TMPDF
TRADE MARKS, PATENTS & DESIGNS FEDERATION
Advancing Industry's View On Intellectual Property Since 1920

TRADE MARKS PATENTS AND DESIGNS FEDERATION (TMPDF)

PP14/06

Public consultation by the European Commission on the future of the internal market - TMPDF Response

Introduction

This Federation serves to advance the view of its member companies on intellectual property (IP) issues. The member companies include many of the most innovative enterprises in the United Kingdom. They collectively hold a substantial proportion of the patents, trade marks and registered designs, as well as much copyright material, effective in the UK and elsewhere in the EU.

We welcome the Commission's timely consultation on the functioning and future of the internal market. Our replies are, in the main, limited to the effect of the internal market on IP matters. Some questions overlap and interact with others and so the various answers below should be considered together. Our recent reply to the Commission questionnaire concerning the future of patent policy in the EU is also highly relevant and is attached.

Replies to the Commission's questions

The Commission's text is reproduced in italics

PART I - The internal market today: achievements and challenges

The Commission considers that *the internal market faces a number of challenges (which may also be opportunities):*

- *The internal market is still not a reality in all areas.*
- *Enlargement*
- *Globalisation is changing profoundly how our economy works.*
- *Rapid technological change is affecting traditional patterns of generating wealth.*
- *The internal market is also coming under challenge from within. Governments have started defying cross-border mergers and acquisitions*

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Questions:

1. *Do you agree with the preliminary analysis of the current situation of the internal market and the challenges it is facing? If not, what is your analysis?*

2. *In which ways have you benefited from the opportunities offered by the internal market? Where in your view does it function well? Where do you see shortcomings?*

We consider that the establishment of a coherent and fully functional IP framework is of key importance for the internal market. In this field, the internal market is not yet a complete reality, although considerable progress has been made over the years. For patents, there have been no Community harmonising measures, other than in relation to biotechnological inventions and supplementary protection certificates (see comments below), although the "acquis communautaire", based on the European patent convention, has led to considerable harmonisation. This convention, and the resolution on harmonisation of national law attached to the unratified 1975 Community patent convention, have had a major influence on the approximation of national laws. Nevertheless, considerable differences in national approaches to what can be patented (e.g., in the fields of computer implemented inventions and of inventions contrary to morality or 'ordre publique'), the interpretation of patent claims and the extent of civil and criminal penalties for infringement exist. There are also differences in attitude – some states seem more hostile to IP than others.

In the fields of trade marks, registered designs and copyright, major directives and regulations have led to a considerable degree of harmonisation, although significant differences exist in approaches to exceptions to rights and the ways in which rights owners can be compensated. As regards trade marks and registered designs, both national and Community rights exist in a reasonably well harmonised framework (although the treatment of spare parts is not uniform). It may be that national rights in these fields may eventually cease to be needed, but that time has not yet come.

There is still the real possibility that different decisions will be reached on the same given facts by the authorities and courts of different member states, which leads to uncertainty for rights owners and those affected by rights. The costs and complexities in securing and exercising rights across the internal market are considerable, and particularly so for small and medium enterprises (SMEs).

A major impediment to the establishment of the internal market, particularly in the field of patents, concerns languages and translations. One of the great advantages of the European patent convention is that applications are processed in one of only three languages. This advantage is lost following grant and the incorporation of the granted patents into the national systems. Compliance with national language requirements is an inevitable demand under the existing national patent regimes. This requirement is to be imposed, at least as far as

claims are concerned, under the prospective Community patent regime, for all Community languages, with translations from the original language text having equal legal effect. These requirements, present and future, impose a huge and unnecessary burden on all innovative enterprises, large and small, in securing effective protection in the EU. This is bad for both industry and the EU. The burden is probably much greater than in most other fields regulated by internal market rules, since each patent document contains an individual, technologically complex specification, of which the claims at least will have to be translated with precision into some 20 or more languages. A patent specification is not, for example, a relatively simple instruction document containing a lot of standard text.

