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Achieving the Benefits of a Centralized Community Patent System at a Minimal Cost

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ACHIEVING THE BENEFITS OF A CENTRALIZED COMMUNITY PATENT SYSTEM AT MINIMAL COST

Seth Cannon†

I. Introduction

After more than 25 years of discussion, the European Community (the "EC") has not reached complete agreement on a proposed Community patent system which would create a “unified” patent effective throughout the European Union (the “EU”). Even though the EC recently reached a compromise on the translation regime, the EC continues to debate the structure and jurisdiction of the proposed Community patent court. On the one hand, businesses argue for a low cost, flexible, and easy to use system, while on the other hand, several EU member states argue for a system in which they maintain a degree of control over certain aspects of patent prosecution and litigation. The International Chamber of Commerce (the “ICC”), the world business organization, warns, however, that businesses may not use such a system if too many compromises are made with regards to these and other issues. In other words, large businesses, as well as Small and Medium Enterprises (“SMEs”), individual inventors, and universities, may not use the proposed Community patent system unless its

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2 See Results of Competitiveness Council, RAPID, Memo: 02/255, Nov. 15, 2002.


benefits sufficiently outweigh its costs and measures are taken to minimize these costs.5

A centralized Community patent system brings significant benefits to both its users and EU member states including low financial costs, legal uniformity and certainty, efficiency, and the elimination of forum-shopping.6 Once patent system users experience the benefits of the Community patent, they will no longer have use for national patent systems.7 Of course, EU member states will bear significant costs as the Community patent system displaces their national patent systems. Also, businesses lose the flexibility to choose, depending on their needs, between the Community patent system and the European and national patent systems. Without flexibility, SMEs and individual inventors in particular have no choice but to use a Community patent system which may be more distant than more familiar national patent systems. In summary, the Community patent system costs EU member states the displacement of their national patent systems and costs businesses lost flexibility from coexistent patent systems and increased distance from a patent system. This note demonstrates that, taking into account national and business interests, the benefits of a centralized Community patent system far outweigh its costs, especially in light of effective measures to minimize these costs.

Section II reviews how an inventor obtains, maintains, and enforces patent rights under both the current patent system and the latest proposal for a Community patent system. Section III analyzes in detail the major benefits of the proposed Community patent system. Section IV analyzes in detail the major costs of the proposed Community patent system. Finally, Section V suggests ways to minimize the costs associated with the proposed Community patent system.

II. The Current and Proposed Patent Systems

Structurally, the current European patent system essentially embodies a decentralized patent system and the proposed Community patent system essentially embodies a centralized patent system.8 Under a decentralized

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8 The level of centralization of a patent system is analogous to the level of centralization of a multi-agent control system in the field of robotics. At one end of the spectrum, a completely decentralized multi-agent control system is composed of agents (normally robots, analogous to individual countries each having their own national patent system)
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patent system, separate and independent institutions each use a distinct set of means to grant, administer, and enforce patent rights. In contrast, under a centralized patent system, a single institution uses a uniform set of means to grant, administer, and enforce patent rights.

A. The Current European Patent System: A Decentralized Approach

The current European patent system essentially embodies a decentralized patent system. Even though a patent system user need only submit a single patent application to the European Patent Office (the "EPO"), when the patent grants, the result is not a single patent, but a "bundle" of national patents. Prior to the creation of the EPO by the European Patent Convention (the "EPC"), if a patent system user desired to obtain a patent in multiple countries, she would have to apply to each national patent office in each of those countries. Thus, Europe's national patent systems constituted a decentralized patent system because each component system acted independently from the others. In 1979, the EPC created the EPO which centralized the European patent application process by enabling a patent system user to apply to a single institution with uniform search and examination laws and procedures to obtain patents from designated national patent offices. Thereafter, decentralized national patent systems maintain and enforce granted patent rights. Since the "centralized" patent application process is relatively short compared to the

acting according to their own individual goals which are achieved by implementing control laws or instructions in software. At the other end of the spectrum, a completely centralized multi-agent control system is one in which a Supervisor (normally a central computer, analogous to the Community patent court and the EPO within the Community patent system) communicates control laws, computed in software according to an overarching goal, to each individual agent who acts accordingly. Then there are hybrid multi-agent control systems that have both centralized and decentralized attributes. The current European patent system is analogous to such a hybrid system – roughly speaking, the patent prosecution process through the EPO is centralized and the litigation process, involving litigation in individual countries, is decentralized. See, e.g., Fabrizio Giulietti, Lorenzo Pollini & Mario Innocenti, Autonomous Formation Flight, IEEE CONTROL SYSTEMS MAGAZINE, Dec. 2000, at 34.


10 Id. art. 4.

11 See id. arts. 2(2), 4(3).
potential "decentralized" life of a European patent, the European patent system essentially embodies a decentralized patent system.

In sum, an inventor, whether a business, university, or individual, may obtain patent protection throughout the EU by hiring a patent attorney to file and prosecute a patent application with the EPO. After the patent grants, the patentee must pay annual renewal fees to both the European and national patent offices to maintain the patent, and, if necessary, litigate in national courts.

1. Obtaining a Patent under the European Patent System

In Europe, the first step in the patenting process is to determine where to file a patent application. Currently, the applicant has two options: the national patent offices or the EPO. If the inventor chooses to obtain a national patent, most national patent offices recommend that the inventor procure the services of a patent attorney or patent agent. The inventor or his representative files the completed patent application with the national patent office accompanied by a fee. An inventor who desires to apply for a patent in multiple European nations would likely choose to apply for a European patent because the inventor only has to file a single application.

The EPC governs the process of obtaining and maintaining a European patent. An inventor or his patent attorney must prepare an application in

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13 In the context of patent law, "prosecution" means the interchange between the patent attorney and the patent office after the attorney files the patent application and before the patent office grants the patent.

14 Proposal for a Council Regulation on the Community Patent, COM(00)412.

15 See, e.g., Deutsches Patent- und Markenamt, FAQ - Häufig gestellte Fragen, at http://www.dpma.de/infos/faq/faqp.html#pat5 (last visited Feb. 21, 2003) (explaining that a patent agent is essentially a patent prosecutor). See THE UK PATENT OFFICE, USING A CHARTERED PATENT AGENT, at http://www.patent.gov.uk/patent/howtoapply/chartered.htm (last modified Dec. 12, 2000) (“A patent agent is a professional qualified in intellectual property law who acts on behalf of an applicant for the purposes of drafting a patent application and then taking that patent application through the various stages needed to grant the patent.”).


17 EPC, supra note 9, art. 4.
one of the three EPO languages,\(^{18}\) designating desired contracting states,\(^{19}\) and file it at the EPO in Munich or its branch at The Hague\(^{20}\) accompanied by filing and search fees.\(^{21}\) EPO employees then search and examine the patent pursuant to the patentability requirements and procedures outlined in the EPC and its implementing regulations.\(^{22}\) When the EPO grants the patent, a “bundle” of patents results comprising patents for each contracting state that the inventor designated.\(^{23}\) The patent then becomes effective in each designated contracting state once a translation is filed with each of these states.\(^{24}\)

2. Maintaining and Enforcing a Patent under the European Patent System

After the EPO grants a European patent, it has the same value as a national patent because the patentee must file translations, pay renewal fees, and institute judicial action in each contracting state.\(^{25}\) The patentee maintains a granted patent by paying annual renewal fees to both the EPO and each designated contracting state.\(^{26}\) When another party infringes the patent in a designated contracting state, the patentee has to institute an action in that state’s court system.\(^{27}\) This requires the costly services of a patent attorney not only authorized and trained to bring a suit before that state’s court, but also fluent in the state’s official language.\(^{28}\) If the state’s court finds the patent valid and infringed, contracting states vary as to the

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\(^{18}\) Id. art. 14(1). The official languages of the EPO are English, French, and German. Id.

