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Towards a Community Patent

Antonio G. Tapia

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TOWARDS A COMMUNITY PATENT

Antonio G. Tapia^A

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INTRODUCTION

During the European Patent Forum of May 2008, Gunter Verheugen, European Commissioner for Enterprise and Industry, declared there was an “urgent need [for a community patent].”¹ The sentiment was well received. However, in 2009, all attempts to implement a patent policy to standardize prosecution and grant across all European Union Community countries failed.² Since the 1970’s, there have been ongoing discussions toward the creation of a Community-

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1. James Nurton, *Verheugen Adds to Community Patent Momentum*, MANAGING INTEL. PROP. (May 6, 2008), <http://www.managingip.com/Article/1927639/Verheugen-adds-to-Community-patent-momentum.html>.

2. Brian Cordery & Gregory Bacon, *Unified Patent Litigation System Incompatible with EU treaties – AG Opinion*, KLUWER PAT. BLOG (Aug. 24, 2010), <http://kluwerpatentblog.com/2010/08/24/unified-patent-litigation-system-incompatible-with-eu-treaties-ag-opinion/>.

wide patent in the European Union (EU).³ In 2003, prospects for enacting a Community Patent Regulation (CPR) seemed hopeful and almost complete.⁴ However, in 2004, a stalemate arose which made the enactment of the CPR even more unlikely.⁵ On December 11, 2012, the European Parliament adopted two draft regulations aimed at creating a European Union-wide patent, along with a Unified Patent Court.⁶ This article will examine the historical challenges to the enactment of, as well as the prospects of, successful implementation of a Community-wide EU patent.

I. PROTECTING INNOVATION: THE BALANCING ACT

The goal of protecting innovation is to advance society on the whole by creating an incentive for innovation. In patent, this incentive is the right of the inventor to exclude others from capitalizing on his invention. However, this must be balanced with monopoly and advancement concerns, which is usually accomplished by affixing a limited time period for the inventor's exclusionary rights. In the U.S. and many patent schemes abroad, this term is limited to twenty years.⁷ Upon expiration of the term, the invention enters into the public domain, where free competition may lower prices for the technology, inform the general public, and allow for further innovation and improvements.

In the U.S., this balancing act of concerns is addressed in the "patent and intellectual property provision" of the U.S. Constitution.⁸ Article I, Section 8, Clause 8 states that one of the many powers of Congress shall be "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁹ Congress has used this provision to create legislation and a standardized process of application and adjudication of patents, as regulated and embodied in the United States Patent and Trademark Office (USPTO).

3. PASCAL GRISET, *THE EUROPEAN PATENT: A EUROPEAN SUCCESS STORY FOR INNOVATION* 12-14 (2013), [http://documents.epo.org/projects/babylon/eponet.nsf/0/8DA7803E961C87BBC1257F480049A68B/\\$File/european_patent_book_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/8DA7803E961C87BBC1257F480049A68B/$File/european_patent_book_en.pdf).

4. *Id.* at 247-49.

5. *Id.*

6. *Parliament Approves EU Unitary Patent Rules*, EUR. PARLIAMENT NEWS (Dec. 10, 2013), <http://www.europarl.europa.eu/news/en/news-room/20121203FCS04313/5/Parliament-approves-EU-unitary-patent-rules>.

7. MARTIN J. ADELMAN ET AL., *CASES AND MATERIALS ON PATENT LAW* 32 (1st ed. 1998).

8. U.S. CONST. art. I, § 8, cl. 8.

9. *Id.*

II. INTELLECTUAL PROPERTY AND PATENT INSTITUTIONS ABROAD

Outside of the U.S., there are several institutions that play a part in the regulation of patents in the European Union. These institutions are the World Intellectual Property Organization (WIPO), the European Patent Commission (EPC), the European Patent Office (EPO), and by some measures, the World Trade Organization (WTO).¹⁰

WIPO is a United Nations agency charged with promoting intellectual property protection around the world.¹¹ The treaties WIPO negotiates are completely ineffectual unless adopted by individual states, such as the EU Member States.¹² Unlike the WTO, WIPO has no enforcement mechanisms, but it does provide a nice domain in which negotiations can take place.¹³ WIPO has been effective in the promulgation of procedural multilateral treaties, for example, the Patent Law Treaty (PLT) and the Patent Cooperation Treaty (PCT).¹⁴ Substantive multilateral patents, such as the Agreement of April 15, 1994 on Trade Related Aspects of Intellectual Property Rights (TRIPS), which requires minimum levels of IP protection, have only been successfully enacted through the WTO because they were tied to trade,¹⁵ providing a mechanism with teeth.

