THE LUXEMBOURG CONVENTION ON THE COMMUNITY PATENT: COMPLEMENTARY APPLICATION OF NATIONAL LAW?

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I. INTRODUCTION

The creation of a unitary patent law for the European Economic Community (EEC) has long been considered a necessary constituent of the process of European economic integration,¹ a process formally inaugurated by the principles of the Rome Treaty.² As a corollary, such economic integration has been postulated as a necessary precondition for the politico-legal unification of Europe.³ The Luxembourg Convention on the Community Patent (CPC)⁴ has the capability to nurture both the process of economic integration and the process of politico-legal unification. Not only does the CPC foster economic integration through its creation of the Community patent, a patent granted jointly for all member states of the EEC by the European Patent Office in Munich⁵ pursuant to procedures established by the 1973 Munich Convention on the European Patent (EPC),⁶ but, in conjunction with the EPC, the CPC also fosters

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¹ K. Wheare, Federal Government 86-87 (3d ed. 1953). It should be noted at the outset that the social utility of having a patents system in the first place will be accepted as axiomatic throughout this article in spite of the fact that this issue is open to serious question. See Letter from Thomas Jefferson to Isaac McPherson on Patents and Monopolies (Aug. 13, 1813), reprinted in Jefferson's Letters 290-91 (W. Whitman arranger 1950).
politico-legal unification through the erection of a unitary legal regime (1) for the governance of the effects of the Community patent as a matter of substantive Community law\(^7\) and (2) for the centralization of proceedings and the concomitant application of common procedures by the European Patent Office and the Court of Justice of the European Communities in most actions concerning the Community patent.\(^8\) Hence, the CPC contains the juridical basis for the EEC to transcend the principle of territoriality, inherent in national patent protection of industrial property rights. In signing the CPC, the Plenipotentiaries of the nine Member States were anxious that the transcendence of the territoriality of national protection rights within the EEC not only alleviate the intra-Community distortions of competition which flow from the principle,\(^9\) but also effect the abolition of obstacles to the free movement of goods protected by patents within the Community.\(^10\)

In order that the laudatory goals of the CPC be achieved, it is imperative that a complete and Community-wide unification of patent law be consummated in actuality. In the absence of thoroughgoing unification, the present diversity of standards will continue to develop along the lines of national patent legislation, thereby potentially obstructing the effective governance of the Community patent by Community institutions. Consequently the goals of the CPC and the principles of the Rome Treaty will be relegated to the realm of hortatory expressions. It is the purpose of this disquisition to determine whether or not the CPC effects the thoroughgoing unification of patent law necessary to achieve the EEC's goals and the goals of the Rome Treaty. While it is the author's belief that the CPC may well serve the twin goals of European economic and politico-legal integration, it is quite evident that the CPC perpetuates the territoriality of the national protection rights and the continuing vitality of national standards in certain key areas of Community patent law.\(^11\) Thankfully, the residual deference of the CPC to territorial national protection rights is not as bad as it could have been if the proposed "Protocol on the Deferred Application of the Provisions on the Exhaustion of Rights Attached to Community Patents" had been adopted as an integral part of the

\(^7\) [1976] 2 COMM. Mkt. Rep. (CCH) ¶ 9797, at 9771.

\(^8\) Id.

\(^9\) Community Patent Convention, supra note 4, preamble, para. 3.

\(^10\) Id. para. 4.

CPC. The fight over the Protocol on the Exhaustion of Rights, and its concomitant negative effects on free trade in patented products and equal conditions of competition, was a tug-of-war between the applicability of national and Community law which was resolved in favor of Community law through the efforts of the Commission of the European Communities. The Plenipotentiaries at the Luxembourg Conference did not incorporate the hotly disputed protocol as part of the CPC. It must be assumed that the Plenipotentiaries acted out of their perception of the negative effect on the free movement of goods which such a protocol would have. However, the Commission's threat of legal action under the Rome Treaty should not be discounted.

Moreover, as alluded to above, certain provisions perpetuating the territoriality of national protection rights did ultimately become integral parts of the CPC. Specifically, the CPC defers to national jurisdiction in two areas of interest after the grant of a Community patent; (1) the compulsory licensing of the Community patent; and (2) actions for infringement of the Community patent. To be sure, there are other aspects of the CPC which indicate deference to national protection rights such as the provisions for the protection of prior national rights.

However, the treatment of prior national rights by the CPC is fundamentally distinguishable from its treatment of compulsory licensing and actions for infringement. Whereas the former provisions deal with problems which automatically resolve themselves into nonproblems according to priorities in time pursuant to the terms

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13 Community Patent Convention, supra note 4.

14 [1973-1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9777, at 9727: "Should the proposals in regard to which the Commission has expressed an unfavorable view...be adopted, the Commission reserves its right to institute proceedings under Article 169 for failure to observe the obligations of the EEC Treaty." Id.

15 Rome Treaty, supra note 2, art. 169.

16 Community Patent Convention, supra note 4, arts. 46, 47, 48, art. 69, para. 4, subpara. (a), arts. 81, 82, 89.

17 Id. art. 36, art. 69, paras. 1, 2, 3, arts. 79, 90.

18 Id. art. 37.
of the convention, the latter provisions deal with problems which do not automatically resolve themselves. Instead, the CPC provides a juridical framework for a continuing application of national law to the Community patent within the territories of the EEC Member States regarding its compulsory licensing and infringement. Hence, it is not unreasonable to suggest that the fabric of Community patent law may become a patchwork quilt in these key areas. The pertinent question at this juncture is whether or not the CPC contains adequate procedural mechanisms to ensure uniformity of treatment of the Community patent by the national courts in these areas. Are there sufficient safeguards in the CPC to prevent the diversity of standards, or does the fundamental jurisdictional division between the applicability of Community and national patent laws to different aspects of the Community patent ensure a perpetual duality, if not a diversity, of standards? As the title to this article foreshadowed, the crucial issue is this: can the application of national patent law to the Community patent be complementary?

The analytical framework for the examination of this issue is tripartite. Section II presents background information for the subsequent discussion through a brief contextual history of the Community patent. In so doing, the relationship between the CPC and the EPC will be elucidated and the “Community patent” and the “European patent” will be distinguished. Furthermore, the place of the CPC in the matrix of international patent legislation will be detailed.

Section III consists of a comparative analysis of the national patent laws of the nine Member States of the EEC which will be determinative of issues respecting the Community patent. Part A assesses the diverse national approaches to compulsory licensing with an eye to the possible effects of the continuing applicability of territorial national protection rights to this aspect of Community patent law. Part B consists of a comparative analysis of the various types of national laws on actions for infringement as they affect the Community patent. The jurisdictional bifurcation of the CPC on the issues of patent validity and patent infringement will thus be examined.

Section IV examines the quality of the substantive and procedural regime established by the CPC, assessed in light of the fundamental issues outlined above. If the application of national law in actions respecting compulsory licensing and infringement of the
Community patent could have retrogressive effects upon both the economic and the politico-legal integration of Europe, how can these effects be minimized or avoided under the procedural regime established by the CPC?

