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Patent Infringement in Germany and Switzerland
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Research Report

Patent Infringement in Europe:
Harmonization of National Enforcement Procedures
for
Intellectual Property Rights

written by

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Abstract

Despite theoretically harmonized standards for IP enforcement in all member states of the European Union according to the Directive 2004/48/EC, there are still differences in national implementation and in local approaches. Well-informed owners of IP rights have the chance to make reasonable use of these differences to their advantage due to open opportunities for forum shopping. In view of the notorious Belgian and Italian torpedo mechanism, however, the intentional abuse of national litigation processes shows clearly the necessity to establish a uniformly operating IP jurisdiction in the European Union.

1 See Harmeling et al., 2008: 69-73.
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I. Introduction

The protection of intellectual property encourages not only innovation and creativity, but also contributes to developing employment and improving competitiveness. Therefore the European Union has to ensure that the underlying substantive law, at the present time being considered to a large extent as acquis communautaire, can be used effectively. In spite of the TRIPS Agreement, there exist still considerable differences with regard to the enforcement of European IP rights, weakening the substantive law and being accompanied by a fragmentation of the internal market in this field. Under these prerequisites, the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004, which entered into force on 22 June 2004, aims at approximating legislation to establish a high, equivalent and homogeneous level of internal protection. For this purpose the term “intellectual property rights” covers industrial property rights, whereas Community provisions on substantive IP law, international obligations, especially TRIPS, and any national provisions in the EU regarding criminal procedures or penalties due to infringement shall not be put on by the Directive.

While the appropriate use of national differences in IP enforcement still remaining after implementation of the Directive can effectively contribute to create a European patent strategy, so-called torpedo actions mean a fatal abuse of negative declaratory judgement by potential patent infringers. Recent rulings by national courts as well as the European Court of Justice indicate the efforts being taken to overcome this problem and to re-establish legal certainty.

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7 See Harmeling et al., 2008: 69-73.
II. Comparative Implementation of the Directive 2004/48/EC in Benelux, England & Wales, France, Germany and Italy

Within two years after adoption of the EU Enforcement Directive, it had finally to be carried out in all member states of the European Union, theoretically providing harmonized minimum standards for measures, procedures and remedies regarding IP right enforcement. Still remaining differences in implementation and in national approaches, however, leave some potential for forum shopping in litigation. According to three main issues – how to preserve evidence, how to obtain information about an infringement and how to get injunctive relief without notifying the infringer – this chapter focuses on the Directive’s impact on the Benelux, England & Wales, France, Germany, and Italy. In order to provide an overview of this topic quite rarely treated in literature so far, the following paragraphs and illustrations are mainly based on the article of Harmeling et al. (2008).

1. Obtaining Evidence

Article 7 of the Directive is concerned with measures to preserve evidence, including descriptions of the process related to infringement. Subject to certain confidentiality limits, the relief should be obtainable ex parte, i.e. on behalf of one party only without notice to or challenge by the other side, and before the infringing goods will enter the market. The concept of this remedy is based on the long-known French saisie contrefaçon, the Italian descrizione procedure and search and seizure orders – formerly called Anton Piller orders – in England & Wales. Since the Italian procedure of conserving evidence is characterized by an enforceability much stronger than for the French saisie contrefaçon, the so-called Italian Intruders have to be regarded as measure of serious consequences for cross-border preservation of evidence in case

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8 See Harmeling et al., 2008: 69-73.
9 For a detailed jurisdictional comparison on patent litigation worldwide see Calame and Sterpi, 2006.
of infringement proceedings. Therefore it would be possible that an Italian court orders extensive conservation of evidence, which has to be performed consequently by the requested courts in other member states of the European Union.\textsuperscript{11}

Figure 1 lists the major practical implications for IP owners seeking to enforce their rights in five selected jurisdictions.\textsuperscript{12}

Summing up, jurisdictions such as England & Wales, France, Italy and Spain\textsuperscript{13}, traditionally experienced in seizure mechanisms to recover evidence, may still reveal most effectiveness in this field. The Benelux countries, however, are obviously catching up, their courts obviously being very engaged in making use of the new rules.\textsuperscript{12}