This is a technical matter, not a matter of preserving individual national cultures. The burden is unnecessary because the texts of granted patents, which only appear several years after the application has been published, are rarely consulted. They are not needed for technical information – that is given in the published application. The only occasions when translations of granted patents are needed is during litigation. It would be a simple matter merely to require that translations should be provided when actually needed for litigation purposes, but not otherwise. The EU is failing European industry in not appreciating that a requirement for translations of granted patents to be provided routinely in all cases is not only a great and unnecessary burden on innovative EU companies but also damages the prospect of achieving a proper community patent regime within the EU and a properly functioning internal market. At the very least, the Commission should apply all its weight to bringing into effect the London Agreement on translations of European patents, as a protocol to the European patent agreement, for all member states at an early date. This would significantly reduce the translation burden and hence the cost, for all patent applicants for European patents.

Overall, in the field of IP, the internal market has assisted considerably in levelling the playing field, but costs particularly in the patent field are excessively high and the outcome of litigation is unpredictable. Political and cultural arguments, rather than the needs of innovative industry, appear to drive the EU agenda.

PART II - Priorities for future internal market policy

The Commission considers *that future internal market policy should focus on the following five priorities:*

1) *A stronger focus on fostering market dynamism and innovation.*

2) *Better regulation.*

3) Better implementation and enforcement.

4) *Taking better account of the global context.*

5) *Investing more in information and communication.*

Questions:

3. *Do you agree with the choice of priorities? Are there others in your view?*

4. *Internal market policy fosters economic reforms in which citizens and businesses then have to adjust. Do you think sufficient account is taken of the costs of making these adjustments? Why (not)? Do you think flanking measures are needed to accompany market opening? If so, what kind?*

We consider that the listed priorities are appropriate in the field of IP. As mentioned above, a coherent, well balanced, IP framework is of key importance to the proper functioning of the internal market and we consider that the Commission has a prime responsibility to establish this framework. Such an IP framework will foster innovation and competition and is therefore essential to the innovative companies that are crucial to the EU's well being.

We agree in particular that the regulatory framework, both in the grant of rights and in the settlement of disputes needs to be of high quality.

We agree also that the global context is very important in this field and that international norms and conventions should be respected. However, global harmonisation should not be pursued solely for its own sake – harmonisation should result in systems that benefit rather than impede European business and industry.

In the IP field, the need and time for adjustment is usually allowed for in transitional provisions. There can be serious short term detriment when unduly long transitional periods are allowed, in that member states implement to different timetables and considerable uncertainties are introduced.

1. Ensuring that internal market policies effectively facilitate market entry and foster innovation.

Questions:

5. *In your experience, does the internal market offer sufficient opportunities for businesses? Why (not)? Where do you see barriers?*

6. *Do you consider that the internal market is "innovation friendly"? Why (not)? Where in your view are the main barriers to innovation? Which steps should be taken to ensure that the internal market is more innovation friendly?*

As regards IP, we have pointed out above that provisions and attitudes differ in different member states, such that different decisions can be reached in the different member states on the same facts. We consider that some countries have failed to implement Community IP measures properly, such that unnecessary barriers continue to exist.

As noted, translation requirements impose a heavy and unnecessary burden. Innovative industry also receives a distinct impression of hostility on ideological grounds to IP rights among some interested parties, including within parts of the

Commission.

- ***Ensuring that IP rights ('IPR') regimes facilitate the development and diffusion of knowledge and technology***

In the field of industrial property, various European-wide rights have been created (Community trademark and design). Work is now underway to render these rights more affordable and effective. The creation of a Community Patent should also lead to a significant reduction in costs to obtain patent protection. IPR policy needs to enable creative enterprises to recoup investment in research and development. However, it also needs to further facilitate the diffusion of knowledge and ideas. To this end, we are studying patent licensing systems and national arrangements for the transfer of technology between university and industry, with a view to uncovering possible obstacles to the proper spread of knowledge.

As regards copyright and related rights, provisions of national law have been harmonised to help to stimulate the free movement of protected goods and services. This has led to a high common level of IPR protection across Europe. However, the way copyright and related rights are commercially exploited in Member States remains very diverse, and licensing has mostly been undertaken on a territory-by-territory basis. This puts a real brake on the development of innovative online services that are made available across borders.