Finally, by way of conclusion, it is hoped that at least a tentative answer to the fundamental question will have been reached: can the application of national law to the Community patent be complementary? If the answer is no or a qualified yes, we shall look to the unfinished business ahead for the EEC.

II. A Contextual History of the Community Patent

The approximation of the various national patent laws of the European States has been contemplated since World War Two. With the signing of the Rome Treaty and the creation of the EEC in 1957, the approximation of national laws became an integral part of the international mandate for economic integration. The actual creation of a unitary patent law for Europe was a long-term project with a first draft convention being promulgated in 1962. The early proposals of the 1960's envisaged the creation of two types of patents for Europe which are related, yet analytically distinct. First, the European patent, subsequently created by the EPC, would be available to all persons, natural and legal, of whatever nationality, and would possess a unitary character in the countries designated by the applicant in his application to the European Patent Office. A. Campbell, in his treatise on Common Market Law illustrates the essential flexibility of the European patent: "One company might require patent protection only for the Community, Switzerland and Austria, and another prefer to confine itself to the U.K. and Scandinavia." Hence, the effect of the European patent only extends to those countries specified as contracting states in the application.
It is easy to see that, without more, the European patent could contribute to the division of the EEC into diverse geographical markets, depending on the design of the applicant for the European patent, and could produce concomitant distortions of competition. Consequently, the early proposals of the 1960's envisaged a second patent, the Community patent, brought to fruition by the CPC, which would regulate the effects of a European patent in the Common Market. Briefly, if an applicant designates even one of the Member States of the EEC on his application for a European patent, he is actually applying for a Community patent, since under the CPC, a designation of one Member State is deemed to be a designation of the entire Community by operation of Community law. Conversely, A. Campbell points to the essential inflexibility of the Community patent: "As far as the Community is concerned it would either be all or nothing. A European patent would be issued only for all [the Community] countries together: no applicant could request a European patent valid in, [for example], Germany and the Benelux countries, but not in France and Italy." The complete patent scheme for the EEC, therefore, contemplates two interrelated and interdependent conventions, the EPC and the CPC. To provide for the smooth operation of the EEC patent regime, it is contemplated that both conventions would enter into force simultaneously. In the absence of such a proviso, divisions of the Common Market under the EPC could be possible. Indeed, it


To avoid dispersal of the effects of the European patent inside the Common Market . . . and to prevent distortions of competition and the creation of barriers to the free movement of goods owing to the territorial limits of national protection rights, it was necessary to conclude a special convention establishing standardized rules for validity and use of the European patent in the Member States of the Community.

Id.


28 [1973-1975 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 9568, at 9250. "An application for a European patent [under the CPC] can only designate the Member States of the Community jointly; designation of one or more Member States is equivalent to designation of all of them." Id.


is expressly provided that the two conventions will enter into force on the same date. The fruition of the early conceptions in the 1973 Munich Convention on the European Patent and the 1975 Luxembourg Convention on the Community Patent represents a step, long overdue, toward economic and politico-legal integration. The crises of the Common Market during the 1960's over the entry of Britain, a common agricultural policy, and the absence of the French representative from the Council of the European Communities from July of 1965 to February of 1966 sapped the dynamism of the EEC integrative processes and diverted attention from the establishment of an EEC patent union during that decade.

Having sketched a contextual history of the Community patent in light of the postwar movement toward European integration, and having elucidated the relationship between the EPC and the CPC, in relation to the European patent, it is appropriate at this juncture to consider the place of the CPC in the matrix of international patent legislation.

A. Campbell has noted that the accretion of international patent legislation since the Paris Convention of 1883 has resulted in some confusion. Consequently it is important to detail the place of the CPC in the international framework in order that the roles of the various international documents be kept analytically distinct. In a nutshell, the CPC constitutes a special agreement within the meaning of the 1973 EPC, a Regional Patent Treaty within the meaning of the 1970 Patent Cooperation Treaty (PCT), and a special agree-
ment within the meaning of the 1883 Paris Convention (Paris Union). 38

The relationship between the EPC and the CPC having been discussed above, it is important to turn to the relationship of the CPC to the other conventions. First, the PCT, signed in Washington by 35 nations in June of 1970, is not primarily concerned with the establishment of an international patent, but with establishing procedures for sharing the work on the international processing of patents. 39 The PCT effects the goal of international processing through its provisions for a common International Application, 40 an International Searching Authority, 41 and an International Preliminary Examining Authority. 42 The 35 Signatories of the PCT, including the United States, not only can have direct access to the European and Community patents under the EPC, 43 but also can have direct access through the PCT. 44 Access to the EPC and CPC through the PCT mechanism will be of especial benefit to United States industry. United States businessmen need only make a single filing under the PCT in the English language, designating one or more of the contracting states to the EPC, to have easy access to the European Patent. 45 Where an EEC Member State is designated, access is given to the Community Patent. The benefits which accrue to United States business interests through the application of the PCT to the EPC and CPC should be manifold. 46 To avoid any confusion

text published by WIPO may be found in 2A J. BAXTER, WORLD PATENT LAW AND PRACTICE app. 3, at 342.16 (1976) [hereinafter cited as Patent Cooperation Treaty].

38 Paris Union, supra note 34, art. 19.
40 See, e.g., Patent Cooperation Treaty, supra note 37, art. 3. This article and other articles which are applicable to the International Application is applicable to the European patent and the Community patent through the EPC. See European Patent Convention, supra note 6, art. 150.
41 See, e.g., Patent Cooperation Treaty, supra note 37, arts. 15-18. These articles and others applicable to the International Search and the International Searching Authority are applicable to the European patent and the Community patent through the EPC. See European Patent Convention, supra note 6, art. 154.
42 See, e.g., Patent Cooperation Treaty, supra note 37, arts. 31-42. The pertinent provisions of these articles are applicable to the European patent and the Community patent through the EPC. See European Patent Convention, supra note 6, art. 155.
43 European Patent Convention, supra note 6, art. 58; U.S. Firms to Benefit from European Patent Convention, [1973-1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9618, at 9379.
46 Id. CCH cites primarily the cost savings and linguistic ease of one central filing in English under the PCT-EPC-CPC regime. Id. at 9380-81.
and to provide for the smooth initial operation of this tripartite international patent regime, a declaration annexed to the CPC provides that the PCT will come into effect for the nine Member States of the EEC on the same day as the EPC and the CPC.47

Second, the relationship of the CPC to the Paris Union should be indicated. The Paris Union48 lays down certain basic principles including that of equal, reciprocal treatment49 in patent matters for nationals of the Member Countries.50 The CPC, as a special agreement within the meaning of the Paris Union,51 is consistent with the principle of equal, reciprocal treatment; however, reciprocity for one EEC Member State under the Paris Union will now be reciprocity for all EEC Member States under the CPC as far as the Community patent is concerned. The Paris Union is also important in relation to the focal point of this inquiry. Granted that the CPC provides a juridical basis for the application of national law in compulsory licensing of the Community patent, the Paris Union provides for the substantive unification of certain aspects of the law of compulsory licensing.52 Furthermore, all Member States of the EEC are Signatories thereto.53 Hence, in the area of compulsory licensing, the complementary application of national law to the Community patent under the CPC will be facilitated by the unification effected by the Paris Union.

