparent and contributes to adjusting the focus of the hearing on decisive questions.

Based on proper preparation during the written procedure, it ought to be possible to conduct a concise, brief hearing before the plenary of the deciding body of justice. Typically a day in court really should last no more than a day. That is not unrealistic, even if the subject matter at dispute is complicated, provided statements of fact were submitted properly and extensively during the preceding written procedure and corresponding evidence was offered. The technical expertise of the technical judges taking part in the proceedings as well as that of the technical attorneys will make sure that a lot of evidence offered on technical facts will not need to be heard in costly procedural steps.

*(g) Appeals.*

Appeal proceedings should not be restricted to a review of questions on points of law in the decision handed down by the first instance. Instead, a full second fact finding instance should be instituted. Nor should the opportunities of the parties be curtailed to plead new facts in the appeal instance. A full second fact finding instance is indispensable, particularly during the initial phase of the European patent litigation system, not only to permit effective checking of decisions by the first instance. It will also make first instance proceedings leaner and speedier because the parties no longer will

76 Article 65 of the rules of procedure of the Court of First Instance of the European Communities lists all the evidence also indicated in Article 117 EPC, with the exception of sworn statements in writing.

77 The rules of procedure of the Court of First Instance of the European Communities differ, see footnote 65.

78 § 87, paragraph 1 of the German Patent Law differs; it subjects nullity proceedings before the Federal Patent Court to the principle of the court investigating of its own motion.

79 Document WPL/SUB 13/01, cf. Art. 112.

feel compelled, as a matter of precaution, to load those proceedings with lots of facts and offers to produce evidence, all of which presumably would make no difference anyway as regards the outcome.

Against this backdrop we are against the „Second Proposal for an EPLP“<sup>80</sup> by Willems that appeal proceedings should be restricted to a legal review of the judgment of the first instance and that new facts and evidence should not be receivable except in strictly defined exceptional cases. A revision so narrowly defined of decisions passed by the first instance would impede the swift harmonization of jurisdiction by the regional chambers of the first instance. In his comment on the proposed Article 133 EPLP Willems explains that a party should be forbidden to express a different legal opinion in the second instance from the one expressed in the first instance. This is not comprehensible. Since the legal interpretation of facts presented is nobody's business

but the court's, no party can be bound to a legal opinion once expressed, regardless of whether it is correct or not.

Developing a patent litigation system for a Community patent is a pioneer undertaking reaching far beyond the boundaries of today's world of patents. Ultimately, it depends on the political will whether a common denominator can be found for the many conflicting interests of member states of the Community so that the outcome will be an efficacious modern system. Patents always were a pacemaker not only of technical progress but also of the development of law. Many attempts in this direction have been made since 1949 when, in the Council of Europe, the French Senator Longchambon set out to „Europeanize“ patent law, and many a success story has been written since. Let us hope that we will succeed in taking yet another step towards a more efficient unified Europe.

## Annex: Treaty of Nice (excerpt)

*The wording of Article 225 (2) (ex-168a) is as follows:*

„(2) The Court of First Instance shall have jurisdiction to hear and determine actions or proceedings brought against decisions of the judicial panels set up under Article 225a.

...“

*After Article 225 an insertion is made as follows:*

„Article 225a. 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.

The decision establishing a judicial panel shall lay down the rules on the organisation of the panel and the extent of the jurisdiction conferred upon it.

Decisions given by judicial panels may be subject to a right of appeal on points of law only or, when provided for in the decision establishing the panel, a right of appeal also on matters of fact, before the Court of First Instance.

The members of the judicial panels shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. They shall be appointed by the Council, acting unanimously.

The judicial panels shall establish their Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council, acting by a qualified majority.

...“

*After Article 229 (ex-172) a new article is inserted as follows:*

„Article 229a. Without prejudice to the other provisions of this Treaty, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may adopt provisions to confer jurisdiction, to the extent that it shall determine, on the Court of Justice in disputes relating to the application of acts adopted on the basis of this Treaty which create Community industrial property rights. The Council shall recommend those provisions to the Member States for adoption in accordance with their respective constitutional requirements.“

*The following DECLARATION was given regarding the above Article:*

„The Conference considers that Article 229a does not prejudice the choice of the judicial framework which may be set up to deal with disputes relating to the application of acts adopted on the basis of the Treaty establishing the European Community which create Community industrial property rights.“

<sup>80</sup> Document WPL/SUB 13/01, cf. Art. 133.