\(^{19}\) Id. art. 79.

\(^{20}\) Id. art. 75(1)(a).

\(^{21}\) Id. art. 78(2).

\(^{22}\) See id. arts. 90-96.

\(^{23}\) See id. arts. 2(2), 64(1).

\(^{24}\) Id. art. 137(2)(b); Promoting Innovation Through Patents: Green Paper on the Community Patent and the Patent System in Europe, COM(97)314, at 4 [hereinafter Green Paper].


\(^{26}\) EPC, supra note 9, art. 86(1); see id. art. 39(1).

\(^{27}\) Jan J. Brinkhof, Patent Litigation in Europe: Two Sides of the Picture, 9 FED. CIR. B.J. 467, 467 (2000).

\(^{28}\) See Riley, supra note 7, at 313-314.
appropriate remedy. The remedy can range from damages to injunctions depending on the state’s policy standards to prevent patent infringement.\(^29\)

If an infringing act occurs in more than one EU member state and the patentee desires to enforce her patent rights, she must bring her complaint before the courts of each EU member state.\(^30\) The Netherlands courts, acknowledging the burdens of such a system on a patentee, have issued judgments that extend beyond its own borders.\(^31\) The Dutch Supreme Court began this practice in the 1989 Lincoln v. Interlas case in which Interlas, a Dutch company, imported, modified, and resold throughout Europe diesel welding units manufactured by a U.S. company bearing the trademark "Lincoln."\(^32\) In response, the Dutch owners of the "Lincoln" trademark sued Interlas.\(^33\) The Dutch Supreme Court sustained a lower court’s decision to issue an injunction effective in the Netherlands, Belgium, and Luxemburg.\(^34\) Thereafter, the Dutch lower courts have applied these principles to patent infringement suits.\(^35\) Therefore, patentees may obtain cross-border injunctions in the Netherlands’ courts; however, other states are under no obligation to enforce such a judgment.\(^36\)


The Community patent system proposed by the European Commission\(^37\) embodies a centralized patent system in which an inventor can obtain, maintain, and enforce a patent through a single institution. The Community Patent Convention (the “CPC”), signed on December 15, 1975, constitutes the first attempt to set forth a framework for a centralized patent

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\(^{30}\) Id.


\(^{32}\) Meibom, *supra* note 31, at 469.

\(^{33}\) Id.

\(^{34}\) Id.

\(^{35}\) Id.

\(^{36}\) Id.

system in Europe.\textsuperscript{38} The CPC provides that the EPO grant a patent having a "unitary" and "autonomous" character.\textsuperscript{39} Thus, a Community patent has equal effect in the states contracting to the convention and is only subject to the provisions of both the EPC and the CPC.\textsuperscript{40} The CPC further provides that a patentee only pay renewal fees to the EPO\textsuperscript{41} and gives jurisdiction to the Court of Justice of the European Communities as the court of last resort.\textsuperscript{42} In the end, however, the EU member states did not ratify the CPC because they found it undesirable.\textsuperscript{43}

EU member states made a second attempt at instituting a Community patent by amending the CPC on December 15, 1989. The amendment outlines a "protocol on the settlement of litigation concerning the infringement and validity of community patents" and introduces a Common Appeal Court.\textsuperscript{44} As with the original CPC, the amended CPC did not enter into force because only seven of the required twelve EU member states ratified it.\textsuperscript{45} Since then, the Commission has made significant efforts to arrive at a Community patent system agreeable to all interested parties.\textsuperscript{46} Despite the Commission's efforts, disagreement among EU member states regarding judicial arrangements continues to block the creation of a Community patent system.\textsuperscript{47}


\textsuperscript{39} See id. art. 2.

\textsuperscript{40} Id.

\textsuperscript{41} Id. art. 48.

\textsuperscript{42} See id. arts. 5, 63.


\textsuperscript{44} Agreement Relating to Community Patents, art. 1, 1989 O.J. (L 401) 1 [hereinafter Luxembourg Agreement].

\textsuperscript{45} France, Germany, Greece, Denmark, Luxembourg, the United Kingdom, and the Netherlands ratified the amended CPC. Proposal for a Council Regulation on the Community Patent, COM(00)412 final, at 5 [hereinafter Regulation Proposal]. It is generally thought that the CPC failed because of the excessive Community patent costs and the complexity of the judicial system. Interested parties felt that the CPC requirement that a patent be translated into every Community language would result in excessive costs. Moreover, interested parties distrusted giving national judges the power to declare a patent invalid throughout the entire Community. Id.

\textsuperscript{46} Id.

1. Obtaining a Patent under the Community Patent System

An inventor desiring to obtain a Community patent follows the same procedures that an inventor applying for a European patent follows because the EPO governs the grant of Community patents. However, instead of designating particular contracting states to the EPC in which the inventor seeks patent protection, the inventor designates the entire Community.

2. Maintaining and Enforcing a Patent under the Community Patent System

After grant, unlike a European patent, the Community patent takes on a “unitary” and “autonomous” character. In line with this centralized character, the patentee pays renewal fees solely to the EPO to maintain his patent rights. If throughout the patent’s life, activity in any EU member state infringes the patent, the patentee or the infringer may bring suit against the opposing party in a Community intellectual property court of first instance (the “chamber of first instance”).

Initially, a central chamber of first instance attached to the Court of First Instance of the European Communities, composed of four legal and three technical judges, exercises exclusive jurisdiction over all Community patent suits. In succeeding calendar years, if cases brought before the central chamber exceed 150, then a regional court of first instance is established within that EU member state or within that territory containing a group of EU member states having the most litigators appearing before the central chamber in that year. Once regional courts are established, they exercise jurisdiction over actions against defendants domiciled in that state or territory. In all other actions, including actions against two or more defendants domiciled in different EU member states, the central chamber exercises jurisdiction. Either party may then appeal a judgment...

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48 Regulation Proposal, supra note 45, art. 1.
49 Id. art. 2(4).
50 Id. art. 2(1)-(2).
51 Id. art. 30. These actions include invalidity, infringement, declarations of non-infringement, the use of the patent or the right based on prior use of the patent, requests for limitation, counterclaims for invalidity, and declarations of lapse. Id. art. 30(1).
53 Id. art. 5.
54 Id. art. 8(2).
55 Id.
of a chamber of first instance to the Community intellectual property court of appeals (the "chamber of appeals").\textsuperscript{56}

III. The Benefits of a Centralized Patent System

By adopting a centralized patent system, EU member states and their inventors not only reap important benefits, but also bear significant costs. For the most part, all costs result from the displacement of the decentralized European patent system currently in place. The proposed Community patent system attempts to alleviate the costs by allowing the centralized and decentralized systems to co-exist.\textsuperscript{57} This solution, however, merely avoids the costs. If the benefits of the Community patent system enjoyed by inventors do in fact outweigh its costs, then more inventors will use the centralized patent system and use the decentralized system less, thereby displacing the decentralized system.\textsuperscript{58} Thus, the costs resulting from the potential displacement of the current decentralized patent system should be addressed in a cost/benefit analysis.

When compared to the U.S. and Japanese patent systems, the European patent system suffers from high cost, legal uncertainty, and inefficiency, even in light of successful measures taken under the EPC to centralize the patent grant procedure. A centralized patent system, on the other hand, brings benefits to both EU member states and businesses that would allow it to compete with the U.S. and Japanese patent systems. The four major benefits are low financial cost to inventors, legal uniformity and certainty, efficiency, and the elimination of forum-shopping.