Third, and also germane to the analytical focus of this inquiry, is the relationship of the CPC to the Strasbourg Convention.54 While it is true that the CPC creates one body of substantive Community law to govern most of the effects of the Community patent, obviating the need to look to a multiplicity of national laws,55 we have

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48 Paris Union, supra note 34.
49 Id. art. 2.
51 Paris Union, supra note 34, art. 19.
52 Id. art. 5, para. A, subparas. (2), (3), (4).
53 Of the nine Member States of the EEC, Belgium, Denmark, France, Germany (Federal Republic), Ireland, Luxembourg, The Netherlands, and the United Kingdom are parties to the latest revision of Union, the Stockholm Text of 1967. Italy, however, is a Signatory of the 1968 Lisbon text.
seen that this is not the case in all areas. The Strasbourg Convention is of signal importance since it provides uniform guidelines for certain aspects of national patent legislation.\textsuperscript{56} Indeed, if the application of national patent laws under the CPC to compulsory licensing and actions for infringement is to be complementary, the Strasbourg Convention is a model of the way to reconcile diverse national laws and divergent standards. In 1973 the Strasbourg Convention had already been followed in the drafts of the new Irish, Scandinavian and French patent laws.\textsuperscript{57} As A. Campbell then noted, "[i]t will undoubtedly govern the basis of any new U.K. legislation . . . ."\textsuperscript{58} The Plenipotentiaries of the EEC Member States, at the Luxembourg Conference on the Community Patent, acknowledged the importance of the Strasbourg Convention by resolving to commence work, as soon as the CPC is signed, "to adjust their laws relating to national patents as soon as possible so as to permit ratification of the Strasbourg Convention"\textsuperscript{59} in order to prevent a "duality of standards in patent law in those States,"\textsuperscript{60} the patent laws of which embody standards and provisions which differ from the CPC.\textsuperscript{61}

Such is the relationship of the CPC to the major related conventions in the matrix of international patent legislation. In digesting these materials it is important to note that the issues of the unification of standards respecting compulsory licensing and infringement actions are not solved, or even often addressed, by the international legislators. Such questions remain the preserve of the national courts, as evidenced by the CPC. At this juncture in the analytical trek, we must remain dissatisfied. Will the application of national law to the compulsory licensing and infringement of the Community patent under the CPC be complementary? A contextual history and an examination of the relationship of the CPC to the other major conventions is not very enlightening. Having approached the question from the standpoint of the related international legislation and

\textsuperscript{56} 3 A. CAMPBELL, COMMON MARKET LAW § 4.10, at 238 (1973). The Strasbourg Convention does not address itself to the problems of unification of national laws respecting compulsory licensing and infringement, however.

\textsuperscript{57} Id.

\textsuperscript{58} Id.


\textsuperscript{60} Id.

\textsuperscript{61} Id.
having found few answers, the question should now be approached from the standpoint of the applicable national legislation. Accordingly, a comparative analysis of the "complementary" national laws on compulsory licensing and patent infringement under the CPC follows.

III. A COMPARATIVE ANALYSIS OF THE APPLICABLE "COMPLEMENTARY" NATIONAL LAWS

It is self evident that the creation of a unitary patent system for the nine Member States of the EEC, prior to their politico-legal integration, was no easy task. The fact that the Plenipotentiaries agreed to establish one system of law to govern the Community patent, and provided that the effects of the Community patent shall be evaluated pursuant to Community law alone, is remarkable. These two salient features, when coupled with the provisions concerning the exhaustion of national rights with regard to both the Community and national patents, constitute evidence of a resolute commitment to the economic and politico-legal integration of Europe. The achievement of a unitary patent law for the Community at this time is all the more remarkable in light of a respectable body of opinion which postulated the politico-legal integration of Europe as a precondition to the unification of the various substantive national patent laws. L. Robbins, writing in 1960 at the time of the early suggestions for a European patent for the EEC, reported the clear majority opinion of national patent authorities, "that due to complexities and differences in the various patent systems, any question of integration of patent laws must follow and not precede general political and legal integration." Notwithstanding the present state of affairs, namely, the continuing politico-legal diversity of Europe, a Community patent union was achieved. Due to the

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42 Community Patent Convention, supra note 4, art. 1, paras. 1, 2.
43 Id. art. 2, paras. 2, 3. These provisions provide that Community patents shall have a unitary and autonomous character with equal effect throughout the Common Market. "They shall be subject only to the provisions of this Convention and those provisions of the European Patent Convention which are binding upon every European patent and which shall consequently be deemed to be provisions of this Convention." Id. art. 2, para. 2.
44 Id. arts. 32, 81. However, with regard to compulsory licensing, see art. 81, para. 3.
balance of fervor between national patent interests and Community integrative interests, represented primarily by the Commission of the EEC, the union achieved by the CPC was inescapably incomplete. Furthermore, the reconciliation of legislative diversity by the CPC was complicated by the fact that, at present, there are two quite different patent systems in operation throughout the EEC, the "registration, non-examination" system and the "novelty and subject matter examination system." The Plenipotentiaries, in drafting the CPC, felt the pressures of national diversity but, rather than treating the various national differences as insoluble and thereby sacrificing the larger goals of economic and politico-legal integration, they effected a compromise solution: the complementary application of national patent laws to certain aspects of the Community patent, namely, its compulsory licensing and infringement. More importantly, the integrative forces, predominantly the Commission of the EEC, won the crucial battle in defeating the proposed Protocol on the deferred application of the provisions on exhaustion of rights.

The Plenipotentiaries were not unaware of the potentially precarious compromise which they effected. They realized that the "unitary" patent regime for Europe, enunciated by the CPC, was incomplete. Further, realizing that the application of national patent laws to the compulsory licensing and infringement of the Community patent might not be complementary, the Plenipotentiaries resolved to form a more perfect union later. Their goal was twofold: (1) to solidify the present gains in the process of integration by signing the CPC now; and (2) to work out remaining differences and supplement the CPC later.

