October 7, 2010

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Dear Sirs:

Intellectual Property Owners Association (IPO[1]) is an international trade association representing companies and individuals in all industries and fields of technology who own or are interested in intellectual property rights. Many of our 230 corporate members file patent applications in Europe. Many have subsidiary organizations located in Europe and some are headquartered in Europe.

IPO is concerned about the continued high cost of acquiring patents in the EU. An EU patent system could serve the interests of our corporate members when designed in a way that ensures quality, cost effectiveness, and legal certainty. In view of the current economic crisis, we believe it is important not to lose the momentum that resulted in the EU Competitiveness Council conclusions of December 4, 2009 on creating an enhanced patent system in Europe as well an EU-wide patent litigation system. It is essential that the legislative bodies responsible for implementation of an enhanced patent system are aware of the urgency of the situation.

[1] EU Register of interest representatives No. 75569863714-64

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The EU patent regulation should provide a one-stop-shop administration of granted European patents to the extent that EU Member States are designated. This would result in a central administration by one patent office, to which one annual renewal fee would be paid, and which can administer any assignments by means of a single administrative act. As regards translations, the regulation should provide that they are only needed in case of litigation. Provisions on validity and infringement are best left to the litigation system.

We are writing to discuss suggested modifications to the contemplated administrative aspects of creating the EU patent system. Specifically, we believe that no amendments to the European Patent Convention (EPC) are needed or desired, and that consequently, a different legal basis in the Treaty on the Functioning of the European Union (TFEU) should be used. With the modifications outlined below, we believe it is possible to have an EU patent system up and running by January 1, 2012. We urge you to do whatever is needed to achieve this goal.

No amendments to the European Patent Convention (EPC) needed or desired

The European Patent Convention (EPC) already contains provisions[2] enabling the EU to create an EU patent system. As a result, the proposed amendments to the European Patent Convention (EPC) are unnecessary. Additionally, ratification by the 38 EPC Contracting States will cause substantial delay. Past experience[3] with both Community Patent Conventions (CPCs) of 1975 and 1989, as well as more recent experience with the EU Constitution, suggests that ratification may be slow or fail for a variety of reasons, including constitutional requirements. We would not support a situation in which some EPC states could cease to be EPC states as a result of not timely ratifying the EPC amendments, or in which EPC provisions essential to guaranteeing the quality and uniformity[4] of European patents would be softened.

Seventy percent of all European patent applications are filed as international applications under the Patent Cooperation Treaty (PCT). To make it possible to designate the EU as such, as provided in the current draft EU Patent Regulation and the envisaged EPC amendments, would also necessitate an amendment to the PCT. This requires ratification by the 142 PCT Contracting States. We believe this to be practically impossible. IPO believes the proposed regulation should eliminate EPC and PCT amendments.

Legal basis in the Treaty on the Functioning of the European Union (TFEU)

Not amending the EPC allows for further streamlining of EU legislative structures. ECJ

[2] Articles 142-149 EPC.

[3] The CPC of 1975 required only 9 ratifications, and the revised CPC of 1989 required only 12 ratifications. Although these numbers were rather low, the EU never managed to collect all required ratifications.

[4] In particular the EPC Centralisation Protocol.

case law[5] teaches that if EU legislation harmonizes something that already exists, such as national laws applicable to the existing European patent granted for EU Member States, the appropriate legal basis in the Treaty on the Functioning of the EU (TFEU) is Article 114 rather than Article 118[6]. Using Article 114 TFEU, only one EU regulation is needed, covering both administrative and language aspects, which would be democratically adopted in accordance with the ordinary legislative procedure, which in the Council only requires a qualified majority, not unanimity.

In contrast therewith, under Article 118 TFEU, two EU regulations are needed, one of which (the one dealing with languages) must be unanimously adopted by the Council after consulting the European Parliament. While it will be difficult to achieve a compromise on the language issue, it is clear that the required unanimity needed for a language regulation under Article 118(2) TFEU will certainly not be achieved. As a result, legislation based on Article 118 TFEU is likely to fail, or could not lead to a system applicable to the entire EU.

Article 118 TFEU requires establishing centralized EU-wide authorization, coordination and supervision arrangements[7]. It may appear necessary, in a system based on Article 118 TFEU, to replace the EPC with an EU patent grant system applicable only to the 27 EU Member States, which is less preferable than the current EPC that also covers 11 European states that are not EU Member States. Article 114 TFEU does not require a replacement of the EPC by a system that only applies to the EU.

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[5] C-350/92 says: "23 The Court has, moreover, confirmed in Opinion 1/94 ([1994] ECR I-5267, paragraph 59) that, at the level of internal legislation, the Community is competent, in the field of intellectual property, to harmonize national laws pursuant to Articles 100 and 100a and may use Article 235 as the basis for creating new rights superimposed on national rights, as it did in Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1)."

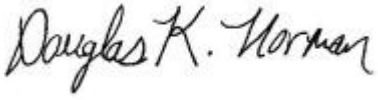
Article 100a EC Treaty is now Article 114 TFEU, while Article 235 EC Treaty has been replaced by Article 118 TFEU when new IPRs superimposed on national rights are created. Importantly, an EU patent that is a European patent granted on the basis of the designations of the EU Member States already exists, and the EU patent regulation would harmonize the 27 national laws currently governing such granted European patents rather than establish a new right in parallel to existing national patents and European patents.

[6] Another reason why Article 118 TFEU is not applicable in case the EU patent system is built on Article 142 EPC, is that in such a situation it is the EPC rather than the new EU patent regulation that provides for the creation of IPRs. Also, such patents are granted for the EU Member States designated in the European patent at the grant date, which means that in case of EU enlargement, only new patents will also apply to the new EU Member States, while all old patents remain applicable only to the states that were EU states at the grant date, so that such patents do not apply throughout the EU, as would hold for patents based on Article 118 TFEU.

[7] See e.g. Mr. Pagenberg's report on the ECJ hearing on the EEUPC litigation system at http://www.ipeg.eu/blog/wp-content/uploads/Pagenberg-Report-Hearing-ECJ-19-5-2010-2.pdf.

We look forward to future opportunities to provide our comments on issues relating to intellectual property rights and their enforcement within the EU.

Sincerely,



Douglas K. Norman
President

cc:
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