The EPC and EPO are two bodies responsible for the debate affecting the patent policy in the EU.¹⁶ The EPC, which operates the EPO, is an independent organization that does not answer to the EU or WIPO,¹⁷ a fact that continues to cause dissension. A more precise discussion on the European Patent Commission (EPC) and the European Patent Organization (EPO) follows.

10. *Summary Table of Membership of the World Intellectual Property Organization (WIPO) and the Treaties Administered by WIPO, Plus UPOV, WTO and UN*, WORLD INTELLECT. PROP. ORG., <http://www.wipo.int/treaties/en/summary.jsp> (last visited Aug. 21, 2016).

11. *Inside WIPO: What is WIPO?*, WORLD INTELLECT. PROP. ORG., <http://www.wipo.int/about-wipo/en/> (last visited Aug. 21, 2016).

12. WORLD INTELLECTUAL PROP. ORG., *WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE* 7-8 (2d ed. 2004), http://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf.

13. *Id.*

14. *Inside WIPO*, *supra* note 11.

15. TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

16. *Legal Foundations*, EUR. PAT. OFF., <https://www.epo.org/about-us/organisation/foundation.html> (last visited Aug. 21, 2016).

17. *Id.*

III. INDIVIDUAL EUROPEAN UNION NATIONAL PATENTS AND DE FACTO HARMONIZATION

Individual national patents were enacted in each Member State to address the balancing act between providing incentives for inventors and preventing monopoly formation. Each country undoubtedly saw the merits of encouraging national advancement through proper legislation of the invention process. However, due to the linguistic, procedural, and judicial differences between nations, the national patent system created an initial disharmony across the EU, leading to great legal uncertainty and an overall chilling effect in the realm of research and development.¹⁸

Over time, a de facto harmonization evolved across national patents. Through the accession to, and influence of, various agreements and conventions, such as the Paris Convention for the Protection of Industrial Property of March 20, 1883 and TRIPS, some harmony resulted. Several Member States also became parties to the Council of Europe's Convention of November 1963, which unified certain aspects of patent law.¹⁹ The de facto harmonization still did not overcome the many problems of the national patent system. As a result, the EU embarked on a path toward a community patent in 1973.

IV. THE EUROPEAN PATENT CONVENTION: MUNICH

The European Patent Convention, also known as the "Munich Convention," occurred on October 5, 1973, and came into force in 1977.²⁰ The Munich Convention was not a community endeavor, really, but was nevertheless the first attempt to promulgate a system of uniform patent rules across Europe. As of 2002, most of the Member States had ratified the Munich Convention and, as such, it is effective throughout Western Europe.²¹ The Munich Convention provided for the creation of the EPO (comprised of the EPO and the Administrative Council), a single harmonized procedure, and a legal framework for granting patents.²²

18. See BRUNO VAN POTTELSBERGHE, LOST PROPERTY: THE EUROPEAN PATENT SYSTEM AND WHY IT DOESN'T WORK 7-17 (2009), http://bruegel.org/wp-content/uploads/imported/publications/patents_BP_050609.pdf.

19. GRAEME B. DINWOODIE ET AL., INTERNATIONAL AND COMPARATIVE PATENT LAW 719 (2002).

20. GEORGE A. BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 777 (2d ed. 2002).

21. *Id.*

22. DINWOODIE ET AL., *supra* note 19, at 719.

With regard to the single harmonized procedure, the Munich Convention provided that an inventor may apply for a European patent at the EPO in Munich or The Hague.²³ Further, the Munich Convention defined what would be patentable.²⁴ The Munich Convention charged that patents would be granted to “inventions, whether products or processes, provided that they are new, involve an inventive step, and are capable of industrial application.”²⁵ These factors are similar to the USPTO patentability requirements of originality, novelty, and utility.²⁶

Under the terms of the Munich Convention for a European patent, when a patent is submitted, the EPO is charged with performing a patentability test, including a priority search, an originality examination, and a test of capability of industrial use.²⁷ Upon passing the EPO examination, the inventor/applicant is deemed to have acquired a patent in each of the ratifying states for twenty years from the date of application, with all the “effect of and be subject to the same [regulations]” of the state.²⁸ The Munich Convention created a legal framework for European patent adjudication and challenges, and the remainder of the patent process was left to individual nation states by the EPC.