First, with regard to the applicability of national law to the compulsory licensing of the Community patent, the EEC Member States, while recognizing the necessity for individual nations to be able to grant compulsory licenses with respect to Community patents in certain circumstances, resolved "to commence the work, as

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67 ROBBINS, supra note 65, at 164.
68 Id.
69 See notes 12, 13, 14 supra.
70 See Resolution on Common Rules on the Granting of Compulsory Licenses in Respect of Community Patents, in Final Act of the Plenipotentiaries of the Member States of the EEC on the Occasion of the Luxembourg Conference on the Community Patent, 19 O.J. EUR.
soon as the Convention enters into force, to enable the Convention to be supplemented by common rules on the granting of compulsory licenses.\textsuperscript{71} Such rules would enforce the unitary character of Community patents and thereby serve the integrative goals of both the CPC\textsuperscript{72} and the principles of the Rome Treaty.\textsuperscript{73} The Plenipotentiaries saw the speedy promulgation of these supplemental regulations as imperative, since "the retention of powers of the national authorities to grant compulsory licenses in respect of Community patents can only be envisaged for a short transitional period because of fundamental legislative differences affecting the free movement of goods protected by patents and the elimination of the distortion of competition."\textsuperscript{74}

Second, respecting the application of national law in actions for infringement of the Community patent, the EEC Signatories also perceived that the complementary application of national law could be retrogressive to the integrative goals of the CPC and the Rome Treaty and acted on their perception by promulgating two distinct calls for supplemental action; once again, such action is to be taken after solidifying present integrative gains through signing the CPC. (1) In one resolution respecting infringement actions,\textsuperscript{75} each Member State of the EEC declared its intention "to promote, as far as possible, uniformity of judicial practice. . . . in respect of actions for infringement of Community patents"\textsuperscript{76} by providing for experienced judges to hear such actions through "the centralization in their respective territories of first instance jurisdiction in respect of the infringement of Community patents."\textsuperscript{77} (2) In another resolution,\textsuperscript{78}
the CPC Signatories addressed a cardinal difficulty which flows from the complementary application of national law in actions for infringement of the Community patent, namely, the bifurcation of jurisdiction respecting patent validity and patent infringement.\textsuperscript{79} Therefore, the EEC Member States covenanted, once again, after signature of the CPC, "to commence . . . the necessary work to provide a solution . . . [S]uch a solution [would] . . . be embodied if possible in a Protocol which should be concluded before any litigation on Community patents takes place and at the latest within 10 years from the date of signing of [this] Convention."\textsuperscript{80} Accordingly, a Working Party was to be established to work on this knotty problem "without delay after signature of this Convention."\textsuperscript{81}

The accurate perceptions of the Plenipotentiaries of the present problems with the CPC and their resolute calls for future supplemental action to the contrary notwithstanding, the CPC must be objectively appraised for what it is: a compromise document calling for the complementary application of national law. Hence, we cannot assume that practice under the CPC will be idyllic and that the EEC signatories can solve the difficulties engendered by these jurisdictional bifurcations between national and Community law "before any litigation on Community patents takes place."\textsuperscript{82} Since national law will express apply to the compulsory licensing and infringement of the Community patent, it is appropriate at this point in the inquiry (1) to examine the diverse laws of the nine EEC Member States respecting compulsory licensing of patents and actions for patent infringement and (2) to subject these national laws to comparative analysis with an eye to those "fundamental legislative differences"\textsuperscript{83} which may adversely affect the administration of the Community patent regime by Community institutions, and which therefore may be in contraposition to the achievement of the goals of the CPC and the principles of the Treaty of Rome. Part A immediately follows with a comparison of applicable compulsory licensing law. Part B examines the applicable law of patent infringement.

\textsuperscript{79} Id.
\textsuperscript{80} Id. at 40-41 (emphasis added).
\textsuperscript{81} Id. at 41.
\textsuperscript{82} Id.
\textsuperscript{83} Resolution on Common Rules for Compulsory Licensing, supra note 70, at 40.
A. National Compulsory Licensing Laws in the EEC

A comparative study of compulsory licensing law indicates that the rationale for such laws is mercantilistic; such laws are on the books to force domestic manufacture rather than to encourage trade among nations.⁴ The general idea is to encourage the working of new inventions on a commercial scale within the particular nation state.⁵ This rationale is illuminating as to the reasons why the EEC Member States did not effect a complete unification of their compulsory licensing laws in the CPC, but instead opted for the complementary application of national law. The realization of the reasons for the reluctance of the EEC Member States to relinquish control over compulsory licensing to Community institutions is a sobering one if we are concerned with the actualization of the goals of the CPC and the principles of the Rome Treaty. "Since the conditions for the grant of compulsory licenses vary from one Member State to another, the reference to national law would lead to varying degrees of restriction of the right conferred by the Community patent and thus to unequal conditions of competition for industry."⁶ Obviously the resolution to supplement the CPC with common rules on compulsory licensing is of great import.⁷

The CPC makes any provision in the national laws of the EEC Member States for the grant of compulsory licenses for national patents applicable to the Community patent,⁸ with the provisos that national applicability shall be limited by the principle of territoriality⁹ and that the provision on the exhaustion of rights shall not apply.¹⁰ Hence, the juridical basis exists for a patchwork of licensing requirements among the nine Member States with concomitant anticompetitive effect and adverse effects on the intra-community free movement of patented products, since the laws of each EEC State contain provisions variously restricting the right of exclusivity conferred by the grant of a patent, if the manner of exploitation or non-exploitation of the patent monopoly is deemed prejudicial to the

⁴ P. Areeda, Antitrust Analysis 441 (2d ed. 1974) [hereinafter cited as Areeda].
⁵ W. Lang, Foreign Patent Laws with Comparative Analysis 703 (W. Wade ed. 1968) [hereinafter cited as Lang, Comparative Analysis].
⁷ Id.; Resolution on Common Rules for Compulsory Licensing, supra note 70.
⁸ Community Patent Convention, supra note 4, art. 46, para. 1.
¹⁰ Community Patent Convention, supra note 4, arts. 32, 46, para. 1.
The complementary application of national law could generate territorial diversity of standards for the Community patent in the three major compulsory licensing contexts: compulsory licenses on grounds of public health, security, national defense; compulsory licenses on the grounds of non-exploitation, where “the product protected by a patent is not manufactured or not manufactured in sufficient quantities on national territory;” and compulsory licenses where there are interdependent patents, the “grant-back” situation where “the invention which is the subject of a recent patent is based on an invention protected by a previous patent and can therefore not be developed without the consent of the proprietor of the earlier patent.” Each of these three contexts will be examined in light of the CPC treatment thereof and the applicable complementary national law.

1. Compulsory Licenses in the Public Interest

First, with regard to compulsory licenses granted in the public interest, the CPC establishes no specific guidelines; hence, the general provisions apply in that national laws shall be applicable with the national courts having exclusive jurisdiction, the holding of the national court on compulsory licensing of the Community patent being limited to the national territory. With regard to the applicable complementary national laws, treatment of compulsory licensing in the public interest varies; the laws of some states address the problem while the laws of others are mute.

a. Belgium. The law of Belgium on compulsory licensing is sparse. The Belgian Patent Act does not specifically refer to the subject; hence, the Belgian law on compulsory licensing consists only of the applicable provisions of the Paris Union, of which

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92 Id.
93 Id. at 9752-53.
94 LANG, COMPARATIVE ANALYSIS, supra note 85, at 701.
96 This is the case due to the opinion, commonly held by the Governments of the EEC Member States, that the nation state should have the power to delimit the private property rights of the patentee for the public good. See Resolution on Common Rules for Compulsory Licensing, supra note 70.
97 Community Patent Convention, supra note 4, art. 46, para. 1.
98 Id. art. 69, para. 4, subpara. (a).
99 Id. art. 46, para. 1.
100 LANG, COMPARATIVE ANALYSIS, supra note 85, at 703.
101 Paris Union, supra note 34, art. 5, para. a, subparas. 2, 3, 4, 5.
Belgium is an adherent to the latest 1967 Stockholm revision. "Belgian law does not provide for compulsory licenses for reasons of public interest." 