In October 2005, the Commission adopted a recommendation on the management, of online rights, which aims to improve the EU-wide licensing of a copyright for a variety of online services. The first experiences with this recommendation are positive. We are also studying how the legal framework applicable to other rights fosters innovation and market entry. Finally, we also consider it important to ensure that our regulatory framework is user-friendly, so as to enhance acceptance and lawful use: of protected products.

Question:

7. *Do you consider that the current IPR regimes foster growth and innovation? In your experience, where is more focus or action needed?*

We generally agree that in the field of copyright and related rights, a high common level of IPR has been achieved in the EU that assists in fostering growth and innovation, although there are still major differences in the ways that copyright levies are assessed, applied and collected. These differences can produce serious distortions in the operation of the internal market – *inter alia*, they lead to price differences, undue burdens on manufacturers, lack of availability of products available elsewhere and unnecessary bureaucracy. We await with interest the results of the Commission initiative in relation to levies and DRMs.

In the fields of trade marks and registered designs, the Community instruments appear to be effective and we wait to see what their eventual impact on national rights in these fields will be. It may be that national rights will eventually wither away.

We counsel that **no** Community scheme of utility models should be created. This will merely add to the burdens of industry, particularly small industry, by creating an excessive number of low quality, unexamined rights that will be a minefield for the innovator.

We also counsel that there should be no attempt to insist that patent infringement should be a criminal offence in all member states. The legal regimes in some countries are such that this would seriously inhibit innovation, as companies would became more nervous about making developments in similar fields to competitors.

We fully agree that the regulatory framework should be user friendly – this encourages innovators to acquire and use rights and supports the promotion of quality through competition and branding. Users should be fully consulted about this framework – see below.

As regards patents, we suggest that the Lisbon Agenda has placed somewhat too much stress on the importance of the Community patent. While such a patent, in an acceptable form and system, would be a very desirable addition to the presently available national and European patents, it should not be said that it is a key to innovation in Europe. However, if a Community patent system were to be properly structured and adopted a sensible language regime, then it could be very helpful in reducing the burden of cost and complexity in obtaining patent protection in the EU, and in fostering a Community wide approach to claim interpretation and infringement.

As far as most industries (other than regulated industries such as pharmaceuticals) in Europe are concerned, the internal market has developed such that the presently available national and European patents serve business and industry reasonably well. As a result of the improved effectiveness of the internal market and increasingly uniform product offerings across Europe, most companies find that patents in three to four of the larger national markets, obtainable via the European Patent Organisation (EPO), may be sufficient to protect their interests throughout the European Union. Competitors are unlikely to infringe across Europe when access to several major national markets is denied. Similarly, a single litigation action in a state that provides relatively trustworthy judicial decisions will often (though not invariably) serve as an example around the Union.

As for license agreements, it is the experience of our members that the vast majority of these work smoothly and satisfactorily for both parties. They are in any event subject to competition law. Small enterprises needing licenses are not heavily penalised by royalties, since these are normally a small percentage of turnover and a small price to pay for permission to take advantage of another's innovation. As regards the allegations made by some commentators that patent rights may be used to prevent innovations reaching the market (particularly those innovations giving cost advantages), patent laws provide that patented inventions should be worked to the fullest extent practicable on pain of compulsory licensing. As regards patent rights acting as barriers to market entry, it should be recalled that the market concerned is that for the new innovative product covered by the patent, not known before. It is not surprising that a company that puts nothing into an innovation may have trouble in securing permission to copy it.

As previously noted, more focus and attention is needed to secure the removal of onerous and unnecessary translation requirements within Europe. In this regard, strong efforts should be made to secure general acceptance of the London Agreement on translations within the framework of the European patent convention.

Efforts to ensure more uniform judicial interpretation of patents are also needed. In this context, development of the European patent litigation agreement (EPLA), again in the framework of the EPC, should be promoted, and the concerns of industry in relation to its details should be heeded. Strengthening of training for and cooperation between judges, e.g., in the context of the European judges forum conducted by the EPO, is desirable.