A. Low Financial Cost to Patent System Users

One of the primary benefits of a centralized Community patent system is the low financial costs to businesses, universities, and individual inventors in obtaining, maintaining, and enforcing patents in Europe.\textsuperscript{59} In 2000, the average total cost to obtain and maintain a European patent designating eight states was approximately EUR 49,900.\textsuperscript{60} This cost was

\textsuperscript{56} Id. art. 39(1).
\textsuperscript{57} Regulation Proposal, supra note 45, at 19.
\textsuperscript{58} Riley, supra note 7, at 323.
\textsuperscript{59} See id. at 300-306. Consumers could also benefit. See Philip Leith, Revision of the EPC, the Community Patent Regulation and European Technical Judges, 23 E.I.P.R. 250 (2001).
three to five times the cost to obtain and maintain a patent in Japan or the U.S. in the same year. This cost-gap puts European innovators at a disadvantage in comparison with their Japanese and U.S. competitors, thus hindering innovation. Furthermore, the high costs of obtaining and maintaining a European patent may delay or deter small and medium-sized enterprises (“SMEs”) and commercially small inventors, who have limited financial resources, from using the patent system. In contrast, the average costs for obtaining and maintaining the proposed Community patent in an enlarged 27-member EU amounts to about EUR 23,805, under half the cost for a European patent designating only eight states. Such a low financial cost moves the Community patent closer into position to compete with U.S. and Japanese patents, which on average cost between EUR 10,000 and EUR 15,000. Moreover, this price provides SMEs and individual inventors with easier access to a European-wide patent system.

The financial cost incurred by inventors to obtain and maintain a European patent have four major components: first, the fees initially incurred to obtain a patent which include the filing, examination, and granting fees; second, the cost of professional representation before the EPO; third, fees for translating the patent into the designated states’ official languages; and, fourth, EPO and national renewal fees. And, of course, the patentee may have to bear the financial cost of enforcing the patent.

61 See id. This figure has changed little since July 5, 2000 because the fees charged by the U.S. and Japan patent offices have not changed considerably since then. See United States Patent and Trademark Office, USPTO Fees – FY 2003, at http://www.uspto.gov/web/offices/ac/qs/ope/fee20030101.htm [hereinafter USPTO Fee Schedule]; see Japan Patent Office, Legislation and Practice Changes – Schedule of Fees, at http://www.jpo.go.jp/infoe/ryokine.htm [hereinafter Japan Fee Schedule].


64 This cost assumes that only the claims are translated into all the official languages. AF, Industrial Property: Council Fails to Make any Progress on Community Patent, European Report, May 25, 2002, available at 2002 WL 13766042 [hereinafter Council Fails].

65 This author calculated these figures based on the U.S. and Japanese fee schedules for 2003. See USPTO Fee Schedule, supra note 61; see Japan Patent Office, supra note 61.

1. Reduced Translation Fees

After the EPO awards an average European patent, which designates eight EPC contracting states,\(^6\) the EPC requires that the patentee translate her patent into the official languages of these states.\(^7\) Translation fees associated with such a patent amount to EUR 12,600 and constitute about 25% of the total cost to obtain and maintain the patent.\(^8\) Translations under the original Community patent proposal, contained in the 1989 CPC, cost the patentee even more because the CPC requires translations into the eleven official languages of all fifteen EU member states.\(^9\) These translations cost patentees about EUR 17,000\(^7\) and the cost only increases as additional countries join the EU.

The latest translation proposal, finding support from several organizations representing businesses, significantly reduces translation costs compared to the EPC and CPC.\(^2\) Under this proposal, the inventor must translate the entire patent into one of the EPO languages (i.e., English, French, and German) and, upon grant, he must translate the claims into the remaining two EPO languages.\(^3\) Under this proposal patent system users only pay EUR 2,200 for translations.\(^4\)

Despite the lowered translation cost that the EPO language solution brings to inventors, business organizations prefer the English-only solution in which patents are prosecuted and granted in English without any further translations.\(^5\) The English-only solution not only brings translation costs to a minimum, but is supported by evidence that patent translations are rarely used and English prevails in technology and education in Europe.

\(^{6}\) Community Patent Proposal, supra note 60.

\(^{7}\) EPC, supra note 9, art. 137(2).

\(^{8}\) Community Patent Proposal, supra note 60.

\(^{9}\) Community Patent Proposal, supra note 60.

\(^{10}\) See Luxembourg Agreement, supra note 44, at arts. 29-30.

\(^{11}\) Community Patent Proposal, supra note 60.

\(^{12}\) See ICC Policy Statement, supra note 4; UNICE Detailed Comments on the Proposal for a Regulation creating a Community Patent, Jan. 9, 2001, at 1 [hereinafter UNICE Detailed Comments].

\(^{13}\) Community Patent Proposal, supra note 60.

\(^{14}\) Id. This translation regime would save the users of the patent system EUR 10,500.

In practice, patent translations are rarely consulted. A recent study found that at "the Institut National de la Propriete Industrielle, the French national institute of industrial property rights, translations are consulted in only 2 percent of cases." Indeed, "when a patent is in dispute or negotiation, everyone reads the text of the patent application in its original language to reach the greatest level of understanding." In other words, everyone reads the patent application in its original language because a measure of understanding is lost in the translation process. Without the requisite level of technical expertise, a translator could modify or lose a patent's critical details in the translation process, thus changing the scope of the patent. Therefore, any solution, such as the English-only solution and, to a lesser extent, the EPO language solution, requiring fewer translations assures an efficient use of translations and reduces the incidence of mistranslation or the need for costly translators having technical expertise.

Of course, no solution completely eliminates translations because even the English-only solution requires at most a single translation into English. But, the English-only solution is less of a burden to inventors when considering evidence showing the prevalent use of English in Europe. First, English is the accepted language of technology. Second, English is taught in 90% of the high schools in the EU. And third, 70% of patent applications are applied for in English. Thus, most users of the European

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76 Community Patent Proposal, supra note 60.
80 Alternatively, patent system users could be required to provide a translation into either English or French considering that French has been the language of European culture and was once the language of diplomacy. Riley, supra note 7, at 301 n.16. Although Germany might object to such a proposal, arguing that it has the largest population in the EU and it produces more patents than any other country. EUROPEAN PATENT OFFICE, 2000 FACTS AND FIGURES 15, at http://www.european-patent-office.org/epo/facts_figures/facts2000/pdf/facts_figures_00.pdf (2001) [hereinafter EPO Facts and Figures].
81 Cf. Leonard, supra note 79, at 564 (discussing the expense of hiring translators and the additional surcharges hidden within translating projects).
82 EFPIA Reviews, supra note 75.
83 Riley, supra note 7, at 303.
patent system know and use the English language on an ongoing basis and only a minority of inventors would have to make the single translation into English. As a result, the English-only solution completely eliminates translation costs for a majority of the patent system users and significantly reduces translation costs for a minority.

SMEs and individual inventors are particularly sensitive to the translation issue owing to the translation expense. Larger businesses, on the other hand, view translations as part of doing business in Europe, because they have easy access to the services of independent, agency, and in-house translators. SMEs and individual inventors located in EU member states whose official language does not fall within an EPO official language are at a disadvantage compared to other inventors located in EU member states having as its official language an EPO official language. To put SMEs and individual inventors on a level playing field with each other and larger businesses, the EPO or the EU member states could subsidize translation costs for those users who are disadvantaged because their official language is not an EPO language. The EPO or the EU member states would likely not be burdened by such a measure when considering that the EPO languages are the official languages of those EU member states who not only have the greatest populations, but have inventors and businesses that are major users of the patent system.