b. Denmark. In contradistinction to the law of Belgium, however, is the Danish patent law which provides for certain granting of compulsory licenses in the public interest. As P. Garde, Secretary of the Danish Ministry of Justice in Copenhagen observes, "[i]n exceptional circumstances a compulsory license may be granted if the public will so demands." There is some basis for the uniformity of certain aspects of compulsory licensing law. With eight other EEC States, Denmark is a Signatory of the 1967 Stockholm revision of the Paris Union. Furthermore, the law of compulsory licensing within Denmark is likely to be uniform since jurisdiction for all such cases is centralized in the maritime and commercial court in Copenhagen.

c. France. The French patent provisions establish a system of "licenses of right" granted in the interest of public health where the Minister of Public Health orders it. Such licenses of right are applicable to patents granted for a medicine or processes to produce a medicine, whenever the medicine (1) is made available to the public in insufficient quantities, or (2) is deficient in quality, or (3) is sold at exorbitant prices. Upon publication of such an order by the Minister of Health, any qualified person may apply to the Minister of Industrial Property for a license of right to exploit the patent. France is also a signatory to the 1967 Stockholm revision of the Paris Union.

d. Federal Republic of Germany. According to the provisions of the German patent law, only the public interest will justify the restriction of the patent owner's rights. "Depending upon the de-

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105 Note 102 supra.
106 Garde, supra note 104.
107 French Patent Law § 37, cited in Lang, Comparative Analysis, supra note 85, at 709B.
108 Id.
109 Id. § 38.
110 Note 102 supra.
111 German Patent Law, cited in Lang, Comparative Analysis, supra note 85, at 711.
gree of such interest, gradations in the restrictions range from a reduction of the effective rights of a patent, through the granting of compulsory licenses, to the classification of the invention as secret."\textsuperscript{112} Virtually no compulsory license has been granted in Germany.\textsuperscript{113} Germany also is party to the Paris Union as revised in Stockholm.\textsuperscript{114}

e. Ireland. Ireland, also a Signatory to the 1967 Stockholm revision of the Paris Union,\textsuperscript{115} only provides for the compulsory licensing of patents where there has been an abuse of the patent monopoly rights. No provision speaks specifically to the granting of patents in the public interest for reasons of health, security or defense.\textsuperscript{116}

f. Italy. The Italian statute, containing no public interest compulsory licensing provisions per se,\textsuperscript{117} does provide for the expropriation of the patentee's rights "in the interest of defense or public utility."\textsuperscript{118} Italy is a signatory to the 1958 Lisbon version of the Paris Union.\textsuperscript{119} Differences between the provisions of the Lisbon and Stockholm versions on compulsory licensing, however, are de minimis.\textsuperscript{120}

g. Luxembourg. The Luxembourg law provides that after three years, a compulsory license may be granted to other exploiters who applied for it, where the public interest so demands.\textsuperscript{121} Luxembourg is party to the Paris Union, Stockholm revision.\textsuperscript{122}

h. Netherlands. Under the Netherlands statute, the patentee is bound to grant a license for reasons of public interest.\textsuperscript{123} Further, the

\textsuperscript{112} Id.


\textsuperscript{114} Note 102 supra.

\textsuperscript{115} Id.


\textsuperscript{117} Italian Patent Law, cited in Lang, Comparative Analysis, supra note 85, at 712.

\textsuperscript{118} Id. at 713.

\textsuperscript{119} Note 102 supra.

\textsuperscript{110} See the Lisbon and Stockholm compulsory licensing language in 2A J. Baxter, World Patent Law and Practice at 239, 253.5, 253.6.


\textsuperscript{122} Note 102 supra.

\textsuperscript{123} The Netherlands Patent Law, § 34(1), cited in Lang, Comparative Analysis, supra note 85, at 717.
State, where it deems it "necessary to the defense of the Realm,"\(^\text{124}\) can be given the authority to use the patent.\(^\text{125}\) The Netherlands is party to the Paris Union, Stockholm revision.\(^\text{126}\)

i. United Kingdom. The U.K., also party to the Stockholm revision of the Paris Union,\(^\text{127}\) provides that where there is a patent for "(a) a substance capable of being used as food or medicine or in the production of food or medicine; or (b) process for producing such a substance...or (c) any invention capable of being used as or as a part of a surgical or curative device,"\(^\text{128}\) there shall be compulsory licensing without delay upon application\(^\text{129}\) unless there are good reasons for not doing so.\(^\text{130}\)

2. Compulsory Licenses for Non-Exploitation of a Patent

As P. Areeda has observed, a significant way for the patentee to exercise his patent is to suppress it by neither using nor licensing it.\(^\text{131}\) Since a patent has value in the marketplace, the rational patentee will not license it if it creates unwanted and unprofitable competition with himself.\(^\text{132}\) Because such practices may be considered as abuses of the patent monopoly,\(^\text{133}\) nation states have provided for non-exploitation of a patent, "mainly because of the concern over the fact that the foreign owners of such inventions could, by refusing to exploit the patents, prevent the development of national industries which might give employment to nationals and utilize available national resources."\(^\text{134}\) However, as observed earlier,\(^\text{135}\) the rationale of such provisions is mercantilistic and nationalistic. For the Member States of the EEC, a prolonged complementary application of national compulsory licensing provisions to the Community patent will be detrimental to the free movement of goods and will distort competition within the Common Market.

\(^{124}\) Id. § 34a(1).
\(^{126}\) Note 102 supra.
\(^{127}\) Id.
\(^{129}\) Id. at 701.
\(^{130}\) Id. at 722.
\(^{121}\) Areeda, supra note 84, at 438.
\(^{132}\) Id.
\(^{133}\) Lang, Comparative Analysis, supra note 85, at 700.
\(^{134}\) Id.
\(^{135}\) See note 84 supra and accompanying text.
The drafters of the CPC resolved this dilemma by providing that compulsory licenses for lack or insufficiency of exploitation of Community patents may not be granted by the national courts in applying their national provisions on compulsory licensing to the Community patent where (1) the product manufactured within the EEC, (2) is put on the market in the territory of a State for which a compulsory license for non-exploitation has been requested, (3) in sufficient quantity to satisfy the needs within the territory of that State.136 These same provisions apply, mutatis mutandis, to compulsory licenses granted for lack or insufficiency of exploitation of national patents of the EEC Member States.137