A matter of concern with some Community instruments in the IP field in the past has been the use of general, ambiguous or permissive language, allowing member states to take different approaches to implementation. We realise that such language is often used to facilitate political and detail agreement among member states to the instrument concerned; nevertheless, non uniform interpretation and implementation leads inevitably to failures in the internal market. Examples of non uniform interpretation include the biotechnology patents directive (e.g., Bolar exceptions), the approaches to supplementary protection certificates, the approaches to the protection of spare parts, the different attitudes to research exemptions, permissive provisions in the trademarks directive. We consider that the Commission needs to take a very firm line, after consultation with industry, to ensure that Community measures are worded as precisely as possible and will be interpreted uniformly by member states.

- ***Ensuring a dynamic and inclusive procurement market***

Questions:

8. *In your experience, do member states authorities apply procurement rules in a way that gives business sufficient opportunity for market entry?*

9. *Do you think that public authorities are sufficiently aware of the opportunities of the EU public procurement framework offers for fostering innovation? If not how could they be made better aware of it?*

- ***Facilitating the development of private equity, venture capital financing and other funding solutions, including for innovative projects***

Question:

10. *In your experience, are there any significant problems with the internal market preventing the development of the private equity and venture capital market on a cross border basis? If so, what are they?*

These questions do not directly concern IP issues.

- ***Improving market access for services and stimulating innovation in the services market***

Question:

11. *Do you think that voluntary standards for services would be beneficial? If so, in which sectors should they be introduced?*

We are concerned about the restrictions on service providers in the IP field. Many EU states appear to have rules that require foreign nationals (including nationals of other EU states) to employ a representative domiciled in and/or a national of the state concerned. While many states require applicants to be represented by lawyers, it is not necessarily required that these lawyers have any knowledge of or qualification in IP matters. Very few IP agents are able to operate across borders (except in the limited field of practice before the European Patent Office). Many member states require that documents such as translations should be authenticated by local professionals. These are serious matters that create unnecessary expense and complication for applicants and thus inhibit innovation. They are also inimical to the operation of the internal market and we suggest that the Commission should give them urgent and thorough attention. We understand that the Commission has taken up some cases in a piecemeal way, but we suggest that a thorough overhaul, possibly backed by a directive, is necessary.

Voluntary standards in this field could be a distraction. What is needed is a uniform approach to the qualifications required by representatives in the IP field (and indeed a recognition that for certain operations such as filing documents and paying renewal fees no special qualifications are required), mutual recognition of qualifications (possibly subject to reasonable, non discriminatory aptitude tests where local professional expertise is required) and an acceptance that domicile and nationality anywhere in the EU meets national requirements.

2. Stepping up efforts to ensure a high-quality framework

Questions:

12. *What are your views on how we carry out consultations on internal market policy? For instance what are your views on the consultation process and on the relevance and presentation of issues in our consultation documents?*

13. *What are your views on the way in which we carry out impact assessments on internal market policies? In your experience, are we using the right policy instruments to achieve the objectives?*

14. *What are your views on evaluations conducted for internal market policies and the follow up given to them?*

15. *Do you think that member states should be encouraged to carry out national*

screening exercises (of existing and new rules and administrative procedures) and if so how?

The Commission, the Parliament, and those member states that do not have them at present, should institute formal consultation mechanisms that ensure that users, especially business and industry, and those others affected by IP rights, such as consumer groups, are properly informed and consulted before any initiative. Such consultation is important to reaching informed judgments as to policy. It is most important that those judgments should also be based on the quality, rather than the volume, of the argument. There have been occasions in the past where consultation on IP matters – at national and EU level - has been limited or non existent.

It is important that users should be consulted at the beginning of any consideration of new legislation, before detailed drafting has started. Systematic consultation should reinforce careful and considered analysis. A mechanism such as an Advisory/Consultation Committee, on which the main representative organisations of those likely to be affected are present, should be established. Such a committee would have the incidental benefit of encouraging interaction between the interested groups, so that better understandings might be achieved.

But adequate consultation is not sufficient. An intellectual change is necessary, whereby supposed "political" concerns and perceptions of political expediency are subordinated to the practical requirements of an efficient, workable system. There is no point in consulting if full weight is not given to the considered opinions of those most qualified to comment and of those most likely to be affected by the policy choices to be made. Consultation should be real, not just for show. Thus a serious exercise to explain the national, regional and international patent systems, and the careful checks and balances within them that have been developed over very many years, to those who will make the decisions concerning future development, is called for.