In sum, the latest translation proposal for the Community patent significantly reduces translation costs by requiring fewer translations. Business organizations agree, however, that a patent system working in the English language would be ideal considering its wide use in education, business, and technology. Nonetheless, business organizations also agree

85 Another translation issue affecting SMEs and individual inventors is notice. Riley, supra note 7, at 307 ("How can a third party become aware of a patent’s scope if he cannot understand the definitions of its claims?").
86 See Leonard, supra note 79, at 562.
87 See Brinkhof, supra note 27, at 471.
88 The Commission suggests public financing (or part-financing) to support SMEs having difficulty securing protection for their inventions. Green Paper, supra note 24, at 20.
89 In 2002 the most populated countries in Europe besides Russia were Germany with 82.4 million, the United Kingdom with 60.2 million, and France with 59.5 million. Italy, having a population of 58.1 million, is the only other country in Europe that approaches the population of France within 10 million. 2002 WORLD POPULATION DATA SHEET OF THE POPULATION REFERENCE BUREAU at http://www.prb.org//Content/ContentGroups/Datasheets/wpds2002/2002_World_Population_Data_Sheet.htm (last visited Mar. 12, 2003).
90 See EPO Facts and Figures, supra note 80, at 15.
that the latest translation proposal sufficiently reduces current translation costs, particularly for SMEs and individual inventors.\textsuperscript{92}

2. Reduced Renewal Fees

Currently, translation fees are not the only costs that add considerably to the cost of obtaining and maintaining a patent; patentees must also pay "exorbitantly" high renewal fees to each designated national patent office every year.\textsuperscript{93} In 1997 50% of renewal fees were paid to national governments, the balance going to the EPO for managing the patent grant procedure.\textsuperscript{94} Today, an even greater percentage of renewal fees are paid to national patent offices: A patent having a ten-year term and designating eight EU member states costs the patent holder about EUR 12,000 in national renewal fees\textsuperscript{95} versus the EPO's EUR 5,425 in renewal fees.\textsuperscript{96} Extending the patent term beyond ten years results in even more costly renewal fees, especially national renewal fees. A twenty-year patent term costs the patent holder EUR 15,625 in EPO renewal fees\textsuperscript{97} and about EUR 56,000 in national renewal fees.\textsuperscript{98}

The centralized Community patent system, by comparison, eliminates national renewal fees because the Community patent creates a "unitary" patent unlike the "bundle" of national patents created by the current European patent system.\textsuperscript{99} Thus, patentees pay renewal fees only to the EPO and avoid having to pay costly renewal fees to designated EU member states.

\textsuperscript{92} See, e.g., ICC Policy Statement, supra note 4 (In fact, the ICC praised the Commission for its "politically ingenious solution" in which an inventor files a patent application in one of the three EPO official languages and on grant translates the claims into the other two official languages.).


\textsuperscript{94} Green Paper, supra note 24, at 5.

\textsuperscript{95} See National Law: VI. Payment of Renewal Fees for European Patents, EPO, at http://www.european-patent-office.org/legal/national/e/vi.htm [hereinafter National Renewal Fees]. This figure was calculated based on the 2002 national renewal fees for the following eight EU member states: Germany, France, the Netherlands, United Kingdom, Switzerland, Italy, Sweden, and Finland.

\textsuperscript{96} See EPO Fee Schedule, supra note 60, at 4.

\textsuperscript{97} See National Renewal Fees, supra note 95.

\textsuperscript{98} See EPO Fee Schedule, supra note 60, at 4.

The Council of the European Union suggests that renewal fees for the Community patent should not exceed the EUR 5,425 renewal fee currently charged by the EPO for an average patent with a ten-year term. But, even if the Community patent renewal fees equaled the current EPO renewal fees, they are double the USPTO renewal fees. In UNICE’s view, the Community patent renewal fees should be substantially less than the renewal fees for an average European patent. The renewal fees could further be reduced, at least for SMEs, individual inventors, and universities, by introducing a special scale of fees as has been done in the U.S. (e.g., a 50% discount). Arguably, a special scale could be applied to the current renewal fees, however, this would not effect a significant change in renewal fees because a patentee must still pay costly national fees. Thus, a centralized patent system, in which a patentee pays renewal fees solely to the EPO, together with a special scale of fees favoring SMEs, individual inventors, and universities sufficiently reduces patent renewal fees.

3. Reduced Litigation Fees

Litigating a European patent is expensive. Individual proceedings must be brought in each EU member state in which the patentee desires to enforce his patent rights. Litigation costs add up quickly when considering that the standard price for a single patent proceeding in the United Kingdom is GBP one million and the standard price in Germany is GBP 200,000. Even though SMEs and individual inventors rarely find

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100 The Council of the European Union is the main decision-making body of the EU comprising representatives from the EU member states. See INSTITUTIONS OF THE EUROPEAN UNION, at http://europa.eu.int/inst-en.htm (last visited Mar. 11, 2003).

101 See EPO Fee Schedule, supra note 60, at 4.

102 U.S. renewal fees for a ten year patent term currently amount to about EUR 2,800. Japanese renewal fees for a patent having fifteen claims and a ten year term currently amount to about EUR 4,620.


104 Id. at 22.


themselves in court,\(^{107}\) should the need arise, SMEs and individual inventors cannot afford to bring proceedings before two, three, or even twenty different national court systems with differing procedures and languages.\(^{108}\) Thus, SMEs and individual inventors are significantly disadvantaged in relation to larger businesses with deep pockets.

As in the U.S. and Japan, a centralized Community patent court requires only one proceeding in the first instance.\(^{109}\) Thus, patentees only have to pay court and legal fees for a single proceeding.

In addition, litigation costs under the Community patent will likely be less than that incurred in countries such as the U.S. and the U.K. because the common law procedures of discovery and cross-examination will probably not be used in light of the procedural rules already established by a parallel proposal to the Community patent – the European Patent Litigation Protocol (the “EPLP”). The EPLP, a proposed amendment to the EPC recently drawn up in reaction to the persistent difficulty in obtaining the required unanimity to adopt the Community patent system,\(^{110}\) establishes procedures for a centralized European patent court referred to as the European Patent Judiciary having jurisdiction over the European patent.\(^{111}\) The EPLP does not propose discovery procedures similar to those in the UK and other common law countries because they are burdensome, time-consuming,\(^{112}\) and add appreciably to costs.\(^{113}\)

On the other hand, the common law’s thorough testing of evidence, especially through cross-examination, assures better decisions whether or not a patent should be enforced, especially when much is at stake (e.g., an expensive plant and its equipment could be shut down).\(^{114}\) The EPLP, however, recognizing the benefit of the common law’s discovery procedures for the EPLP, the need for a centralized Community patent court was proposed in the Regulation Proposal, supra note 45, art. 30(3).

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\(^{107}\) See Liege Report, supra note 25, at 24. SMEs rarely seek to protect their inventions because of the prohibitive costs. See id.

\(^{108}\) See Brinkhof, supra note 27, at 468 (Giving a short list of procedural differences among European national court systems). In fact, many SMEs can hardly afford to litigate in the United States. Id. at 469. There are currently 20 contracting states to the EPC. GERALD PATERSON, THE EUROPEAN PATENT SYSTEM: THE LAW AND PRACTICE OF THE EUROPEAN PATENT CONVENTION (2d ed. 2001).

\(^{109}\) Regulation Proposal, supra note 45, art. 30(3).

\(^{110}\) The EPLP developed from discussions amongst the Working Party on Litigation, chaired jointly by Germany, Luxembourg, and Switzerland, government delegations, and other business and intellectual property organizations. Jan Willems, Third Proposal for an EPLP, Aug. 27, 2001, 3-7 [hereinafter EPLP].

\(^{111}\) Id.

\(^{112}\) In 2001, the UK resolved or “heard just 26 applications or trials in the first six months of this year, while its rival in Germany heard around 600.” Leader: Matheu Swallow, THE LAWYER, Sept. 23, 2002, at 3.