V. THE COMMUNITY PATENT CONVENTION: LUXEMBOURG

The next step toward a Community patent occurred on January 26, 1976. On that date, nine Member States tried to enact a Community patent by signing the Community Patent Convention (CPC), also known as the “Luxembourg Convention.”²⁹ “[T]he Convention would have transformed the national stages in the granting of European patents into a single stage common to the Member States.”³⁰ Unfortunately, the CPC effectually became merely an advisory writing to the EPC. The CPC never came into effect because Denmark and Ire-

23. BERMANN ET AL., *supra* note 20, at 778.

24. *Id.*

25. DINWOODIE ET AL., *supra* note 19, at 724.

26. 35 U.S.C. §§ 101-103 (2016).

27. *European Patent Convention: Examination on Filing and Examination as to Formal Requirements*, EUR. PAT. OFF., <http://www.epo.org/law-practice/legal-texts/html/epc/2013/e/ar90.html> (last updated June 30, 2016).

28. The European Patent Convention, pt. 1, ch. I, art. 2(2), Mar. 20, 1883, <http://www.epo.org/law-practice/legal-texts/html/epc/2013/e/ar2.html> (last visited May 30, 2015).

29. BERMANN ET AL., *supra* note 20, at 777.

30. DINWOODIE ET AL., *supra* note 19, at 720.

land refused to ratify it.³¹ The CPC was amended as a supplement to the Munich Convention on December 30, 1989.³² This amendment included the Protocol on the Settlement of Litigation Concerning the Infringement and Validity of Community Patents.³³

The failure of the Community Patent Convention could possibly be attributed to the cost of the Community patent, primarily the cost of translation and the cost to the judicial system.³⁴ Under the CPC system, the patent had to be translated into every Community language.³⁵ Under the judicial system, national judges had to be able to declare a Community patent invalid effective for the entire territory of the Community.³⁶ This was a major element of legal uncertainty for the applicant, and as such, a hurdle to complete adoption by the Member States.

VI. THE GREEN PAPER AND THE COMMUNITY PATENT REGULATION

Under the terms of a “European patent,” the patent applicant seeking protection in individual European states had to choose the country, comply with formal requirements set by each nation, pay any established fee to the national patent office, and provide a translation of the patent for each nation.³⁷ The European patent process was still cumbersome and expensive, impeding innovation.

After the failure of the CPC, the European Commission sought to find a different solution to the stifled innovation across Europe. Instead of a Convention approach, the first attempt to issue a Community Patent Regulation (CPR) was memorialized in the Green Paper on Patents on June 24, 1997.³⁸ All interested parties were invited to submit concerns and commentary on the issue.³⁹ The

31. BERMANN ET AL., *supra* note 20, at 777.

32. Agreement Relating to Community Patents 89/695/EEC, 1989 O.J. (L 401) 1 (EC) [hereinafter CPC]. The CPC has not entered into force.

33. *Id.* at 2.

34. *Promoting Innovation Through Patents - Green Paper on the Community Patent and the Patent System in Europe*, at 22-24, COM (97) 314 final 8-14 (June 24, 1997) [hereinafter *Green Paper*].

35. CPC, *supra* note 32, at 15-16.

36. DINWOODIE ET AL., *supra* note 19, at 720.

37. *Selling Online: How Can I Protect My Business Idea?*, EUR. COMMISSION (last updated Jan. 2, 2016), <https://ec.europa.eu/growth/tools-databases/dem/watify/selling-online/how-can-i-protect-my-business-idea> [hereinafter *Selling Online*].

38. *Green Paper*, *supra* note 34.