\section{2. Rights of Information}

Article 8 of the Directive deals with a \textit{right of information both against the infringer and against third parties} being involved in production or distribution of infringing goods.\textsuperscript{12} This is based on Article 47 of the TRIPS Agreement\textsuperscript{14}, reading

\begin{quote}
\textit{“…to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.”}
\end{quote}

The relevant provision in the Directive got its inspiration from the established practice in the Benelux countries, in England & Wales and in Germany.\textsuperscript{12} The Directive lays down that this remedy shall only be granted for “justified” and “proportionate” requests. Depending on the national implementations, it is of general interest whether the right of information will be obtainable as \textit{provisional relief} and may be strengthened by penalties. This part of the Directive enables IP owners to compel third parties into revelation of names and addresses of \textit{all parties involved} as well as into the disclosure of information regarding the infringing action and the

\begin{itemize}
\item \textsuperscript{11} See Prinz zu Waldeck und Pyrmont, 2005: 36.
\item \textsuperscript{12} See Harmeling et al., 2008: 69-73.
\item \textsuperscript{13} Not shown in Figure 1.
\item \textsuperscript{14} See TRIPS Agreement (1994), 1997: 44.
\end{itemize}
corresponding prices. The term “third parties” may also extend over providers of commercial scale services, especially over so-called Internet Service Providers (ISPs).\textsuperscript{12}

Figure 2 shows clearly in which way the right of information has been treated in five European jurisdictions.\textsuperscript{15}

Obviously, owners of IP rights can gain advantage from jurisdictions where an order for information is available provisionally, e.g. in the Benelux countries, England & Wales and in Germany, making it easier for them to build their case against the infringer.\textsuperscript{15} Italy – and Austria\textsuperscript{16} as further example – have not offered this remedy on a provisional basis so far, and the French courts seem to hold different views on this subject.\textsuperscript{15}

3. \textit{Ex parte} Injunctive Relief

Article 9 of the Directive stipulates provisional and precautionary measures, i.e. \textit{ex parte} injunctive relieves and seizures of infringer’s property, including blocked bank accounts or orders for communicating bank, financial or commercial documents.\textsuperscript{15} According to the Directive, continuing relieves have to demand proceedings following within a reasonably short period. The principle of “irreparable harm” will have to be required as mandatory before granting an \textit{ex parte} injunctive relief, which is understandably difficult to prove and means an interesting challenge on the EU harmonization procedure.\textsuperscript{15}

Figure 3 summarizes the prerequisites in five different EU member states for getting injunctive relief, possibly without notifying the infringer.\textsuperscript{15}

On balance, the conclusion drawn from this compilation will be that Germany and likely the Benelux and Italy might be the most effective in granting \textit{ex parte} injunctive relieves.\textsuperscript{15} While this redress has been known in England & Wales and in Spain\textsuperscript{17} for a period of time, the courts in these countries may apply it more often in future due to harmonization efforts.\textsuperscript{15}

\textsuperscript{15} See Harmeling et al., 2008: 69-73.
\textsuperscript{16} Not shown in Figure 2.
\textsuperscript{17} Not shown in Figure 3.
### Benelux (BX)

**Pre-Directive**
- Some court decisions allowed patent owners to examine allegedly infringing products
  - legal basis for trademark owners unclear

**Post-Directive**
- Recovery of both physical and digital evidence

### England & Wales (GB)

**Items Unchanged**
- Seizure orders available already for many years, including on ex parte basis
- For ex parte orders: rights owner has to demonstrate that infringer might destroy evidence if notified in advance
  - often in anti-counterfeiting litigation

### France (FR)

**Pre-Directive**
- Existing remedy allows for both physical and descriptive seizures
  - IP owner can obtain some samples of the goods and information about
    - origin / quantity of infringing products
    - relevant distribution network
- No requirement for rights owner to provide evidence of the infringing act
- **Saisie contrefaçon**: directed at gathering evidence for future proceedings on the merits and strategically used in international litigation
  - preparation for follow-up ex parte injunctive relief proceedings