\(^{113}\) See Cole, supra note 106, at 222.

\(^{114}\) Id. at 222-223.
procedure, proposes a system “in which the court may, on request of a party, order the other party to bring certain documents into the proceedings and/or allow inspection of the (original) document.”

Since the EPLP procedures represent the views of most European delegations, it is likely that the Community patent system will adopt similar procedures, and thus keep the cost of litigation lower than it otherwise would be if it adopted the complete common law discovery procedures. By securing a lower cost, however, the Community patent sacrifices high quality decisions.

**B. Legal Uniformity and Certainty**

A centralized patent system promotes legal uniformity and certainty. Legal uniformity is established when judges interpret and apply patent law and procedure uniformly among members of the centralized patent system. A single high court of last resort composed of judges with judicial experience in patent law assures such uniformity. Legal uniformity benefits patent system users by eliminating the possibility of two judicial proceedings trying the same issue coming to different conclusions. The judicial experience and technical expertise that a centralized patent system attracts contributes towards legal certainty because the judges could better come to sound decisions than judges in the national courts, many of whom do not have much experience in patent law. This also benefits patent system users by providing them with confidence in the judicial system.

Critics have argued that “a single court is no guarantee of uniformity, particularly if its personnel and resources are appropriated from the present piecemeal system.” Of course, judges and personnel coming from various EU member states come into a new Community patent system having been influenced by their own distinct court systems. For example, members of the UK bar, in particular, are apparently uncomfortable with having technical “non-lawyer” judges on the judge panels because no such judges are allowed to pass judgment in the UK’s high courts. Furthermore, the thoroughness of common law trial procedure found in the UK courts, especially cross-examination, will likely not be encompassed within the procedures of the Community patent system.

Even assuming that judges and personnel drawn from the national patent systems have similar legal backgrounds, they would still have

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115 EPLP, *supra* note 110, at 106.
116 Groombridge & Loh, *supra* note 5.
opposing views, even if they were drawn from the same country.\textsuperscript{119} Moreover, many Community patent judges drawn from the EU member states, if not all, have been exposed to the uniform set of laws governing the European patent. Although they may not interpret and apply that law uniformly, eventually case law will develop and they will look to those decisions for guidance.\textsuperscript{120}

To further address these concerns, a two-level centralized patent court structure could be put into place to guarantee uniformity. Many scholars and institutions have recognized, and in many cases, encouraged the use of such a court structure for hearing Community patent disputes.\textsuperscript{121} In fact, the European Commission (the “Commission”) has expressed approval for centralized Community patent courts of first and second instances.\textsuperscript{122} Thus, a court of second instance ensures that the courts of first instance apply and interpret patent law uniformly just as the federal circuit does with respect to the district courts in the United States. Uniformity will not be guaranteed immediately. The courts of first instance will differ as to the interpretation and application of the patent law, but the court of second instance will level out these differences.

Closely related to uniformity, the Community patent system provides legal certainty. Critics of the two-level structure have argued, however, that “[t]he existence of separate bodies is not conducive to the objective of legal certainty” because each body would have distinct personnel and distinct implementing regulations.\textsuperscript{123} The Community patent system could address this argument by adopting the Canadian model where a single court has a trial division and an appeals division “in which judges would be appointed to one of the divisions but would ex officio also be a member of the other division.”\textsuperscript{124} Several advantages have been cited for this model, namely: (1) it would be “more convincing to the users of the appellate court if the judges working there would also have experience in first instance jurisdiction,”\textsuperscript{125} (2) it would prevent a “mentality of competition” between

\textsuperscript{119} The United States Supreme Court justices have views and backgrounds that differ significantly.

\textsuperscript{120} It is unlikely that the Community patent system will accord significant value to precedent as under the common law tradition because continental Europe follows the civil law tradition. See Perkins & Mills, supra note 106, at 574.


\textsuperscript{122} See Regulation Proposal, supra note 45, at 11.

\textsuperscript{123} Cole, supra note 106, at 222.

\textsuperscript{124} EPLP, supra note 110, at 17.

\textsuperscript{125} Id. at 18.
the first and second instance, and (3) it would promote the same status among the judges.

 Nonetheless, Europeans may have strong reservations about having judges serving in both courts at the same time. An alternative solution, broadly supported by Europeans, is to simply make sure that qualified and experienced judges in the field of patent law sit on the bench in the centralized courts. Qualified and experienced judges would make sound decisions, thus contributing to legal certainty. Moreover, the court of second instance would be made more convincing to its users by requiring that its candidate judges serve a term on the court of first instance. Furthermore, the potential status differential between the first and second instance courts would be beneficial by attracting highly qualified patent judges to the second instance court.

 The Commission recognizes the value of qualified and experienced patent judges. The Commission requires that the Community Patent Court consist of both legal and technical members. The legal members are required to have a high level of experience in patent law. The “[t]echnical members must have a high level of experience” in the fields of chemistry, physics, and mechanics and have “appropriate experience in patent law.”

 In addition to requiring that judges be highly qualified, legal certainty could further be assured by staggering the judges’ terms. This ensures that the expertise developed by the panel of judges could be passed from the senior judges to the junior judges. The Commission’s proposed provision provides for the staggering of judges by requiring that the legal and technical judges be appointed for a term of six years with half of the judge positions being filled every three years. Initially, half the judges appointed would be chosen by lot to have their term expire after three years.

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126 Id.
127 Id.
128 Id.
129 Liege Report, supra note 25, at 11. This solution, however, may necessitate the use of the Canadian model given the small number of experienced patent judges in Europe, especially as more and more regional courts are created. See EPLP, supra note 110, at 18.
130 See Working Document on Jurisdiction, supra note 52, art. 2(2).
131 Id. art. 2(1).
132 Id. art. 2(2).
133 Id.
134 Id. at 12.
135 Id. at 11.
136 Id. at 11.
A centralized court structure does more than establish legal uniformity and certainty; it eliminates the patent system users’ ability to forum shop. Under the current decentralized system, businesses are free to choose national courts where they can assure for themselves a favorable result or where they can attain their commercial objectives. For example, patent owners may commence proceedings in pro-patent countries, and “infringers may seek jurisdictions in which patents are readily revoked.” Also, since the Dutch Supreme Court began to issue cross-border injunctions in Lincoln v. Interlas, “the Netherlands is ‘becoming a favored European jurisdiction for patent cases.” A centralized court system, on the other hand, eliminates the choice that gives patent system users the ability to forum-shop.

C. Increased Efficiency

The third significant benefit of a centralized patent system is efficiency. A patent system is efficient if it produces the desired effect without wasting resources, the most important of which include time, money, and skilled professionals.

Efficiency benefits both the patent system users and the national patent courts and offices by saving them both time and money. Under the current decentralized system, not only do patents have to be litigated country by country, but also many national courts do not have sufficient experience in patent law to quickly and effectively hear and decide patent disputes. In addition, when the EPO grants a patent, it must be translated into an official language of each designated EU member state even though translations are rarely consulted. The Community patent system improves efficiency with regards to the jurisdictional system and post-grant translations.

1. A More Efficient Jurisdictional System

The inefficiencies of the European patent system are most striking with respect to the jurisdictional system. Under the current European patent

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137 Laddie, supra note 105, at 406.
138 Groombridge & Loh, supra note 5.
139 See Bender, supra note 31, at 68.
141 This definition of “efficient” in the context of patent systems is drawn from the dictionary definition. See THE MERRIAM WEBSTER DICTIONARY (1997) (“productive of desired effects especially without waste”).
142 See Cole, supra note 106, at 221.
system a European patent infringed in several countries must be litigated
country by country.\textsuperscript{143} Multiple proceedings, however, are becoming more
and more unnecessary not only because national courts inconsistently apply
national intellectual property laws, but also because of the recent trend
towards making national intellectual property laws more consistent with
each other.\textsuperscript{144} Justice Hugh Laddie commented that if countries "have, in
substance, the same I.P. diet" then it makes little sense "splitting it into
national helpings."\textsuperscript{145} Indeed, if time, money, and skilled professionals are
being used in similar proceedings, then patent system users and national
jurisdictional systems are using their resources inefficiently.