As regards the relevance and presentation of issues in policy documents, we usually find that these are handled quite well, although, as is only to be expected, consultation documents are usually biased in favour of the policy that the Commission desires to promote. A good example would be the presentation of the proposed (now withdrawn) directive on utility models, where the serious disadvantages of the regime promoted were not pointed out.

In the IP field, we have seen little of impact assessments and evaluations and are unable to comment on them.

We agree that member states should be encouraged to carry out national screening exercises. It is important to consult users, through national consultation processes involving user organisations.

3. Ensuring that internal market rules are correctly implemented and applied in member states

Questions:

16. *In which fields do you see the greatest need to step up cooperation between Member State authorities in order to make the internal market work?*
17. *What is your assessment of the role and work of supervisory or regulatory authorities in Member States? Should similar systems of supervision be extended to other internal market fields?*
18. *What is your view on current mechanisms for enforcing internal market rules at the national level? What should be improved?*
19. *What is your experience (if any) of the Commission's infringement policy in the field of the internal market? Which type of infringement cases should we handle as a priority?*
20. *Do you agree with the need to step up coordination and responsibility in Member States for managing the internal market? What (further) assistance could the Commission give in this respect?*

We cannot deal with questions calling for comparisons between different fields of activity. As regards mechanisms for enforcing internal market rules, we are not aware of any great problems in the IP field – most member states appear to have transposed the relevant Community instruments and European norms (such as those indicated by the EPC) reasonably effectively. As regards the Commission's infringement policy, we are unclear as to why the Commission has not pursued the issues regarding representation in the IP field, pointed out above, with greater vigour.

We agree that in the IP field, greater awareness and understanding is needed among judges and administrators in a number of member states. Judges should be expert in IP law and able to come to grips fully with the technical aspects of the cases they hear. This is normally the case in the UK, Germany and the Netherlands, but courts in some other countries appear to lack the necessary expertise. Considerable efforts should be made, as noted above, towards remedying this situation.

4. Responding effectively to the increasingly global environment

Questions:

21. *In your experience does internal market regulation take sufficient account of the bigger picture of international competitiveness? If not, in which areas do you see problems and what could be done?*
22. *On which regulatory issues and with which countries and regions should the EU strive for more international regulatory convergence or equivalence? How should this be achieved? By contrast, where do you think differing rules and standards should coexist?*
23. *Where should the EU engage more strongly in either intergovernmental or non governmental standard setting organisations?*

In the IP field, there are well established fora, such as the World IP Organisation (WIPO), the World Trade Organisation (WTO), the Council of Europe, etc., where global issues are discussed. Our experience is that Community negotiations on the internal market have always kept the discussions in these other fora in view. While common standards world wide are desirable, they should not be pursued as an objectives in themselves. For example, in the area of patent law harmonisation, it

would be highly undesirable to fall in with the United States positions on grace period and first to invent.

The European patent convention is a major influence on international harmonisation in the patent field, as is the Community trade mark regulation in the trademark field and should be promoted with vigour in the international context.

5. Ensuring that citizens and businesses are well informed about the opportunities offered by the internal market and encouraged to make the most of them

Question:

24. *In you experience, do member states and the EU institutions do enough to promote the opportunities presented by the internal market? Which concrete actions would you suggest for improving the situation?*

In the IP field, larger enterprises are normally well aware, through their professional representatives, of the various possibilities for IP protection in the EU. However, there are serious failures of understanding among smaller enterprises and many NGOs, particularly those that seem hostile to IP. There are also failures to appreciate the benefits and potential of IP in supporting innovation among general policy makers, both in national administrations and indeed in parts of the Commission. We agree that a coordinated effort between the Commission and member states to improve the general level of appreciation of IP throughout the EU would be highly desirable. Industry associations should be consulted about the content of appropriate publications. Small business federations should be supplied with promotional material for distribution to members. These and other bodies and authorities should be encouraged to include pages on their websites providing an introduction to IP rights and where to find further information. Links should be provided to useful websites, e.g., those of the EPO, WIPO and national patent offices, all of which give valuable information and access to search tools that enable users to search for patents and technical information, often free of charge.

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