Given provisions in the CPC such as these, designed to promote the free movement of goods protected by patents throughout the Community and to transcend the territoriality and mercantilism of national compulsory licensing, the question arises: why worry about the complementary application of national law to the compulsory licensing of the Community patent for non-exploitation? The answer to the question inheres in another provision of the CPC, the “Reservation in respect of compulsory licenses,”138 which provides that the provisions of the CPC concerning compulsory licenses for lack or insufficiency of exploitation of Community patents or national patents139 would not apply in the territory of the States which exercise the reservations during a transitional period of not more than fifteen years.140 This reservation was included in the CPC “[i]n response to the requirements of the domestic industrial policy of certain Member States.”141 While it is true that the Plenipotentiaries resolved to immediately draw up common rules on compulsory licensing to supplement the CPC,142 thereby automatically bringing the “Reservation in respect of compulsory licensing” to an end by operation of law,143 it is still probably wise to look to the diverse national laws of the nine EEC states on the assumptions

137 Community Patent Convention, supra note 4, art. 82; [1976] 2 COMM. MKT. REP. (CCH) ¶ 9797, at 9771.
138 Id. arts. 47, 82; [1976] 2 COMM. MKT. REP. (CCH) ¶ 9797, at 9771.
139 [1976] 2 COMM. MKT. REP. (CCH) ¶ 9797, at 9771; Community Patent Convention, supra note 4, art. 89, para. 2.
140 [1976] 2 COMM. MKT. REP. (CCH) ¶ 9797, at 9771.
141 Resolution on Common Rules for Compulsory Licensing, supra note 70.
142 Community Patent Convention, supra note 4, art. 89, para. 3.
that (1) some Member States might enter into the Reservation in response to their domestic industrial constituencies, and (2) that the preparation of “common rules” will not take place overnight. Objectively viewed, it is plain that, where States make the Reservation, the CPC may call for the complementary application of national laws for a period of up to 15 years.  

a. Belgium. Under the Paris Union, compulsory licenses may be granted for non-exploitation after a certain time period. However, the grant of authority “consists of a special administrative procedure which has not yet been put into effect under Belgian law.” While Belgium has not passed compulsory licensing legislation, a patent may be revoked for non-working. Whether the complementary application of that provision would allow for the territorial partial revocation of the Community patent in Belgium under the CPC is open to question.

b. Denmark. Danish law provides for compulsory licensing for non-exploitation of a patent “unless good reason causes the non-working.” Hence, there is also a juridical basis in Danish law for the creation of obstacles to the free movement of patented products throughout the Community and continuing potential deference to national mercantile interests.

c. France. After an amicable request by a third party for a license has been refused by the patentee and, upon a showing by the third party of ability to exploit the patent so as to satisfy the requirements of the national market, a third party may obtain a compulsory license from the tribunal de grande instance. The tribunal shall set (1) the duration of the compulsory license, (2) its field of application, and (3) the amount of royalties to be paid to the patentee. Furthermore, patentees “may be given formal notice by the Minister. . . for Industrial Property to undertake the

114 Id. art. 89, para. 2.
115 Paris Union, supra note 34, art. 5. The time periods are uniform for all EEC states since all are Signatories to the Union. Id. art. 5, para. a, subpara. (4).
117 LANG, COMPARATIVE ANALYSIS, supra note 85, at 703.
118 Community Patent Convention; supra note 4, art. 46, para. 1.
121 French Patent Law § 33, cited in LANG, COMPARATIVE ANALYSIS, supra note 85, at 709a.
122 Id.
123 Owners of patents on medicines are not included.
exploitation of ... patents so as to satisfy the requirements of the national economy.' If no action is taken within a year and the non-exploitation is highly prejudicial to economic development and public interest, the patent becomes subject to compulsory licensing. As is evident, these provisions not only introduce the discretion of the domestic tribunal into the terms of the compulsory licensing of the Community patent, but also introduce considerations of French economic development and public policy.

d. Federal Republic of Germany. German law does not recognize any compulsory licenses for failure to work or insufficient working of a patent, but only grants compulsory licenses using a broad "public interest" criterion. Hence, the provisions of the Paris Union do not appear to apply, although there is confusion as to the Union's applicability where an application of a third party to the Patent Tribunal is based upon both non-exploitation and "public interest." Further, if the public interest cannot be satisfied by granting compulsory licenses, a patent may be withdrawn if the invention is exclusively or mainly exported outside Germany, except where conventions between States apply.

e. Republic of Ireland. Irish law embodies classic mercantile justifications for the granting of compulsory licenses which, when applied to the Community patent, could produce yet another national territorial result. The rationale of such provisions is not only to encourage invention but also to provide for commercial working within Ireland. Such licenses for non-exploitation within Ireland will be granted where the Controller finds an "abuse of monopoly rights under the Patent." Particular grounds for abuse of monopoly rights which could affect the Community patent in Ireland are:

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155 Id.
156 Id. at 711; von Uexkull, West Germany: Patent Law, supra note 113, at 4.
157 German Patent Law § 15(1), cited in LANG, COMPARATIVE ANALYSIS, supra note 85, at 710; see note 156 supra.
158 Paris Union, supra note 34, art. 5, para. a, subpara. (4).
159 LANG, COMPARATIVE ANALYSIS, supra note 85, at 711.

160 Id.
161 German Patent Law § 15(2), cited in id. at 710.
162 LANG, COMPARATIVE ANALYSIS, supra note 85, at 711. For example, "[w]orking of German patents owned by nationals of the United States is not required, according to the United States-German Treaty of February 23, 1909." Id.
(1) where an invention which is capable of being commercially worked in Ireland is either not being worked at all or not being worked to the fullest extent that is reasonably practicable within the country;165 (2) where the demand for the patented product is being met to a substantial extent by importation rather than by domestic production;166 (3) where the commercial working within Ireland is prevented or hindered by importation of the patented product;167 and (4) where the establishment or development of domestic industry or commerce is being unfairly prejudiced through refusal of the patentee to grant a license.168 It goes without saying that such provisions could have negative effects upon the free movement of patented goods, and could distort competition within the EEC when applied in a complementary manner to the Community patent on the basis of territoriality.

f. Italy. Italian law provides for the lapse of a patent which is not worked,169 where valid working is defined as manufactured in Italy on a scale commensurate with domestic needs, with importation not deemed to be valid working.170 The non-working or insufficient working does not cause a lapse by operation of law; instead, the patent must be declared revoked by a court.171

g. Luxembourg. If the patentee fails to exploit his invention in the Grand Duchy within a reasonable time, using his best efforts, the patent may be withdrawn by Grand Ducal Ordinance.172 In providing for compulsory licensing, Luxembourg employs a "public interest" criterion173 similar to that of West Germany. In Luxembourg the finding of public interest is declared by Grand Ducal Ordinance upon advice of the Council of State.174

h. The Netherlands. The criterion embodied in these statutes also serves national mercantile interests. If the patentee fails to make use of his patent after a certain time, he must license it if

166 Id. § 39(2)(2).
167 Id. § 39(2)(3).
168 Id. § 39(2)(4)(iii).
170 Lang, Comparative Analysis supra note 85, at 712.
171 Id. at 713.
173 Id.
174 Id.
"desirable in the interest of industry in the Realm or in the colonies or possessions."\textsuperscript{175} The patentee, after three years from the date of the patent, must grant a license if an industry has not been established in the Kingdom which sufficiently makes use of the patent through manufacture of the product on an adequate scale or through sufficient use of the process or improvement.\textsuperscript{176} If the patentee fails to do so, the Patent Office itself may issue such licenses and determine the royalties due the patentee.\textsuperscript{177}

i. United Kingdom. The British law also provides for compulsory licensing where "there is inadequate working or oppressive conduct by the patentee."\textsuperscript{178} The provisions of the British statute are so similar to those of the Irish law discussed above as to justify the inference of a common source.\textsuperscript{179} However, when applied by the different judicial systems of the two sovereign States, the similarity may vanish. Further, the statutes each embody highly protective provisions for British and Irish industrial interests, respectively.