39. *Id.* at 4

Commission issued its draft of Community Patent Regulations on August 1, 2000.⁴⁰

It is important to understand the intentions and benefits of the proposal. The Green Paper proposal aimed to improve the operation of the internal market and to adapt the manufacture and distribution of patented products to the Community dimension.⁴¹ The proposal was also a part of the drive to promote innovation and growth in the EU.⁴² Further, the Community patent was deemed essential for eliminating the distortion of territorial competition, which may result from national protection rights and was viewed as one of the most suitable means of ensuring the free movement of patented goods.⁴³

Perceived benefits of the CPR included allowing innovators to adapt production and distribution activities to the European Community realm, and stimulating research and development (R&D) investment in Europe (at that time, five times lower than that in the U.S. or Japan).⁴⁴

The August 2000 CPR sought to achieve three objectives: (1) hold the EPO responsible for investigating and issuing a Community patent valid in all of the Member States and with opportunity to challenge validity; (2) create a scheme with only three official languages (English, German, and French), addressing the main problem with the Luxembourg language requirement; and (3) create a specialized tribunal.⁴⁵

The specialized tribunal would be competent for all issues of interpretation of the regulation and the application of Community patents.⁴⁶ Review would be conducted by the Court of Justice.⁴⁷ This would eliminate divergent holdings by national courts and errors due to subtleties of language and interpretation.

In order to create a new tribunal, the Treaty of Nice would have to be amended at Article 225(a) to authorize the Council to create a specialized judicial panel in this field, and at Article 229(a) to enable the Council to provide for appeals to the Court of Justice.⁴⁸

40. BERMANN ET AL., *supra* note 20, at 778.

41. *Green Paper*, *supra* note 34, at 4.

42. *Id.* at 1b.

43. *Green Paper*, *supra* note 34, at 2.

44. DINWOODIE ET AL., *supra* note 19, at 721.

45. BERMANN ET AL., *supra* note 20, at 779.

46. *Id.*

47. *Id.*

48. *Id.*

VII. LEGAL BASES FOR A COMMUNITY PATENT REGULATION

The legal basis for the proposal of the CPR is Article 308 of the EC Treaty (ECT), the implied powers provision.⁴⁹ This provision allows institutions to employ means not specifically provided for in the Treaty.⁵⁰ Using this legal basis, the CPR would be appropriate because, to achieve the desired goals of a Community patent, Member States could not be left with any discretion to alter or determine the Community law applicable to the Community patent.⁵¹ Also, Member States could not be left to decide the effects and administration of the patent once granted.⁵² Ultimately, the most important fact in the equation is that the unity of a Community patent could not be guaranteed by less “binding” measures than the legal basis that Article 308 affords.⁵³

A regulation of this nature must also satisfy scrutiny under the principles of subsidiarity and proportionality.⁵⁴ Subsidiarity strictly limits Community action to areas where national action is ineffective or unsuitable to the needs of the Community.⁵⁵ Since the objectives of a unitary patent scheme with a specialized tribunal could not be obtained by the Member States acting alone or collectively, a community patent therefore, by reason of cross-border impact, had to be promulgated at the Community level. This satisfies the criteria of subsidiarity.

Proportionality requires that there be no lesser means available to the Community to achieve the same goal.⁵⁶ The Court of Justice ruled that Community intellectual property rights could not be created by harmonizing national legislation.⁵⁷ Further, regarding the unity of the patent right, Member States could not be left with any discretion concerning its implementation.⁵⁸ The proposed instrument, a Regulation, was thus confined to the minimum needed for the attainment of

49. *Id.* at 106.

50. *Id.*

51. DINWOODIE ET AL., *supra* note 19, at 721.

52. *Id.*

53. *Id.*

54. *18th Report on Better Legislation – Application of the Principles of Subsidiarity and Proportionality*, (Sept. 13, 2012), <http://www.europarl.europa.eu/sides/getDoc.do?type=ta&language=en&reference=P7-TA-2012-340>.

55. BERMANN ET AL., *supra* note 20, at 120.

56. *Id.* at 171.