## Comments on Mr. Terell's article (1/2001, 36-39) "Implications of recommendations in the Guidelines concerning the use of Rule 45 EPC"

J. Atkins<sup>1</sup> (GB)

In an article in epi Information 1/2001, at pages 36-39, concern is expressed about the EPO policy regarding so-called complex applications, and in particular about new Guideline B-VIII, 6, concerning the issuance of partial search reports under Rule 45 EPC.

The new Guidelines are partly a result of what is in effect acknowledged in the above-mentioned article, at least with respect to parameters, are justifiable concerns of the EPO.

We agree that the EPO owes a responsibility to the patent community, and the general public, for upholding the EPC. Applications must be dealt with on a basis of equity and strictly within the terms of the EPC. If there are some unanswered questions on these issues, in this case regarding the new policy on complex applications, then these must be addressed.

In this brief comment, we would like to present some clarification which, we hope, answers these questions and also alleviate other concerns that might exist on this issue.

### A new policy?

The issuance of partial search reports under Rule 45, based on substantive reasons, is actually not new at all. It has been used since the early days of the EPC. An internal EPO study showed that in 1997, i.e. before the Guideline changes, over three hundred partial searches were issued by the EPO on the basis of lack of clarity or support of the claims, or insufficient disclosure of the invention. Thus no change has been brought about by the new policy regarding the use of Rule 45 as such. The new policy merely aims to clarify for the users of the patent system, and examiners, when Rule 45 can be used, which, by the way, does not include lack of inventive step under Article 56, as suggested in section 5, paragraph 2, of the article. This would not have any effect on whether a meaningful search would be possible.

In the past, there had been some unclarity about when Rule 45 could be used, see for example the previous version of Guideline B-III, 3.12. In the records of the 1972 Washington Conference at which the PCT was signed there are footnotes mentioning that the prescribed requirements referred to in Article 17(2)(a)(ii) PCT (the PCT equivalent of Rule 45 EPC) are the provisions of Articles 5, 6 and 7 PCT, and Rules 5,6 and 7 PCT. Because of the harmonisation between the EPC and PCT this means that, for search under the EPC, the relevant

requirements for the EPC are those of Articles 83 and 84 EPC.

The package of Guidelines for complex applications was announced in the OJ 5/2000, pages 228 to 234. In the preceding year, in the OJ 7/1999, page 426, there was a mention in the Report on the 76th meeting of the EPO Administrative Council that more frequent use would be made of Article 17(2) PCT and Rule 45 EPC. In addition, Article 5 and 6 PCT, and Articles 83 and 84 EPC, would be applied more strictly.

The new policy is in fact applied rather sparingly. Less than 2 % of searches were issued as a partial search in the period September 1999 to August 2000. In addition, in most of these cases of partial search there will have been little or no change to the scope of a search compared to past EPO practice. The main change lies in the openness to the applicant and the public about what really has been searched when it was not possible to carry out a meaningful complete search, rather than give the impression that a complete search was carried out. There were only 10 cases in which no search report was issued.

### Use by examiners

It has been argued that an examiner has no need to occupy him or herself with substantive issues during search, because these can be dealt with during substantive examination. There is, after all, sufficient case law for the examiner carrying out the substantive examination to rely on.

Although the latter may be true, it is submitted that this does not really help a examiner performing the search when he faces a complexly drafted application which, due to certain substantive problems, cannot reasonably be subjected to a meaningful search covering the entire breadth of the claims.

In such cases the search will be limited to what can be meaningfully searched. The underlying substantive reasons, and also the subject matter that has been searched, are indicated in the partial search report. This is the *raison d'être* of Rule 45 EPC. As a safeguard, to avoid situations in which examiners without training in substantive examination might incorrectly use Rule 45, an Expert System has been set up in DG1. The examiners must consult a specially trained expert, who is always an examiner experienced in substantive examination, before issuing a partial search report. In other words a search division is formed. Furthermore, at the end of

<sup>1</sup> Mr. John Atkins, Director, EPO-DG1

2001 half of the examiners in DG1 (as well as in DG2) will be performing both search and examination.

### **Follow up in examination**

Under the EPC, the ultimate decision in first instance on substantive issues resides firmly in the hands of the examiner responsible for the substantive examination, in fact the Examining Division. Because of the Expert System, a confirmation of the position taken during the search is normally likely to happen. However, the position adopted during the search will be reviewed if, for example, the applicant provides specific reasons for not accepting it.

