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The Need for Further Accessions to the London Agreement

Highlights

- The high cost of obtaining an EPC patent outside the London Agreement
- The London Agreement ensures significant cost savings
- Positive effects on allocation of resources to R&D
- Importance for opening access to the patent system
- The public-notice function of granted patents
- Safeguards in case of litigation

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The Need for Further Accessions to the London Agreement

Executive summary

A patent system to which users have limited access, due to high translation costs, will not serve its purpose. By reducing the obligation to provide patent translations, the London Agreement lowers financial barriers to entry and opens access to the patent system. This is true for users in EPC member and other industrialized States and particularly important for SMEs and users from developing countries. The full benefits of the London Agreement will only be realized if all signatories of the European Patent Convention (EPC) accede to the London Agreement on patent translations. Full accession to the Agreement will induce significant cost savings and reallocation of resources to research and development (R&D). Further accessions should increase legal security and have no negative impact on the public-notice function of patents, in particular due to the existence of safeguard clauses. For these reasons, it is imperative that as many EPC signatories as possible accede at the earliest opportunity

Introduction

The London Agreement on patent translations[1] entered into force in May 2008, four months after ratification by France. Before that date, in a European patent system with 35 member States and no less than 26 different national languages, the requirement of the full patent translation in potentially all 35 States could lead to astronomic costs and inefficient allocation of resources.

As such, the entering into force of the London Agreements represent a great step forward for the European patent system, given the expected impact of the Agreement on costs of patenting in Europe.

By lowering cost barriers, the London Agreement also represents a great step forward for inventors throughout the world, including from developing countries, thereby providing greater access to the patent system to inventors of countries for which the European market could prove until now to be too costly.

Until now, however, only 15 member States of the European Patent Organization (EPO) have ratified it. Full benefits of the Agreement will hence only be realized if all signatories of the European Patent Convention ("EPC") accede to the London Agreement.

In a situation of financial crisis and world wide recession, accession to the London Agreement is crucial to the community of States for the following reasons.

The cost of obtaining an EPC patent outside the London Agreement is high

Before the entry into force of the London Agreement, Article 65(1) of the EPC permitted an EPC signatory to require that a translation of the granted patent be filed in its official language. The signatory State was further authorized to prescribe that the failure to observe any translation requirement would lead to the patent being deemed void *ab initio* in that State (Article 65(3) EPC). Because many member States exercised this right, obtaining Europe-wide coverage of a patent

[1] *For the full text of the Agreement, see http://www.epo.org/patents/law/legal-texts/london-agreement.html. For the state of accession and ratification, see http://www.epo.org/patents/law/legal-texts/london-agreement/status.html.*

granted by the EPO required translation of the granted patent into many languages at great cost, and provided for some legal insecurity. A 2000 study by the European Commission indicated that a patent granted by the EPO ("European patent") costs approximately five times as much as a U.S. patent, and three times as much as a Japanese patent, with the costs of translation into European languages being a significant component that accounted for the differences.[2] The same study estimated the cost of translation of a European patent into ten working languages to be 17,000 Euros, into the three official languages of the EPO to be 5,100 Euros, and, into only one of the official EPO languages, with translation of only the claims into the other two languages, to be 2,200 Euros. Thus, according to this study, translation of a European patent into each additional language costs, on average, about 1,700 Euros.

High translation costs are important reasons to strive for the ratification of the London Agreement by those EPO Member States who have not done so yet.

The London Agreement ensures significant cost savings

The London Agreement will substantially decrease the costs of patenting in Europe by reducing the need for obtaining full translations of patents. Accordingly, Article 1(1) of the London Agreement provides that any EPC signatory having an official language in common with one of the official languages of the EPO shall dispense with any requirement to translate the patent into its official language.

Article 1(2) provides that a signatory not having an official language in common with one of the official languages of the EPO shall dispense with any translation requirement of the full text of a patent if the latter was granted in the official language of the EPO prescribed by the signatory, or if the patent was translated into that prescribed language.