57. DINWOODIE ET AL., *supra* note 19, at 733.

58. *Id.*

these objectives and did not exceed that necessary for the purpose, satisfying proportionality requirements.⁵⁹

The last hurdle to enacting a Community-wide patent would be mandating the accession of the remaining Member States to the Munich Convention. This would yield the best possible symbiosis between the EPO and the Community.⁶⁰

VIII. MAIN FEATURES OF THE COMMUNITY PATENT

To be successful, the Community patent must incorporate the following factors: (1) be unitary and autonomous in nature; (2) provide affordability; (3) have appropriate language arrangements and meet information requirements; and, perhaps most importantly, (4) guarantee legal certainty.⁶¹

A stated goal of the founders of the EPO was to “equip the European economy with a truly supranational patent system,”⁶² which requires a unitary and autonomous system. The unitary nature of the Community patent means that the patent would produce the same effect throughout the territory of the Community and it could be granted, transferred, invalidated, or allowed to lapse only in respect to the whole of the Community.⁶³ Autonomy requires the patent only be subject to the provisions of the proposed Regulation and to the general principles of Community law, not subject to individual national laws.⁶⁴ In order to stem from a body of Community patent law, the EPO has been charged with extending Community patent law principles and judicial precedent.⁶⁵

Affordability was also a concern handled in the CPR. In 2015, it was estimated that obtaining a European patent protected in the twenty-seven Member States would cost nearly 36,000 euro (\$41,076 USD).⁶⁶ In 2015, the average U.S. patent cost was around 2,000 euros (\$2,282 USD), while a Chinese patent was about 600 euros (\$684.60

59. *Id.*

60. *Id.* at 723.

61. *Id.* at 724.

62. *European Patent Office Welcomes Historic Agreement on Unitary Patent*, EUR. PAT. OFF. (Dec. 11, 2012), <http://epo.org/news-issues/news/2012/20121211.html> [hereinafter *Historic Agreement on Unitary Patent*].

63. *Unitary Patent - Frequently Asked Questions*, EUR. PAT. OFF., <http://www.epo.org/law-practice/unitary/faq.html> (last updated Dec. 13, 2012).

64. *Id.*

65. DINWOODIE ET AL., *supra* note 19, at 724.

66. *See generally European Parliament Breaks Patent Translation Deadlock*, OPTICS.COM (Dec. 13, 2012), <http://optics.org/news/3/12/20>.

USD).⁶⁷ Most of the high European patent costs hinge on translation fees, extensive procedures, and national litigation.⁶⁸ It is quite disconcerting that the cost to translate a single patent into ten languages was more than 17,000 euro. The CPR's requirement to translate into three official languages, namely English, French, and German, would only cost 2,380 euro.⁶⁹ It was also essential that the overall cost of a Community patent be comparable with those associated with patents granted by the EU's main trading partners. The current European patent is three to five times higher than that of the U.S. or Japan.⁷⁰ Creating a more affordable patent would provide inventors with more incentive to apply for a European Community-wide patent.⁷¹

The language requirements, besides cutting costs as described above, also had to be appropriate and meet information requirements. The EPC argues that, realistically, English is the universal language for patents in the EU, making further translation requirements beyond the three language system unnecessary encumbrances.⁷² However, one might argue then that this fails to meet the information requirements and would place many inventors who do not speak one of the three languages at a disadvantage—not only because they cannot perform basic priority searches, but also because they are more likely to be defendants in infringement cases. The EPO argues that the proposed application and legal system of the CPR provides sufficient protection with respect to the suspected infringer.⁷³ The damages and judicial provisions would allow the court to examine specific facts of each case to protect the defendant.⁷⁴ In essence, a defendant would be able to prove innocence by asserting a language barrier and show that a bad faith infringer would not have spent money in research and development (R&D) for an invention he knew was already patented.⁷⁵

67. See generally Gene Quinn, *The Cost of Obtaining a Patent in the US*, IPWATCHDOG (Apr. 4, 2015), <http://www.ipwatchdog.com/2015/04/04/the-cost-of-obtaining-a-patent-in-the-us/id=56485/>; Conversion of 1 Euro = 1.141 USD as of Jan. 22, 2015. *Historic Lookup*, X-RATES, <http://www.x-rates.com/historical/?from=USD&amount=1&date=2015-01-22> (last visited Sep. 10, 2016).

68. Dinwoodie provides a chart on page 725 of his text in which a comparison is made. DINWOODIE ET AL., *supra* note 19, at 725.

69. *Costs Comparison: "Classic" European Patent versus New Unitary Patent*, EUR. COMMISSION (2016), http://ec.europa.eu/internal_market/indprop/docs/patent/faqs/cost-comparison_en.pdf.