The Community patent system, on the other hand, provides a more
efficient patent system. An infringed party only has to bring a single patent
dispute before a single Community patent court whose decision would be
effective throughout the entire EU.

\textbf{2. Increased Efficiency from Fewer Translations}

Once the EPO awards a patent, the patentee must translate the patent
into an official language of each designated country to make it effective.\textsuperscript{146}
Such a procedure is far from efficient because, in practice, translations are
used in fewer than 5\% of cases and sometimes their quality is poor.\textsuperscript{147} Yet,
despite the possible inefficiencies of translations, the EU translates its
official publications into all eleven of the EU's official languages so that
Europe's citizens can understand and comply with Community
legislation.\textsuperscript{148} Nevertheless, patents and Community legislation differ with
respect to their uses and the persons they affect. Patents affect Europe's
sophisticated parties, such as lawyers, businesses, and inventors, who have
the capacity to understand both technical information and multiple
languages. Community legislation, on the other hand, affects each
European citizen whether or not sophisticated enough to understand
multiple languages.

Compared to the inefficiency of translating a European patent into an
official language of all designated states, the current proposal for a
Community patent requires that the inventor file a patent in one of the EPO
languages and to translate the claims into the remaining two EPO
languages. Then, users could take a large portion of the more than EUR 40

\textsuperscript{143} EPC, supra note 9, art. 64(3); Laddie, supra note 105, at 406.
\textsuperscript{144} Laddie, supra note 105, at 405.
\textsuperscript{145} Id.
\textsuperscript{146} See EPC, supra note 9, art. 137(2).
\textsuperscript{147} Liege Report, supra note 25, at 25.
\textsuperscript{148} Gerd Toscani, Translation and Law – The Multilingual Context of the European Union
million currently spent on translations every year and invest it in research which could improve Europe's competitive position vis-à-vis the U.S. and Japan.149

D. Eliminates Forum-shopping Among the Centralized and National Patent Systems

A centralized patent system not only eliminates the current forum shopping problem among national patent systems, but also eliminates possible forum shopping between the national patent systems as a whole and the centralized patent system which coexist under the Commission's regulation proposal.150 Currently, a patent system user may choose a country's forum that will assure for it a favorable result so long as that country has jurisdiction.151 Under a centralized system, on the other hand, the legal procedures and substantive law are the same throughout the system. Then, inconsistency among the lower patent courts would only result from different interpretations and applications of patent law. And, even then, a higher court would resolve major inconsistencies among lower courts.

Jürgen Schade, a judge for the Federal Patents Court in Munich, argues that the current forum shopping problem is exaggerated because it is abusive in only one limited circumstance.152 As a legal strategy, a patent infringer could apply to a national court for a negative declaratory judgment to delay the proceedings and prevent the patent-holder from applying for substantive relief in another country's court.153 Judge Schade argues that establishing a centralized patent system is not the only means to prevent this particular abuse.154 In fact, he offers less extensive means. The EPC contracting states could adopt a procedural law enabling the patent-holder to apply for substantive relief to a court of their choosing which has jurisdiction over the dispute.155 Even though other means exist to eliminate forum-shopping, a centralized patent system still accomplishes this goal

149 Id.

150 See Groombridge & Loh, supra note 5.

151 It is not surprising that businesses would require this sort of flexibility considering that it gives them options to choose from in their efforts to minimize risk.


153 Id. This legal strategy is also referred to as the "Belgian Torpedo" phenomenon. See Groombridge & Loh, supra note 5.

154 Schade, supra note 152, at 180.

155 Id.
while accomplishing the most important objective to lower the financial costs of obtaining, maintaining, and enforcing a patent in Europe.

To further discount the forum-shopping problem, Judge Schade argues that forum-shopping is a "positive advantage" because it provides a degree of competition among national courts. Judge Schade supports his position by pointing to the competition between the district courts in the United States, welcomed by the legal profession and industry. Indeed, similar competition could develop between the Community patent system's chambers of first instance; however, the forum-shopping existent among the national patent systems differs from the potential forum-shopping among the chambers of first instance because the latter is tempered by a supervising appeals court.

IV. The Costs of Centralization

Businesses benefit significantly from a centralized Community patent system because they can obtain, maintain, and enforce patents at a much lower cost than through the European patent system. As a result, businesses enjoy increased innovation which leads to economic prosperity. Furthermore, EU member states benefit, though indirectly, through increased tax revenue from those businesses.

With the establishment of a centralized patent system, however, European governments and their constituents must bear significant costs. A centralized patent system will likely displace national patent offices and courts. At the same time, large businesses, SMEs, and individual inventors lose the flexibility gained from coexistent patent systems and increases the distance between them and a patent system.

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156 Id.
157 Id. at 280-282.
158 This cost is significant given that Germany, who produces a major portion of Europe's patents, supports a more decentralized system with first instance national courts. See Michael Becket, Germany Blocks Patent Overhaul, The Daily Telegraph (London), Nov. 25, 2002 at 34. One might simply propose a patent system composed of both a centralized patent system and a decentralized patent system to give patent system users the ability to choose that system whose benefits better meet their needs. In fact, both the International Chamber of Commerce and the Commission of the European Communities endorse a system in which the national, European, and Community patent systems coexist. ICC Policy Statement, supra note 4; Regulation Proposal, supra note 45, at 18. Note, however, that the benefits of each individual patent system do not necessarily add up to a total benefit greater than the total benefit of any one patent system because each patent system is independent of the others. In other words, their co-existence does not necessarily lead to a synergistic relationship. Additional costs may be incurred as a result. A hybrid centralized-decentralized patent system, however, could bring in some benefits from each system.
A. Displacement of National Patent Systems

When the community patent system displaces the national patent systems, national patent offices and patent courts will no longer be needed. As a consequence, national patent office personnel lose their jobs, EU member states no longer have control over patent examination and litigation, and EU member states lose a lucrative revenue source arising from renewal fees and litigation. Indeed, EU member states on average obtain over EUR 1,000 in total renewal fees from a patent with a ten year term and over EUR 5,500 in total renewal fees from a patent with a twenty year term. Germany, in particular, who produces over 40 percent of the EPO’s patents in relation to those produced by all the contracting states to the EPC, does not support a centralized Community patent court because it derives much income from the large quantity of patent litigation brought to its courts. This is not surprising when considering that a single patent proceeding in Germany costs GBP 200,000.

Governments are additionally concerned for the welfare of their patent agents. Patent agents in Europe derive a major portion of their income from patent application translations and “some governments are unable to

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159 Kara M. Bonitatibus, The Community Patent System Proposal and Patent Infringement Proceedings: An Eye Towards Greater Harmonization in European Intellectual Property Law, 22 PACE L. REV. 201, 232 (2001). Germany does not support the proposal for a central patent court “primarily because of the income that it derives from the large quantity of patent litigation.” Dyson, supra note 93. Even if the Community and national patent systems were to co-exist, national patent offices would lose business to the Community patent because the Commission’s Regulation Proposal seems to suggest that any fees paid to national patent offices through the Community patent office would be paid to compensate national patent offices for services it renders in connection with the Community patent. ICC Policy Statement, supra note 4; see Regulation Proposal, supra note 45, at 11.