Article 1(3) provides that each of the signatory States referred to in Article 1(2) would continue to have the right to require a translation of the claims of a granted patent into its actual official language. Finally, Article 1(4) allows a signatory to dispense with any remaining translation requirements at its option.

Because all countries prescribing an official language under Article 1(2) so far have only prescribed English, the net effect of the London Agreement, in the countries ratifying or acceding to that Agreement, has been that an application filed in a language other than English need only be translated into English upon grant, with claims of the patent possibly being required to be translated into a number of local European languages.

For the owner of a European patent, significant cost reductions will therefore be induced from the mere reduction of the volume of text to be translated and from the fact that national taxes for the publication of translations as well as the need to refer to a patent attorney for translations will be significantly reduced or even disappear.

Finally, the cost savings from further accessions to the London Agreement should greatly exceed the cost of all patent litigations in Europe in a single year, let alone the costs from any impairment of the public-notice function arising from further accessions to the London Agreement. A recent study of patent damages in Europe estimated that the total cost of patent litigation in Germany (the European jurisdiction with the greatest rate of patent litigation and the highest amount of total annual patent litigation costs) in 2004 was approximately 225 million Euros, with 3.5 million Euros of patent infringement damages being awarded that year.[3] The study additionally estimated that approximately

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[2] *See Proposal for a Council Regulation on the Community Patent, 2000/0177 (CNS) (COM 2000) at 11 (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0412:FIN:EN:PDF.*

[3] *Patent Litigation Insurance, A Study for the European Commission on the Feasibility of Possible Insurance Schemes Against Patent Litigation Risks, Final Report, June 2006 at 13 (http://ec.europa.eu/internal_market/indprop/docs/patent/studies/pli_report_en.pdf).*

300,000 patents were in force in Germany that year. The approximate cost of translating each of these German patents in force to just one other language would thus be approximately:
300,000 x 1,700 Euros/language = 510 million Euros

Thus, even a single further accession to the London Agreement has the potential to save far more than the costs of all patent litigation, including the award of patent infringement damages, in a single year.[4]

Ratification of the London Agreement is expected to positively affect allocation of resources to R&D

These potentially important savings are expected to have positive effects on research and development (R&D), allowing for resources saved on translations to be reallocated to further R&D and other business activities. Besides, savings may positively affect patent strategies, leading to an extended geographical validation of European patents, particularly into those countries which will have adhered to the London Agreement.

Cost savings may also lead to validation of patents in countries outside the London Agreement, outside Europe, and outside the industrialized world.

Today, opening access to the patent system is more important than ever, also to inventors from developing countries

Access to the patent system is a key to stimulate innovation. However, high costs resulting from the obligation to translate granted patents may act as a deterrent to file patents and, consequently, as a deterrent to innovate. In the midst of a financial crisis which will only accentuate the importance of the real economy, access to the patent system needs to be promoted more than ever. The London Agreement provides a most effective way to meet this policy objective by lowering costs and barriers resulting from translations.

This is also particularly true for developing countries. Industrialized countries must undertake all they can to help them access the patent system. One effective way of doing so is by ratifying the London Agreement. This will particularly benefit inventors in developing countries, as they will be able to obtain cost effective intellectual property protection in the world's largest single market at a reasonable cost.

The London Agreement enhances the public-notice function of granted patents

One argument that has been made against ratification and implementation of the London Agreement is that dispensing with translation requirements will detract from the public-notice function of patents. According to this argument, a patent published in the local language of a EPC signatory delineates the boundary between inventions in the public domain and those that are proprietary in that State. Accordingly, it is sometimes argued that the London Agreement impairs this important function by making it more difficult for businesses, especially those in non-English speaking countries, to distinguish proprietary inventions from those in the public domain.