70. DINWOODIE ET AL., *supra* note 19, at 726.

71. *Id.* at 725.

72. *Id.* at 727.

73. DINWOODIE ET AL., *supra* note 19, at 727.

74. *Id.*

75. *Id.*

The CPR would also guarantee legal certainty in other ways. The EU Commission hopes that, with sufficient legal certainty, significant R&D costs would be justified and thereby increase overall innovation across Europe.⁷⁶ Also, creation of a centralized Community court could guarantee a unity of law and consistent precedent.⁷⁷ The passage of adjudication to a centralized court would also address the problem of excessive workload for both the Court of Justice and the Court of First Instance.⁷⁸

The CPR's proposed legal system would also make for speedy litigation. Litigation in the patent realm will be limited to two years.⁷⁹ This time limit takes into account the relatively short duration of the protection offered by a patent, which in principle is twenty years, but in reality is much shorter when one considers further innovation and viability of an invention. Review of decisions taken by the Commission falls within the jurisdiction of the Community court. Such jurisdiction is vested in the Court of Justice under Article 230 of the EC Treaty.⁸⁰

IX. THE FAILURE OF THE COMMUNITY PATENT REGULATION

Discussion on the Community Patent Regulation led to a political agreement on March 3, 2003.⁸¹ However, in 2004, under the Irish presidency, the Competitive Council failed to agree on the details of the regulation regarding translation and infringement issues.⁸² It ultimately proved unsolvable at that time. After the council in March 2004, EU Commissioner Frits Bolkestein commented on its effect on Europe:

The failure to agree on the Community Patent I am afraid undermines the credibility of the whole enterprise to make Europe the most competitive economy in the world by 2010 I can only hope that one day the *vested, protectionist interests* that stand in the way of agreement on this vital measure will be sidelined by the over-

76. *Id.* at 721.

77. *Id.* at 728.

78. *Id.* at 729.

79. *Id.*

80. *Id.* at 730.

81. European Commission Press Release MEMO/03/47, Results of the Competitiveness Council of Ministers (Mar. 4, 2003), http://europa.eu/rapid/press-release_MEMO-03-47_en.htm.

82. European Commission Press Release MEMO/04/58, Results of the Competitiveness Council of Ministers (Mar. 12, 2004), http://europa.eu/rapid/press-release_MEMO-04-58_en.htm?locale=en.

riding importance and interests of European manufacturing industry and Europe's competitiveness. That day has not yet come.⁸³

Jonathan Todd, Commission's Internal Market spokesman, stated, "It is extremely unfortunate . . . that European industry's competitiveness, innovation and R&D are being sacrificed for the sake of preserving *narrow interests*."⁸⁴

X. PROGNOSIS AND RESUSCITATION OF THE COMMUNITY PATENT REGULATION

Despite the failure of the CPR in 2004, the Community patent was still considered essential for the creation of a level playing field for trade within the European Union. As such, there was continuing support for its enactment. Small businesses supported the idea of a Community patent if it could provide a relatively inexpensive way of obtaining patent protection across a wide trading area. Large businesses, the largest users of the pre-2012 European patent system, based their support of the CPR on other factors. For large businesses, the European patent with unitary effect would have to exceed the national protections, translation requirements, and adjudicative certainty of the European patents to which they had grown accustomed.⁸⁵ The support for a unified patent was by no means unanimous, and the debate continues.

Renewed work toward a unitary patent started in 2011, with the adoption of a European Council decision to authorize enhanced cooperation; twenty-five countries signed on to achieve that enhanced cooperation.⁸⁶ Notably missing from the list of cooperating countries were Spain and Italy, two countries who cooperated only in requesting that the European Court of Justice annul the Council decision for enhanced cooperation.⁸⁷ In April 2013, the European Union Court of Justice dismissed the joined Spanish and Italian claims.⁸⁸ In the order

83. *Id.* (emphasis added).

84. Johnathan Todd, *Patently Unclear*, INNOVATION & TECH. TRANSFER (May 2004), <http://cordis.europa.eu/itt/itt-en/04-3/policy03.htm> (emphasis added).