**Post-Directive**
- Implementation offers new rights (e.g. information) to IP owners and harmonizes judicial procedures
  - French saisie may lose its leading role in future

### Germany (DE)

**Post-Directive**
- Rights to retrieve and secure evidence has been significantly expanded, especially in the Netherlands

### Italy (IT)

**Items Unchanged**
- **Ex parte** preliminary seizure and search orders possible for right owners
  - may relate also to means of production and commercial documents in the possession of the alleged infringer to calculate damages
- Seizure orders remove infringing goods from the market & preserve evidence
- Search orders (descrizione) inspect the premises of alleged infringers and depict illicit activities with the help of a court-appointed expert

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**Figure 1: How to preserve evidence.**

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18 According to Harmeling et al., 2008: 69-73.
<table>
<thead>
<tr>
<th>Country</th>
<th>Pre-Directive</th>
<th>Post-Directive</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benelux (BX)</td>
<td>♦ Information could be obtained via preliminary witness hearings</td>
<td>♦ New right introduced to obtain information from any third party</td>
</tr>
<tr>
<td></td>
<td>♦ No right to obtain information from non-infringing third parties</td>
<td>♦ Third party as to provide all information on</td>
</tr>
<tr>
<td></td>
<td>♦ particular problem in border seizure cases</td>
<td>♦ infringement</td>
</tr>
<tr>
<td></td>
<td>➔ no details of the good’s origin or proposed destination or customers</td>
<td>➔ its origin and distribution network</td>
</tr>
<tr>
<td>France (FR)</td>
<td>♦ French Civil Procedure Code authorized a court to force a third party to</td>
<td>♦ Similar provisions have been included in the French Intellectual Property</td>
</tr>
<tr>
<td></td>
<td>provide information under penalty</td>
<td>Code</td>
</tr>
<tr>
<td></td>
<td>➔ production / distribution of infringing goods</td>
<td>➔ at present disagreement among courts about whether this remedy to be</td>
</tr>
<tr>
<td></td>
<td></td>
<td>available during the course of proceedings or only after a judgement</td>
</tr>
<tr>
<td></td>
<td></td>
<td>➔ majority of decisions favours provisional orders for information</td>
</tr>
<tr>
<td>Germany (DE)</td>
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<td></td>
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<tr>
<td>Italy (IT)</td>
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<td></td>
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<tr>
<td>England &amp; Wales (GB)</td>
<td>♦ For &gt; 30 years IP owners could apply for a provisional order:</td>
<td>♦ Third parties can be ordered to provide information on</td>
</tr>
<tr>
<td></td>
<td></td>
<td>➔ origin and distribution network of infringing goods</td>
</tr>
<tr>
<td></td>
<td></td>
<td>➔ persons involved</td>
</tr>
<tr>
<td></td>
<td></td>
<td>➔ extent of the infringement</td>
</tr>
<tr>
<td></td>
<td></td>
<td>➔ In Practice: by way of oral testimony by summoning the informed persons</td>
</tr>
<tr>
<td></td>
<td></td>
<td>➔ according to rules which apply to witnesses in ordinary proceedings</td>
</tr>
</tbody>
</table>

Figure 2: How to obtain information about an infringement.19

19 According to Harmeling et al., 2008: 69-73.
Figure 3: How to get *ex parte* injunctive relief.\(^{20}\)

\(^{20}\) According to Harmeling et al., 2008: 69-73.
III. Cross-border Patent Litigation in Europe

With respect to the implementation framework for the EU Directive as described in chapter II, lack of legal harmony and insufficient performance of judicial authorities in some member states of the European Union can give potential patent infringers several opportunities to block measures of legal defence initiated by the IP right owner.