This concern is misguided. First, it is unlikely that the public-notice function of patents will be actually impaired by a system in which most European patents would likely be filed in or translated into

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[4] *This comparison assumes that each of the 300,000 patents in force in Germany was a European patent granted by the EPO. It is likely the case that only a certain percentage of these German patents were European patents that were registered in Germany. However, even an assumption that only 10% of these patents were actually European patents leads to a cost-savings-per-translation-saved of 51 million Euros. Thus, under this assumption, the cost savings from five further accessions to the London Agreement could potentially lead to cost savings that exceed the total cost of patent litigation and awarded patent damages in a year.*

English. European businesses, especially those that are active beyond their home jurisdictions, are increasingly competent in using the English language as an every-day business tool. For that reason, further accessions to the London Agreement should not detract from the public-notice function of patents to any significant extent.

Additionally, most jurisdictions may continue, under the London Agreement, to require that the claims of granted patents be translated into their local languages. Because the claims are the legally operative part of patents and specify the scope of the exclusive patent right, the public-notice function of patents should not be impaired by any further accession to the London Agreement.

Safeguard clauses are available for countries for which translations are important

Whereas the lack of public notice argument may be set aside, the need for translations in the case of litigation has to be addressed. The London Agreement does so, based on the observation that it is mainly in the case of litigation that the need for a translation may arise. According to its Article 1 (3), contracting States continue to have the right to require that a translation of the claims into one of their official languages be supplied under the conditions provided for in Article 65, paragraph 1, of the European Patent Convention. Besides, Article 2 allows contracting parties to prescribe that, in the case of a dispute relating to a European patent, the patent owner may be requested to supply, at his own expense and at the request of an alleged infringer or of a Court, a full translation into an official language of the State in which the alleged infringement took place. The London Agreement hence foresees the necessary safeguards in case of litigation.

Conclusion

EPC signatories that have not yet acceded to the London Agreement continue to be able to require translations of the full patent under Article 65(1) of the EPC. There are currently twenty such states. Given the approximate figure of 1,700 Euros for full translation of a granted European patent into a new language, the cost of non-implementation of the London Agreement in these countries may range as high as 34,000 Euros per granted patent. This is an unacceptable cost that continues to have a negative impact on the European patent system.

Besides, ratification of the London Agreement opens access to the patent system and as such, supports innovation at a time at which this is particularly needed. Further opening access to the patent system by reducing translation requirements, and hence costs, is an inexpensive and efficient way of contributing to overcoming the present economic crisis.

Finally, full ratification of the London Agreement provides an efficient way of supporting inventors from developing countries, by enhancing their access to a cost-effective patent protection system.
The full benefits and cost savings of the London Agreement will only be achieved when all EPC signatories accede to the London Agreement.

The International Chamber of Commerce (ICC)

ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

The fundamental mission of ICC is to promote trade and investment across frontiers and help business corporations meet the challenges and opportunities of globalization. Its conviction that trade is a powerful force for peace and prosperity dates from the organization's origins early in the last century. The small group of far-sighted business leaders who founded ICC called themselves "the merchants of peace".

ICC has three main activities: rules-setting, dispute resolution and policy. Because its member companies and associations are themselves engaged in international business, ICC has unrivalled authority in making rules that govern the conduct of business across borders. Although these rules are voluntary, they are observed in countless thousands of transactions every day and have become part of the fabric of international trade.

ICC also provides essential services, foremost among them the ICC International Court of Arbitration, the world's leading arbitral institution. Another service is the World Chambers Federation, ICC's worldwide network of chambers of commerce, fostering interaction and exchange of chamber best practice.

Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on vital technical and sectoral subjects. These include financial services, information technologies, telecommunications, marketing ethics, the environment, transportation, competition law and intellectual property, among others.

ICC enjoys a close working relationship with the United Nations and other intergovernmental organizations, including the World Trade Organization and the G8.

ICC was founded in 1919. Today it groups hundreds of thousands of member companies and associations from over 130 countries. National committees work with their members to address the concerns of business in their countries and convey to their governments the business views formulated by ICC.

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