85. See generally Adam Brant et al., *What the Unitary Patent Will Mean for Business*, MANAGING INTELL. PROP. (Sept. 1, 2013), <http://www.managingip.com/Article/3263186/What-the-unitary-patent-will-mean-for-business.html>.

86. Commission Regulation 1257/2012, 2012 O.J. (L 361) 1 [hereinafter Reg. 1257/2012].

87. *Spain and Italy Oppose Unitary Patent*, ADAMSONJONES (July 26, 2011), <https://www.adamson-jones.co.uk/news-events/ip-news/spain-and-italy-oppose-unitary-patent>.

88. Court of Justice of the European Union Press Release No. 47/13, *Joined Cases C-274/11 & C-295/11, Spain & Italy v. Council* (Apr. 16, 2013), <http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-04/cp130047en.pdf>.

of dismissal, the Court focused on the use of enhanced cooperation agreement, not the Treaty on the Functioning of the European Union, which requires unanimity.⁸⁹

Organizations that opposed the unitary patent included Ericsson, Nokia, and BAE.⁹⁰ Members of the European Parliament also expressed opposition.⁹¹ At least one website dedicated its content to addressing perceived pitfalls of “the regulation and [building] a democratic innovation policy in Europe,” as well as “provid[ing] raw materials and tools to any citizen who wants to take part in this process.”⁹²

In late 2012, the European Parliament and the Council of the European Union adopted two regulations pertaining to a unitary patent.⁹³ The unitary patent, designated by the EPO as the European patent with unitary effect, seeks to provide uniform protection with equal effect, create an affordable patent scheme by limiting language requirements, and establish, through a related regulation, a Unified Patent Court.⁹⁴ In effect, the unitary patent fulfills each of the CPR requirements described above.

The unitary nature of the adopted Regulations is established by provisions for “uniform protection” for those patents granted by the EPO under the same set of claims: limitations, transfers, revocations, lapses, and licenses apply equally to all participating member states.⁹⁵ The main purpose of the Unitary Patent Regulation is not to replace European patents issued under the Convention, but rather to attribute the additional characteristic of unitary effect throughout the member states.⁹⁶ When chosen by the patent applicant, uniform protection is achieved by supplanting the prior patent regime’s effects that were “determined by the national legislation of each Contracting State.”⁹⁷

89. *Id.*

90. Robin Wauters, *Nokia and Ericsson Urge European Parliament Members to Reject “Seriously Flawed” Patent Regulation Proposal*, THE NEXT WEB (Dec. 11, 2012), <http://thenextweb.com/eu/2012/12/11/nokia-and-ericsson-urge-european-parliament-members-to-reject-seriously-flawed-patent-regulation-proposal/>.

91. *Id.*

92. *About This Site*, UNITARY PAT., <http://www.unitary-patent.eu/content/home> (last visited Aug. 14, 2016).

93. *Historic Agreement on Unitary Patent*, *supra* note 62.

94. *See Agreement on a Unified Patent Court*, Feb. 19, 2013, 175 O.J. 1.

95. *See id.*

96. *Historic Agreement on Unitary Patent*, *supra* note 62.

97. Court of Justice of the European Union Press Release No. 152/14, Advocate General’s Opinion in Case C-146/13 Spain v. Parliament & Council & C-147/13 Spain v. Council (Nov. 18, 2014), <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-11/cp140152en.pdf>.

Affordability is achieved primarily through the establishment of language arrangements. The language translation limitations were a main point of contention among the member states, but, with twenty-three official languages spoken in the twenty-seven member states, the impasse could have been insurmountable. In essence, Spain's objections related to not only the concern that overall patent applications in Spain would decrease, but that Spanish patent applicants would be the target of patent trolls, companies filing groundless patent claims.⁹⁸

Yves Bot, EU Court Advocate General, acknowledged in November 2014 that the language arrangements will be discriminatory and that EU legislation called for different treatment.⁹⁹ Mr. Bot noted that, in balancing the desire for a unitary patent while avoiding the excessively high costs of multiple translations, the EU had "no choice but to restrict the number of languages."¹⁰⁰ Because patent applications require technical precision, the cost of translation can be prohibitive, especially as services charge a "per-word rate" and require additional fees for chemical formulas or diagrams.¹⁰¹ The EPO determined that it would use the "tried and tested language regime based on . . . English, German, or French."¹⁰² Furthermore, the EPO is moving away from human translations altogether, and will make a high-quality machine translation available.¹⁰³ The EPO even has plans to assist in translation reimbursement for those applicants who are domiciled in EU member states which do not use English, French, or German as official languages.¹⁰⁴