1. Action for Negative Declaratory Judgement

In general a declaratory judgement means a judgement of a court in a civil case, the purpose of which is to declare the rights, duties, or obligations of the parties involved in a dispute.\(^{21}\) A declaratory judgement is distinctively characterized by standing itself, no executory process following as a matter of course. If necessary, a more coercive remedy such as an injunction may be sought by the aggrieved party.\(^{22}\) Declaratory judgements enable an alleged infringer to “clear the air” regarding products or services at the focal point of a business, and therefore are quite common in patent matters as well as in other fields of IP litigation.\(^{21}\)

Analogous to this exposition, an action for negative declaratory judgement (DE: negative Feststellungsklage; FR: action de déclaration de non-contrefaçon) serves to establish that a right or a legal relationship does not exist, on condition that the plaintiff has a legitimate interest to take legal action.\(^{23}\) In European patent cases, common claims for negative declaratory judgement are based on non-infringement of a patent and of the patent owner’s rights, respectively, or on invalidity / cancellation ex tunc of a patent or of certain patent claims. According to Article 105 of the EPC 2000, any third party having been alleged to infringe a patent by its owner and having started proceedings for a non-infringement declaration may intervene into a pending opposition procedure even after the opposition time limit has expired.\(^{24}\)


\(^{22}\) See Gifis, 2003: 131.

\(^{23}\) See Holzer und Josi, 2009: 578.

\(^{24}\) See Bremi, 2008: 127.
2. The Torpedo Strategy

2.1 Definition and Legal Basis

A potential defendant having reason to assume that he will be shortly sued for infringement of another party’s patent might torpedo this process invisibly under the surface\(^{25}\) by initiating an action for declaration of non-infringement or alternatively an action for invalidation of the patent. This can be done in view of consolidating the case before a single court for all European countries covered by the patent in order to reduce litigation costs.\(^{26}\) As logical consequence, these torpedo proceedings have been used in a constructive way by private individuals as well as middle-class companies afraid of being taken to several national courts by financially strong patent proprietors.\(^{27}\)

In some cases, however, a torpedo action is only directed at pre-empting the jurisdiction of a court being different from the court where the patentee would like to start its infringement action.\(^{28}\) While the patent owner usually prefers Dutch, English, French or German courts, well known for performing efficient infringement proceedings and expedited proceedings on the merits (DE: Leistungsklagen) as well as rapid grants of preliminary injunctions, the potential infringer will rather choose those courts for its torpedo action whose strong workload and limited human resources “guarantee” delayed proceedings, e.g. Belgian and Italian courts some years ago.\(^{28}\)

The Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (EuGVÜ\(^{29}\)) – The Brussels Convention – which has been replaced by Regulation (EC) No. 44/2001 of 22 December 2000 (EuGVVO\(^{30}\)), effective by 1 March 2002, provides the legal basis any torpedo action makes reference to.\(^{28}\) Paragraphs 1 and 2 of Article 27 EuGVVO, corresponding to

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\(^{25}\) See Luginbühl, 2005: 391.
\(^{26}\) See Véron, 2004: 638-639.
\(^{27}\) See de Ranitz, 2001.
\(^{28}\) See Véron, 2004: 639.
\(^{29}\) Europäisches Gerichtsstands- und Vollstreckungsübereinkommen.
\(^{30}\) Europäische Gerichtsstands- und Vollstreckungsverordnung.
Article 21 EuGVÜ, lay down the following solution to *lis pendens* situations,\(^{31}\) relying on the imaginary fact that *different jurisdictions* in Europe *operate equally*.\(^{32}\)

1. *Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established*.\(^{33}\)

2. *Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court*.\(^{33}\)

Regarding patent litigation, this means that a *defendant to a possible patent infringement action* may induce a freeze for 2-7 years therein just by commencing a *torpedo action* at a court characterized by excessively long procedural duration.\(^{31,34}\)

As expected, such a system provoked lots of criticism due to being unfair for the patentee and *almost insulting* to the “torpedoing” court because profit is made out of its workload and also to the “torpedoed” court being paralysed by a quick “first shoot” done by the defendant.\(^{35}\) Especially for small companies (e.g. Start-Ups), whose assets often mainly consist of patents and which urgently depend on successful fundraising, any torpedo action launched by a competitor could endanger the whole course of business. Other statements regard these torpedoes as *predictable result* of both the European Patent Convention, preferring a “*bundle*” of national patents to a *genuine unitary European patent*, and of the Brussels Convention neglecting any provisions – in contrast to other international treaties – that negative declaratory actions should have *no pre-emptive effect*.\(^{35}\)

\(^{31}\) See Véron, 2004: 639.