3. Compulsory Licensing of Interdependent Patents

In order to eliminate wasteful, duplicative research by competitors seeking access to existing but patented technology,\textsuperscript{180} to encourage research and invention by new entries where the use of any discovered improvement may be blocked by earlier interdependent patents held by industrial patentees of strong market position,\textsuperscript{181} and to ease the spread of technology in society,\textsuperscript{182} compulsory licensing of interdependent patents has been seen as advantageous. Briefly, if a license under an earlier patent is necessary to be able to work a later patent which represents an improvement in the state of the existing art, many States have compelled the earlier patentee to license the later one (a "grant back"). The drafters of the CPC recognized the social utility of such licensing and expressly provided that any provisions in the laws of the EEC Member States for the

\textsuperscript{175} The Netherlands Patent Statute § 34(1), cited in Lang, Comparative Analysis, supra note 85, at 717. The possessions and colonies are Surinam and the Netherlands Antilles.

\textsuperscript{176} Id. § 34(2).

\textsuperscript{177} Warendorf, The Netherlands: Patent Law, supra note 125, at 4.


\textsuperscript{179} See notes 163-68 supra and accompanying text.

\textsuperscript{180} Areeda, supra note 84, at 441.

\textsuperscript{181} Id.

\textsuperscript{182} Id.
grant of compulsory licenses on earlier patents in favor of later dependent patents "shall be applicable to the relationship between Community patents and national patents and to the relationship between Community patents themselves." This provision is not subject to the "Reservation in respect of compulsory licenses" discussed earlier. Further, the applicable national laws here are not merely complementary; instead, they constitute the entire body of law applicable to this aspect of the compulsory licensing of the Community patent, since the CPC does not establish compulsory licensing for interdependent patents as a matter of substantive Community law. Rather, national provisions are incorporated by reference. Hence, a comparative exposition of these provisions is appropriate.

a. Belgium. Belgian law does not provide for compulsory licensing for interdependent patents. The applicable provision of the CPC incorporating national law therefore has no meaning. The lack of such a provision where other States may have one is, however, a basis for unequal treatment of patented goods within the EEC.

b. Denmark. Denmark, however, permits the owner of a subsequent patent, the working of which depends on another earlier patent, to get a compulsory license "if special reasons advocate it." Such law will be applicable to the Community patent within Denmark.

c. France. The French law also contains provisions which will be applicable to this aspect of the Community patent. Generally, the owner of the later improvement patent shall not work his invention unless he gets the consent of the earlier patentee. Conversely, the earlier patentee may not use the improvement technology without the consent of the subsequent patentee. The tribunal de grande instance, after hearing the State Attorney, may grant to the owner of the improvement patent a nonexclusive license on the earlier patent which is the subject of the improvement. Such license must be necessary to work the new patent, and the improvement must represent a "substantial technical advance" over the earlier pat-
Furthermore, under French law the owner of the earlier patent can request the court to grant him a license under the improvement patent for his grant to the improvement patentee.

d. Federal Republic of Germany. The law of West Germany does not make provision for compulsory licensing for dependent patents. The patentee's rights under his patent may only be restricted when it is in the public interest to do so. Conceivably the grant of a license on an earlier patent necessary to exploit a later significant improvement in technology could be deemed within the public interest.

e. Republic of Ireland. Under the Irish law there is a provision which will be applicable to this aspect of the Community patent. One ground which constitutes an "abuse of monopoly rights under a patent," and which therefore will justify compulsory licensing, exists where the refusal of the earlier patentee to grant a license or to grant a license on reasonable terms prevents or hinders "[t]he working or efficient working in the State of any other patented invention which makes a substantial contribution to the art."

f. Italy. Italian law has some provisions which will be applicable to this aspect of compulsory licensing of the Community patent. A compulsory license may be granted where a later patent cannot be worked without disturbing the rights of a prior patentee. The improvement patentee's invention must constitute, however, "a remarkable improvement of the art," a requirement similar to that of the French provisions. Further, if both inventions have the same industrial purpose, the prior patentee may request that he be granted a compulsory license on the improvement, a provision also similar to the French solution.

g. Luxembourg. The law of the Grand Duchy does not contain

190 Id.
191 Id.
192 Weinstein, France: Patent Law, supra note 150, at 5.
194 Id.
198 Id.
199 See note 190 supra and accompanying text.
200 See notes 191, 192 supra and accompanying text.
provisions on interdependent patents. As in West Germany, a "public interest" criterion is applied to all compulsory licensing.

h. The Netherlands. Under these laws, the "patentee is at all times bound to grant [a] license which may be necessary to enable a subsequently patented invention to be used." The French requirement of "significant technical advance," and the Italian requirement of "remarkable improvement of the art," are not reflected here. The Netherlands also provides for reciprocal granting of a license on the improvement to the earlier patentee.

i. United Kingdom. Once again, the British statute and the statute for the Republic of Ireland resemble each other closely. A subsequent patentee may obtain a compulsory license from a prior patentee where the refusal to grant such a license would hinder or prevent "the working or efficient working in the United Kingdom of any other patented invention which makes a substantial contribution to the art."

The comparative survey of the various national laws of the nine Member States of the EEC respecting the three primary areas of compulsory licensing—public interest compulsory licensing, compulsory licensing for non-exploitation or insufficient exploitation, and compulsory licensing where there are interdependent patents—indicates the divergent approaches of the various national systems. To be sure, the exposition reveals similar strains here and there. However, should the EEC States fail to reach agreement on common rules and should the Member States exercise their rights under the CPC "Reservation in respect of compulsory licensing," then the application of national law to the Community patent will be "complementary" but not harmonious. Concomitant distortions of competition and obstacles to the free movement of goods within the Common Market could result.