It is noted here that it is an important EPO principle, ensured by the Guidelines at C-VI, 8.5-8.9, that unsearched subject matter should not be subject to examination for grant. This means that where the examiner does not feel able to follow up the position taken during the search, an additional search is carried out. There would be no need to file a divisional application at that stage.

### **Rechtliches Gehör and appeal**

It is stressed that, after the issuance of a partial search report, an application may not be refused before the applicant has had the opportunity to comment on the grounds and evidence as is required under Article 113(1). If an examiner issues a partial search report using substantive arguments, and the examiner in substantive examination agrees with these same arguments, then the latter must first issue a communication under Article 96(2) raising similar arguments.

A single instance of appeal exists at the EPO from an adverse decision by an Examining Division, namely the Boards of Appeal. This is, and always has been, the case not only for examinations where the first examiner is different from the examiner carrying out the search, but also where they are the same, i.e. under BEST. Whether substantive examination is based on a partial search or not, is not relevant.

### **Parameters**

If an applicant chooses to employ unusual parameters in a claim to describe his invention, a comparison of the claim with the prior art may be effectively impossible. In such cases a meaningful search cannot be carried out. A prima facie case of lack of clarity arises in substantive examination (see Guideline C-III, 4.7a) and, accordingly, lack of clarity will be the reason used during the search for issuing a partial search. This approach is in fact not dissimilar to that of the USPTO as described in the article, except that the EPO examiner makes a public statement about the problems in search. If the applicant is aware of any prior art that discloses the use of the parameter, this could be cited in the application at the time of filing. If the applicant accepts his responsibility for patent quality in this respect, a partial search might be avoided. If however a partial search is the only option, the search will normally be limited to disclosed embodiments and/or any particular effects brought about by the invention. It should be noted here that examiners at the EPO do have access to an extensive array of non-patent literature, contrary to what is suggested by the last sentence of section 5 of the article. In some cases an objection on the basis of lack of support &/or disclosure may also be raised.

### **Other options**

A major contender for the partial search would be a US-type system in which the applicant can first be asked to amend, or provide further evidence, before a search is carried out. Under the present European system, with a separated search and examination, this does not appear to be possible.

The alternative mentioned, namely to issue the patent, and to rely on the opposition procedure to eliminate invalid patents, is not an option open to the EPO as it would be simply issuing poorly searched patents. This would run counter to the assumption that patents granted by the EPO are valid, and would have serious consequences for the applicant community, not the least of which would be financial.

We hope that these clarifications will take away the concerns about the recent Guideline changes concerning complex applications.

# Patenting Software under the European Patent Convention<sup>1</sup>

R. Burt (GB)

I have been looking forward to this book being published and now have to opportunity to see whether it lives up to expectation.

The book starts with a general history of the exclusions from patentability and the definition of an invention under the EPC, and then considers the technical nature of software inventions. Two chapters covering claim formulation to obtain grant and to obtain maximum protection are followed by a chapter covering the requirements for the specification. The chapter of examples of granted software patents describes a very large number of European patents in a variety of fields (from computer operating systems to expert systems for chemical process control or inventory control). There are four special topic chapters covering user interfaces, software for generating computer programs, the rejected document processing cases, and business model patents and e-commerce. The book concludes with a thought provoking postscript chapter.

The great benefit of this book is that it is not just another review of the case law; the cases are analysed with reference to the prosecution history and consideration is given to how the case could have been argued differently and how grant might be obtained today. All the interesting and important cases have been covered.

This book is valuable because it not only covers the case law and would be useful for anyone arguing a case

before the courts, but also because it covers the subject in a sufficiently straightforward and practical way to make it useful for trainees or attorneys not familiar with handling software patent applications. I have only one very minor criticism of the book and that is the use of the notation T year/number to refer to EPO Board of Appeal decisions rather than the more usual EPO notation T number/year.

The cost, at £165-00, is very reasonable when you consider the amount of research that must have been done in order to write the book. I recommend that all industrial IP departments (not just those in the computer industry) and private practices should at least have a copy of this book in their library, and should give serious consideration to giving a copy to all attorneys and trainees specialising in software and related topics. The book is clearly aimed at practitioners although there are sections which potential inventors would find interesting. Whether you read the book from cover to cover or use it to dip into particular topics, I am sure you will find it a useful and enjoyable work (yes, it more than lived up to expectation).

There is a belief within some parts of the legal community and the software industry that software is not patentable in Europe. There will be no excuse for this misconception in the future.

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<sup>1</sup> Keith Beresford  
Sweet & Maxwell, 2000  
ISBN 0 752 006339  
249pp. Price £165-00

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