\(^{32}\) See ECJ to examine torpedoes, 1999/2000: 12.


\(^{34}\) For further aspects of cross-border law enforcement and torpedoes see Schneider (2005), 185-204, and Pitz (2003), 178-182.

\(^{35}\) See Véron, 2004: 640.
2.2 Limits to Blocking Effects

The national courts of the EU member states have developed mainly two solution approaches to protect the IP right owner from being attacked by torpedo actions, comprising (A) a more restrictive interpretation of the term “cause of action” in Article 27 (1) EuGVVO and (B) the doctrine of abuse of law.36

Over the last decade the Italian torpedo branded Italy as a rogue jurisdiction for international patent litigation due to its slow moving judicial machinery.37 This abuse of negative declaratory judgements, even triggered by sending a warning letter to the infringer, was so damaging that some multinational companies did not designate Italy for their European patent applications anymore.38 In particular German courts have been willing to stay their own proceedings in consequence of an action for declaratory judgement in Italy, sometimes with regrets39. As a result, the patent owners often gave up, the patent expired and the dilution of the market in the meantime caused irreparable harm.38

In its ruling from 6 November 2003 in RL Macchine v Windmoeller & Holscher, the Italian Supreme Court refused that Italian courts were responsible for jurisdiction in torpedo cases.37 The so-called mirror-theory teaches that an action for declaration of non-infringement means precisely the opposite of an infringement action. The rational basis upon which the torpedo action lies is that a declaratory judgement action can be taken to the court where the plaintiff, i.e. the alleged infringer, has its domicile, on the assumption that the alleged infringement would occur at this place. As the plaintiff in a declaratory judgement action denies that any tort has been committed, this is not in accordance with Article 5 (3) EuGVVO demanding that a person domiciled in a Member State may, in another Member State, be sued in matters relating to tort, delict or quasi-delict, in the courts of the place where the harmful event occurred or may occur.40 Therefore this article has to be read in a more narrow sense, for which reason the Italian Supreme Court refused to consider the mirror theory and came to the conclusion that declaratory judgement actions have to take place where the defendant, i.e. the patent owner, is domiciled.37 In spite

38 See Barraclough, 2004: 12 f.
of its clear importance, the strict application of Article 5 (3) EuGVVO is not in line with German, Dutch or British courts, assuming authority to make legal decisions for declarations of non-infringement over foreign-owned national patents. This assumption also affects national designations of European patents.41

In order to improve its IP litigation process at various degrees, Italy established twelve specialized IP chambers in July 2003, being exclusively competent for all patent and trademark matters.41 Besides, one should keep in mind that Italy belongs to the European jurisdictions where interlocutory (fast track) proceedings in patent cases are quite common and can be excessively used, provided that some fundamental requirements are fulfilled.41,42

In a very similar way, Belgian courts tried to disarm torpedoes by refusing any jurisdiction over declaratory judgement actions of non-infringement for non-Belgian parts of a European patent.43

Concerning abuse of law in case of declaratory judgements, courts in France, Germany and the Netherlands affirmed that under these circumstances the court seized in a subsequent action may disregard the litispendence stoppage (DE: Rechtshängigkeitssperre) laid down in Article 21 EuGVÜ, especially since the plaintiff’s right to orderly legal proceedings (Article 6 (1) EMRK44) would be otherwise thwarted.45 Also the Belgian jurisdiction has adopted the doctrine of abuse of law, the abusive commencement of an action over and above that being regarded as illicit act (cf. Article 1382 of the Belgian Civil Code). In contrast, the Swiss Federal Court46 and the English High Court refused an examination for abuse and did not accept any exemption from Article 21 EuGVÜ and Lugano Convention, respectively.45 Whether the IP owner is entitled to claim damages for fraudulent initiation of an unlawful declaratory judgement action is subject to national law, in Germany according to § 826 BGB, which has to be interpreted in conformity with European law.47 Based on the judgements mentioned in this paragraph, the IP owner had hopes of preventing a suspension of infringement proceedings at least in some countries, provided that abusive commencement of an action abroad by the defendant could be proved.45