Because of the need to establish a system of legal certainty, an integral part of the potential success of the unitary patent is the Unified Patent Court (UPC). The EU specifically made the entry into force of the unitary patent dependent upon the establishment of the Unified Patent Court.¹⁰⁵ The Unified Patent Court Agreement establishes a court of exclusive jurisdiction for unitary patent litigation and is de-

98. Blanca Cortes Fernandez & Ralf Reuther, *Ole! Spanish Lawsuits Against Regulations No. 1257/2012 and No. 1260/2012*, CMS LAW-TAX, <http://www.cmslegal.com/Hubbard.FileSystem/files/Publication/baba305e-0272-4de7-b2e8-032dc5606d2f/Presentation/PublicationAttachment/9673c048-e705-4c6f-b04a-16f39d0e08ee/Spanish-lawsuits-against-regulations.pdf>.

99. Press Release No. 152/14, *supra* note 97.

100. *Id.*

101. Jeff Shieh, *Monitoring Patent Costs: Translations*, INOVIA (July 11, 2013), <http://info.inovia.com/2013/07/monitoring-patent-costs-translations/>.

102. *Unitary Patent*, EUR. PAT. OFF., <http://www.epo.org/law-practice/unitary/unitary-patent.html> (last updated Jan. 20, 2016).

103. *Id.*

104. *Id.*

105. Reg. 1257/2012, *supra* note 86, at art. 18(2).

signed to operate as a Court of First Instance, a Court of Appeal, and as a Registry.¹⁰⁶ The EPO envisions the UPC as a “speciali[z]ed court . . . with exclusive jurisdiction concerning infringement and validity questions related to unitary patents.”¹⁰⁷ Questions linger concerning the role of the European Court of Justice and the rules of procedure for the UPC, but ratification of the UPC Agreement is underway. Twenty-five EU member states, including Italy, signed the Agreement, which requires the ratification by at least thirteen states, including France, Germany, and the United Kingdom, before entry into force.¹⁰⁸ As of January 2016, six countries have ratified the Agreement, including France.¹⁰⁹ Germany and the United Kingdom appear to be well on the way toward ratification of the UPC.¹¹⁰

CONCLUSION

Despite the overwhelming agreement that a unitary patent is necessary and the support signaled by twenty-five Member States signing onto the UPC Agreement, a few patent experts do not believe the unitary patent and the UPC will come to fruition in the near term, perhaps not until 2016.¹¹¹ Furthermore, some speculate that the unitary patent will not be used by the majority of patent applicants.¹¹²

In conclusion, if the EU hopes to become the most innovative trade and market leader of the free world, it will have to remember the successes and address the failures of the past while balancing the needs of its individual Member States. Given the potential advantages of uniformity, cost savings, and greater legal certainty offered in the unitary patent, another year does not seem too long to wait.

106. *Unified Patent Court*, EUR. PAT. OFF., <http://www.epo.org/law-practice/unitary/patent-court.html> (last updated Jan. 29, 2015).

107. *Historic Agreement on Unitary Patent*, *supra* note 62.

108. *Unified Patent Court*, *supra* note 106.

109. *Agreement on a Unified Patent Court*, EUR. COUNCIL, <http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/agreement/?aid=2013001> (last visited Mar. 28, 2016).

110. Philip Jeffrey, *Unified Patent Court (“UPC”) Ratification - 5 Down, 8 to Go . . .*, DEHNS PAT. & TRADE MARK ATT’YS, http://www.dehns.com/site/information/industry_news_and_articles/unified_patent_court_ratification_5_down_8_to_go.html (last visited Oct. 12, 2016); Dugie Standeford, *EU Unitary Patent and Court Are Here. Or Are They?*, INTELL. PROP. WATCH (Feb. 14, 2013), <http://www.ip-watch.org/2013/02/14/eu-unitary-patent-and-court-are-here-or-are-they/>.

111. Standeford, *supra* note 110.

112. *Id.*