160 Even with the proposal that the national and Community patents co-exist, certain EU member states still fear that a major portion of the national patent office’s workload will be displaced. Ph. Busquin, The Community Patent, an instrument serving European research, THE COMMUNITY PATENT: THE CURRENT SITUATION AND THE OUTLOOK FOR THE FUTURE, at 25 (Mr. Ph. Busquin, the Commissioner for research policy, argues, however, that “these fears are excessive; need we recall that the creation of the European patent system in 1978 did not lead to the disappearance of the national offices. Under these circumstances, these fears should not be used as a pretext to distort the proposed system.”).

161 See National Renewal Fees, supra note 95.


163 Dyson, supra note 93; see also, Patently Absurd: The EU Should Consider a Fresh Start in its Patent Quest, FIN. TIMES (London), Nov. 15, 2002, at 20.

distinguish between their national interests and the interests of a small group of their citizens, in this case a few hundred patent agents.\textsuperscript{165}

**B. Loss of Flexibility from Coexistent Patent Systems**

A cost that is particularly important to business interests is the loss of flexibility assured by coexistent patent systems. The ICC, the world business organization representing both large and small enterprises, has stressed that the Community patent system should co-exist with the two existing decentralized systems.\textsuperscript{166} This gives businesses the flexibility to choose whether to obtain and maintain a patent through the Community patent system, the European patent system, or the national patent systems.\textsuperscript{167}

Coexistent patent systems also allows for the Community patent to be convertible into a European patent in certain situations.\textsuperscript{168} An important situation is one where it is discovered that the subject matter of the Community patent is not new because the subject matter is within the scope of a national patent application or published national patent.\textsuperscript{169} In that case, the Community patent would convert into a European patent, except that the bundle of patents generated would not include the national patent from the member state in which a national prior right exists.\textsuperscript{170} Otherwise, the Community patent would be rendered invalid.\textsuperscript{171}

The Chartered Institute of Patent Agents ("CIPA") provides additional reasons why coexistent patent systems provides flexibility. First, some individual inventors and SMEs may not need or want patent protection throughout the entire European Community.\textsuperscript{172} Second, "the absence of

\textsuperscript{165} Di Cataldo, \textit{supra} note 78, at 29; \textit{See also} Philip Leith, \textit{supra} note 59, at 251.

\textsuperscript{166} \textit{See, e.g.}, ICC Policy Statement, \textit{supra} note 4.

\textsuperscript{167} \textit{Id.} This cost is discounted by the possibility that competing patent systems would exhaust the supply of competent patent judges and that litigants would forum-shop between the Community and national patent systems. Groombridge & Loh, \textit{supra} note 5.

\textsuperscript{168} \textit{Id.}

\textsuperscript{169} \textit{Id.}

\textsuperscript{170} \textit{Id.}

\textsuperscript{171} \textit{See} Regulation Proposal, \textit{supra} note 45, art. 28(1)(f) ("The Community patent may be declared invalid only on the grounds that . . . the subject-matter of the patent is not new having regard to the content of a national patent application or of a national patent made public in a EU member State on the date of filing or later or, where priority has been claimed, the date of priority of the Community patent, but with a filing date or priority date before that date.").

\textsuperscript{172} CIPA Comments, \textit{supra} note 63, P 3.2.1 ("[S]ome patentees operate only within a localized area and therefore do not want or need patent protection over a much wider area, such as throughout the Community.").
C. Increased Distance Between the Patent System and Its Users

An important cost incurred by litigants in adopting a centralized patent system is the increased distance between the litigant and the centralized patent court. Because of this distance, litigants, particularly SMEs, may be dissuaded from litigating a patent. Moreover, litigants lose the "local presence" benefits afforded by current national courts. These benefits include the confidence that local litigants have in decisions made, the greater ability to conduct discovery, and the increased ability that local courts have to understand the cases in the context of the local situation.

V. How to Achieve the Benefits of a Centralized Patent System at Minimal Cost

By adopting a centralized Community patent system, EU member states face the potential displacement of their national patent systems. As a result, businesses lose both the flexibility guaranteed by coexistent patent systems and the benefits assured by a "local" patent system. Rather than wait until their national patent systems fall into disuse, EU member states should presently consider measures to minimize these significant costs. Personnel from displaced national patent systems could fill positions in decentralized EPOs and Community patent courts. SMEs and individual inventors, who primarily benefit from coexistent patent systems, could be compensated for their lost flexibility by decreasing the cost of obtaining, maintaining, and enforcing patents. Finally, a "local" patent system could be assured by competent regional courts.

A. Decentralize Examining and Judging Responsibilities of the Community Patent

Even though national courts lose litigation revenues, the other costs resulting from displaced national patent systems, which include lost jobs
and local user's loss of a local patent system with which they have familiarity, could be minimized by maintaining the national patent offices, but converting them into EPO branches, and by employing national patent judges in the first and second instance Community patent courts. Thus, examining and other administrative responsibilities of the EPO would be spread among the national patent offices having solid infrastructures already in place and qualified patent judges would simply be transferred to the Community patent system.

Many existing national patent offices have qualified staffs and produce high quality patent examinations. Since these offices will eventually be displaced, they should be converted into EPO branches. These regional patent offices could provide searching and examination services and "undertake consultancy and service activities (informing companies on protection, helping them present their files, etc.)."  

Most business organizations oppose EU member state's desire for the "re-nationalization" of patent search and examination responsibilities of the EPO, who would administer the Community patent, to national patent offices. The regional patent offices, however, would not "re-nationalize" the patent search and examination responsibilities of the EPO. To the contrary, the regional patent offices would represent instrumentalities of the EPO.

Business organizations further warn that they will not use a centralized system in which national patent offices assume searching and examining responsibilities, unless it produced high quality work. Admittedly, this would be difficult to achieve by simply giving work to national patent offices because of their differing procedures. Regional offices, on the other

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177 "National patent offices in Member States . . . could carry out a range of tasks, including state of the art searches." Council Fails, supra note 64. See also Liege Report, supra note 25, at 8.

178 Id. at 9.

179 UNICE Message on the Proposal for a Council Regulation on the Community Patent, COM (2000) 412 Final, Oct. 25, 2001, at 2 ("If a number of individual national patent offices are entrusted with search and/or even possibly examination tasks by the EPO Administrative Council, it will be an impossible task to implement and enforce adequate systems for quality control and the unitary character of the granted patents. This will be particularly true in a situation when the national patent office concerned does not fully meet the objective quality criteria laid down in the PCT; A compromise involving such a hand-over of work to national patent offices could jeopardise the existing quality and uniformity of the present European Patent system. Such a situation would be a step back towards mutual recognition of nationally granted patents, a principle dismissed when the present European patent system was established."); Liege Report, supra note 25, at 88 ("What is more, businesses would like to underline the need for all applications for a Community patent to be processed in a uniform way in order to ensure the total impartiality of the system. Finally, they stress that a quality documentary search is an essential precondition for a reliable examination.").
hand, would have to comply with certain quality requirements and the main EPO office in Munich would teach and control the procedure.\textsuperscript{180} These “regional” EPOs would also have the “local presence” advantage characteristic of the proposed “regional” courts.\textsuperscript{181} Thus, individual inventors and SMEs previously dependent on existing national patent offices would not be disadvantaged by an otherwise long distance relationship with the EPO.