42 For further details on Italian procedural rules in infringement litigation, on summary proceedings and provisional measures see Scuffi (2004), 12-20.
44 Europäische Menschenrechtskonvention.
3. Results of Recent ECJ Rulings

In its decision from 9 December 2003 on the “Gasser” case, the European Court of Justice (ECJ) stated that Article 21 EuGVÜ has to be interpreted as meaning *that the court seized with the infringement action cannot refuse to stay its proceedings for the mere reason that a previous declaration judgement action for non-infringement has been brought in a court known for exceptionally long duration of proceedings.*\(^{48,49}\)

Even if the defendant was aware of having invoked an incompetent court at the time of filing the first action, the Article 21 EuGVÜ has to be applied strictly.\(^{50}\)

The ruling of the ECJ in the “Turner” case from 27 April 2004 confirmed that under no circumstances any court in a member state of the European Union should be allowed to impede or prejudice a legal procedure pending in front of a court of another member state.\(^{50}\) These so-called *Anti-suit Injunctions* are considered as being incompatible with the EuGVÜ structure.\(^{49,50}\)

Two relevant judgements of the ECJ from 13 July 2006 (Roche v Primus; GAT v LuK) repealed the legal basis on which mainly German and Dutch courts rendered decisions on cross-border patent litigations in the past. As a result, patent infringers in principle have to be sued in these countries where the infringement takes place.\(^{51}\)

All these rulings mentioned above aim to reduce forum shopping as far as possible and to secure a reliable judicature and legal certainty.\(^{52}\) One has to realize, however, that this could lead to a revival of torpedo power, especially with regard to the new East European member states of the EU, whose courts are now also available at potential patent infringers.\(^{53}\)

Due to its tendency to incapacitate gradually the national courts in cross-border patent litigations, the ECJ smooths the way for a European Patent Court, which could be realized via the optional European Patent Litigation Agreement (EPLA).\(^{52}\) Within the European Union though there is a strong tendency to transfer the EPLA, originally conceived as state treaty, in a community implement. This would be associated with the permission to use all community languages for court

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\(^{49}\) See Kraßer, 2005: 96.
\(^{50}\) See Leitzen, 2004: 1014.
\(^{51}\) See Herr, 2006: 482.
\(^{52}\) See Luginbühl und Stauder, 2006: 881.
\(^{53}\) See Leitzen, 2004: 1012.
proceedings, with a centralized court organization and with the renunciation of technically qualified judges.\textsuperscript{54} Under recent aspects, the EPLA could serve at least as interim solution\textsuperscript{55} on the path of trial and tribulation to a unitary European patent court.

\textsuperscript{54} See Luginbühl und Stauder, 2006: 881.
\textsuperscript{55} See Luginbühl, 2005: 408.
IV. Concluding Remarks

The remarkable disparity among the EU member states in IP jurisdiction is quite unsurprising, since on the one hand the harmonization of IP enforcement measures represents an ambitious goal, and on the other hand all legislation is mainly determined by diverging interpretations of law and different practices of national courts. A general principle of EU jurisdiction can be gathered from the compilations in Figures 1-3, which clearly demonstrate that individual remedies appear to be most effective in those countries where they originate from. Furthermore, smaller jurisdictions such as the Benelux seem to be most effective in adopting new remedies. Based on the knowledge which legal remedies are easiest enforceable where, any well-informed IP owner has the chance to develop an efficient pan-European enforcement strategy.

As the European Court of Justice forced back the national courts in order to construct a unified legal system and to avoid fragmentation of the EU home market, the EU authorities have to guarantee that torpedoes as prime example of abuse of national patent litigation will not be restored at the same time. This could be realized either by amending the Brussels Convention with limiting provisions to prevent abuse of law, e.g. by a narrow interpretation of the rules for choice of venue, or by issuing transitional rules for certain member states granting a definite period of time wherein their litigation procedures are to be adjusted to Western European standard. In this context, the most effective measure would doubtlessly consist in establishing a uniform civil court system with a harmonized code of civil procedure, closely related to the creation of a European Community Patent.

V. References


