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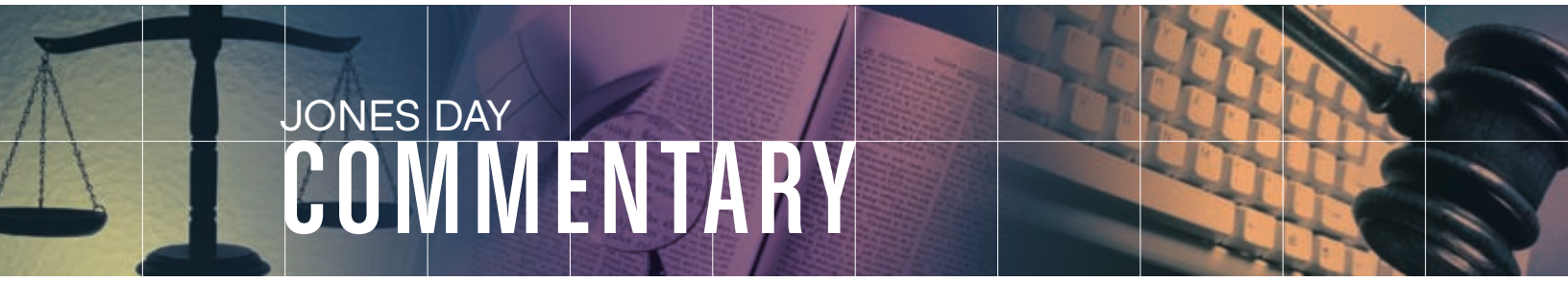

UNIFYING THE PATENT SYSTEM IN EUROPE: ARE THE WHEELS BACK IN MOTION?

The European Commission issued a press release and Communication on April 3, 2007, for improving the patent system in Europe. This *Commentary* provides a short summary of where matters now stand.

BACKGROUND

The patent system in Europe has seen limited harmonization. Despite a common prosecution procedure (the EPO), much of the patent system, including enforcement, is still run on a country-by-country basis. This is regarded by many as costly and cumbersome. Updating the system has been the subject of debate for a number of years. Out of the debate, two main proposals emerged. On the one hand, there was the EPLA (European Patent Litigation Agreement), which would use the existing system for granting patents but would set up a new single European Patent Court for litigating European patents. (The new system, like the EPO, would be separate from the European Union). This concept, which would do away with enforcement on a country-by-country basis, has recently received public support from patent judges across Europe (they signed a resolution in support and proposed procedural rules). On the other hand, the European Commission proposed the introduction of a Community Patent: a single patent to cover the whole of the European Union, with accompanying discussion about a forum for enforcement and validity challenges. This concept of the Community Patent has foundered previously, most notably on translation issues.

THE PUBLIC CONSULTATION

The European Commission resurrected the debate in January 2006 when it issued a public consultation on European patent policy. The consultation addressed both concepts: the idea of a single Community Patent and improvements to the current system of litigating European patents. The results of this consultation have now been published.

The European Commission had indicated that it would take matters forward late in 2006. However, when nothing happened, it was generally concluded that the update was bogged down by political disagreements between the different European countries.

THE COMMUNICATION

However, on April 3, 2007, the European Commission published a Communication (essentially a notice of intent) reporting on the results of the public consultation and on the way forward. First, the Commission embraced the concept of a single Community Patent, indicating that it is "a key objective for Europe," and acknowledged that a solution will have to be found to the question of translations. Given the strong and divergent views of Member States, this is likely to be a long-term task. The Communication then concentrated on what is the appropriate litigation forum for patents in Europe. The Commission addressed three proposals.

The first proposal was the EPLA. The Commission concluded that this is unlikely to gain universal acceptance because some Member States are strongly against creating a separate jurisdiction for European patents. The primary concern is that should the Community patent come into force in the future, this would be subject to courts within the framework of the European Union and accordingly there could be competing jurisdictions for patents in Europe. Some Member States are not comfortable with this.

The second proposal was for the establishment of a Community court within the framework of the European Union that would deal with litigation on European patents and, when created, Community Patents. The Commission concluded that this is unlikely to gain universal approval because some Member States believe such a system would be unworkable in practice—it may be impossible to appoint appropriate judges and, from past practice, courts are not set up to provide decisions in a timeframe that would be acceptable.

The third proposal was a compromise that the Commission hopes will be acceptable to all Member States. It is effectively a combination of the first two proposals—it would be based on the EPLA system but would also have competence over Community patents if and when they come into existence. Accordingly, a new single European patent court would be set up that would have competence over European patents and, from when they start, Community patents. While there would be a "standard" appeal system, this court system would be subject to the European Court of Justice in matters of EU law, including the validity of Community patents. The Commission believes that this compromise proposal addresses the primary concerns expressed against the first two proposals.

WHAT DOES THIS MEAN?

The assumption over recent months in Europe had been that the delays from the Commission in taking matters forward after the public consultations were a sign that political differences had once again killed any progress on updating the patent system in Europe. The key point to take from the press release and Communication is that the Commission has not given up on reforming the patent system in Europe and is keen to press matters forward.

In substance, the compromise proposal put forward is only a tinkering with the previous proposals. Given the greater political differences over the Community patent (which realistically mean that progress on the Community patent cannot be expected for some years), what the Commission is really pushing is a form of EPLA pan-European court, albeit with flexibility for the future to cover Community patents, should they ever come into existence.

Despite its continued enthusiasm, the Commission still has a considerable task ahead in getting all the Member States to agree. However, contrary to the assumption over recent months, it appears that the wheels are back in motion on revising the patent system in Europe. However, progress can at best be expected to be slow; the existing system is here to stay for the time being.

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