Even though the Community patent system would not completely displace national patent offices by establishing regional EPO patent offices within national patent office infrastructures, the Community patent system would displace national patent courts and its corresponding revenue. Nevertheless, specialized patent judges employed by national courts will still be needed to fill the judge panels of the Community patent courts\textsuperscript{182} and lawyers and patent agents will continue to receive business from patent holders seeking to enforce their patent rights in such courts. Furthermore, inventors will still seek after local patent agents and lawyers to assist them in filing patent applications and to obtain counseling.\textsuperscript{183}

B. Decrease the Financial Cost of Obtaining, Maintaining, and Enforcing Patents for SMEs and Individual Inventors

As the centralized patent system displaces the decentralized patent system, patent system users lose the flexibility gained from co-existent centralized and decentralized systems.\textsuperscript{184} Thus, large businesses could not choose the system that best suits their needs and SMEs and individual inventors have no choice but to use the centralized system regardless of its financial cost and other disadvantages. To minimize these disadvantages, at least for SMEs and individual inventors, the system could provide

\textsuperscript{180} Liege Report, supra note 25, at 8.
\textsuperscript{181} See Working Document on Jurisdiction, supra note 52, at 4.
\textsuperscript{182} Some national courts, however, do not have specialized patent judges such as the Dutch courts. See Brinkhof, supra note 27, at 470. But, the UK and Germany, for example, have patent courts with specialized patent judges. See CIPA Comments, supra note 63, A 3.4(b).
\textsuperscript{183} See Promoting Innovation through Patents - The Follow-up to the Green Paper on the Community Patent and the Patent System in Europe, COM(99)42 at 15 [hereinafter Follow-up to Green Paper].
\textsuperscript{184} Arguably, the only advantage of the co-existent patent systems is flexibility. Cf. UNICE Position Paper on the Green Paper on the Community Patent and the Patent System in Europe, INTELLECTUAL PROPERTY RIGHTS: COMPENDIUM OF UNICE POSITION PAPERS, Oct. 31, 1997, at 9 (“By maintaining both systems, companies will be able to enjoy the desired advantages of the Community patent without losing the proven advantages of the European patent.” But, the only way to simultaneously enjoy the advantages of both systems would be to obtain a patent from each system for the same invention.)
mechanisms to make it cheaper for SMEs and individual inventors to obtain and maintain Community patents. The Community patent system could accomplish this by providing SMEs and individual inventors a 50% discount for search, examination, and renewal fees as is currently done in the United States. Even under the proposed Community patent system, where SMEs and individual inventors only have to bring patent disputes before a single court system, SMEs and individual inventors still cannot afford to enforce their patent rights. To make litigation affordable, the Community patent system could ensure that SMEs and individual inventors have access to legal costs insurance for patents. Several member states have tried such insurance systems with differing results. France and Sweden discontinued trials of a legal costs insurance system for patents probably because, in practice, litigation costs are difficult to predict and these costs can often exceed the financial limit insured. Nonetheless, several British insurance companies still provide insurance policies that cover only legal costs and not damages. As a result, a few SMEs have brought legal actions that they otherwise could not afford to bring. Therefore, the Community patent system should ensure that SMEs and individual inventors have access to legal costs insurance by having member states finance a legal costs insurance system.

C. Establish Competent Regional Courts in the First Instance

Establishing competent regional courts in the first instance minimizes the harm caused by the distance that a centralized patent court places between it and potential litigants. Under the current decentralized patent system, litigants may simply adjudicate their patent disputes in their national courts, unless, of course, litigants come from different EU member states. Even then, a defendant is not burdened by distance because she normally defends in her national courts. Litigants in either position enjoy the “local presence” that national courts offer. The Community patent system could provide the benefits of “local presence” by establishing competent regional courts.

185 Green Paper, supra note 24, at 22.
186 See USPTO Fee Schedule, supra note 61.
188 Follow-up to Green Paper, supra note 183, at 19.
189 Id.; see CIPA Comments, supra note 63, A 4.5.2.
190 Follow-up to Green Paper, supra note 183, at 19
191 CIPA Comments, supra note 63, A 4.5.2.
192 Green Paper, supra note 24, at 20.
The Commission itself proposes the creation of “regional chambers” to the Community Patent Court.193 After the “central chamber” to the Community Patent Court is set up, the Commission specifically proposes a procedure whereby regional chambers are gradually created.194 If the number of cases coming before the central chamber exceeds 150, then a regional chamber is established in the EU member state “in which the greatest number of parties involved in litigation before the central chamber were domiciled.”195 Further regional chambers are created by repeating this procedure.196

Even though establishing regional courts brings the Community Patent Court physically closer to litigants, this alone is not sufficient to imitate the “local presence” of national courts. The “regional chambers” must be competent so that litigants have confidence in the decisions rendered by its judges. Qualified and experienced judges, drawn from the region in which the court sits, would ensure the competence of regional chambers. The Commission’s proposal requires that judges have high levels of experience in patent law and in one of several relevant technical fields.197 Highly qualified and experienced national patent court judges would simply transfer from the national patent courts displaced by the Community patent court. Moreover, the Commission’s proposal staggers the judges’ terms of office to perpetuate the expertise built up by the judge panel.198

Some EU member states would likely have difficulty meeting the criteria to create regional chambers within their own borders. The Commission partially addresses the problem by providing a means whereby EU member states may group together to create a regional chamber.199 But, the Commission fails to set forth how to determine where to put the regional court. Certainly, the EU member state in which the regional chamber is established would be at an advantage. Traveling judges drawn from these EU member states in proportion to the number of patent cases brought before each of their national courts solves this problem.

193 Working Document on Jurisdiction, supra note 52, art. 1(2).
194 See id. art. 5. The UK and the Scandinavian countries support the Commission’s proposal for the creation of regional courts in a second stage, however, several countries, notably France, Germany, Italy, and Austria push for immediate decentralization. AF, Competitiveness Council – Deadlock in Negotiations on Community Patent, EUROPEAN REPORT, Nov. 16, 2002.
195 Working Document on Jurisdiction, supra note 52, art. 5(1).
196 Id. art. 5(2).
197 Id. art. 2(2).
198 Id. art. 2, Notes.
199 Id. art. 5(3).
VI. Conclusion

EU member states, reluctant to adopt the centralized Community patent system, must look beyond the costs associated with its implementation and see that its benefits far outweigh its costs. In addition, its benefits have a positive affect on a wide array of interested parties, including the EU member states themselves. Through a centralized patent system, SMEs and individual inventors can obtain, maintain, and enforce their patent rights throughout a much larger territory and for a price and in an amount of time not much more than through their national patent systems. Consequently, SMEs and individual inventors have easier access to greater patent protection, thus encouraging innovation in the EU member states and throughout the EU and encouraging competition with the U.S. and Japan.\footnote{See Green Paper, supra note 24, at 1.}

Understandably, EU member states are concerned that a purely centralized patent system displaces their national patent systems and impinges on long held traditional notions of sovereignty and the territoriality of patents.\footnote{Laddie, supra note 105, at 407; see Peter M. Gerhart, Why Lawmaking for Global Intellectual Property is Unbalanced, 22 E.I.P.R. 309, 309 (2000) (explaining that a global intellectual property system is still in the distant future because “we are still heavily wedded to principles of territoriality and sovereignty.”).} More importantly, and as a practical matter, EU member states worry that judges and national patent office personnel will lose their jobs. Businesses, while supporting a centralized patent system, also support the continued existence of national patent systems which cater particularly to the needs of local SMEs and provide businesses in general with flexibility. The current proposal, calling for the continued existence of national patent systems, however, only temporarily answers the concerns of EU member states and businesses. Given the likelihood that the centralized patent system could entirely displace the current decentralized patent system, the proposal should minimize this cost so that EU member states and businesses can better enjoy the benefits of a centralized patent system. Distributing patent responsibilities among EU member states, while at the same time maintaining the “unitary” character of the Community patent, goes far to minimize the displacement cost.

Whatever costs EU member states and businesses incur by relinquishing familiar and age-old national patent systems, in the end, they will benefit more from a centralized patent system and even more by taking measures to minimize the resultant costs.