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201 See note 193 supra and accompanying text.
204 See note 190 supra and accompanying text.
205 See note 197 supra and accompanying text.
207 See note 195 supra and accompanying text.
209 Community Patent Convention, supra note 4, art. 89.
B. National Laws on Patent Infringement and the CPC

The CPC expressly provides for the complementary application of national law in actions for infringement of the Community patent,\(^{210}\) the grant of complementary jurisdiction being preceded by the principle that the *effects* of the Community patent are to be governed solely by the CPC.\(^{211}\) Specifically, the CPC language is that the "infringement of a Community patent shall be governed by the National Law in the Contracting State where the court hearing the action is located"\(^{212}\) unless the State's conflict of law rules call for the application of the national law of another Contracting State.\(^{213}\) Hence, while the CPC achieved centralization of proceedings in Community institutions in actions for revocation and limitation of Community patents, union was not achieved for infringement actions, which are to remain the preserve of the national courts.\(^{214}\)

The Commission of the European Communities was aware that the CPC's division in jurisdiction concerning patent validity and patent infringement could cause difficulties.\(^{215}\) A completely unified Community patent regime where all aspects of the Community patent are regulated by Community institutions would be a better solution. Presumably a solution will be found which will reinforce the unitary character of Community patent\(^{216}\) in the forthcoming work pursuant to the Resolution on Centralization of Jurisdiction\(^{217}\) and the Resolution on Litigation of Community patents.\(^{218}\)

The possible difficulties which may arise are best illustrated by a comparative analysis of the applicable national laws on infringement which will be applied to the Community patent under the CPC. As mentioned earlier, as a comparative proposition, there are generally two distinct types of patent systems within the EEC: the registration, non-examination system, as exemplified, for instance, by France, Belgium, Italy and Luxembourg; and the novelty and

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\(^{210}\) *Id.* arts. 36, 69, para. 2, 79.

\(^{211}\) *Id.*

\(^{212}\) *Id.*

\(^{213}\) *Id.*

\(^{214}\) *Id.*


\(^{217}\) *Id.*

\(^{218}\) Resolution on Centralization, *supra* note 75.

\(^{218}\) Resolution on Litigation, *supra* note 78.
subject matter examination system, as exemplified by West Germany and The Netherlands. In [the former type of system] . . . a patentee does not know the true scope of his patent until it has been tested in the courts. On the other hand, [in the latter type of system] the owner of a German or Dutch patent can sue an infringer with considerable confidence. In the former type of patent system, the issue of patent validity may be reached in an action for patent infringement. For instance, in France, after a complaint of infringement has been filed with the tribunal de grande instance, the infringer must file a brief generally making a counterclaim which may be based on the validity of the patent at issue. However, in the latter type of system, as represented by West Germany, for example, the court is bound to accept the patent as validly granted in an infringement suit. Italy allows for the issue of patent validity to be reached in an action for infringement. The patentee benefits from a presumption of validity which the infringer must overcome by demonstrating invalidity or forfeiture of the patent. Likewise, the courts of the Republic of Ireland and those of the United Kingdom may reach the issue of validity in an infringement action.

Furthermore, with the existence of these divergent types of patent systems within the EEC, it behooves industrial interests and inventors to manipulate national law to their own advantage with an eye to a potential infringement action, as national law will be applied to the Community patent. For example, "as to infringement, British claims are very strictly, sometimes unbelievably restrictively construed. There is no doctrine of contributory infringement. There is no doctrine of equivalence. Infringement requires all elements of the claim. Because of this British practitioners normally draft very broad claims.” The situation is different in West Germany, how-

1977] COMMUNITY PATENTS

123
ever, where "there is a theory (elementenschutz) that if claim 1 calls for A B and claim 17 calls for C, the German court can, if it finds C by itself is patentable, enforce the patent as to C alone."\textsuperscript{227} Accordingly, it has been suggested that United States patent practitioners, for instance, when sending a United States patent or patent application abroad in order to bring it into accord with local practice, should send it to Great Britain.\textsuperscript{228} Under the CPC's complementary territorial application of national law in infringement actions, however, the same claims could be simultaneously valid and invalid in different EEC States.

Since the presence of these divergent types of patent systems within the EEC allows the courts of some Member States to reach the issue of patent validity in an action for infringement, there exists the juridical basis for the partial revocation of the Community patent on grounds of invalidity by the courts of certain Member States. It is easy to see how a Community patent could be simultaneously valid and invalid depending on the locus in the Common Market.\textsuperscript{229} The CPC solves this problem by providing that national courts, when applying national law in a complementary fashion in an action for infringement of a Community patent "shall treat the patent as valid."\textsuperscript{230} If the CPC stopped at the statement that the national courts, in dealing with the Community patent, shall treat it as valid, the CPC would be a more remarkable step towards the economic and politico-legal integration of Europe. Indeed, such a statement unifies two distinct types of national legal regimes for dealing with patent infringement, eliminating the specter of possible simultaneous validity and invalidity or partial territorial revocation of the Community patent within the EEC. However, against the better advice of the Commission of the European Communities,\textsuperscript{231} the Plenipotentiaries incorporated a "Reservation in respect of infringement proceedings,"\textsuperscript{232} which provides that notwithstanding

\textsuperscript{227} Id.
\textsuperscript{228} Id.
\textsuperscript{229} Note 215 supra.
\textsuperscript{230} Community Patent Convention, supra note 4, art. 76 (emphasis added).
\textsuperscript{232} Community Patent Convention, supra note 4, art. 90.
the rule that national courts should treat the Community patent as valid,33

any Contracting State whose national law makes provision for a
decision to be taken in infringement proceedings as to the validity
of national patents may. . .[reserve] the right to provide that its
courts dealing with infringement relating to a Community patent
may. . .decide upon the effect of the Community patent in the
territory of the State in which the court is located.244

Where a court of a Member State has decided that the Community
patent is ineffective, "[t]he Community patent shall not have ef-
fect in the territory of a contracting State which has made a reser-
vation."235 National procedures are to be applied when the national
court adjudicates the issue of the validity of a Community patent.236
Furthermore, the reservation may be made for a period of up to 15
years.237 Hence, the complementary application of the national laws
and the two distinct types of patent infringement systems to the
Community patent may have a potentially long-term vitality. In
brief, "[a] derogation may be made for a maximum of fifteen years
from the principle of the exclusive jurisdiction of the departments
of the European Patent Office [in Munich] as regards the validity
of the community patent."238

As is evident, this reservation runs counter to one of the funda-
mental principles of the CPC,239 whereby the Community patent has
the same effect in all the EEC States.240 An earlier draft of the CPC
had provided that the European Patent Office would have sole
jurisdiction to cancel the Community patent with effect for all the
Member States.241 The Reservation contravenes the fundamental
principles of the creation of a common system of law for the CPC,242
wherein the Community patent is to have unitary243 and autono-

232 Id. art. 76.
233 Id. art. 90, para. 1.
234 Id. para. 2.
235 Id. para. 4.
236 [1976] 2 COMM. MKT. REP. (CCH) ¶ 9777, at 9771.
REP. (CCH) ¶ 9786, at 9751.
238 Id.
239 Commission Opinion of September 26, 1975, on the Draft Convention for the European
Patent for the Common Market, 18 O.J. EUR. COMM. (No. L 261) 26 (1975), reprinted in
240 Id. at 27, 8724; Community Patent Convention, supra note 4, art. 1.
241 Community Patent Convention, supra note 4, art. 2, para. 2.
mous character with equal effect throughout the EEC. As the Commission observed, such a contravention "creates obstacles to the free movement of patented goods and to the creation of equal conditions of competition and also is at variance with the principle of the 'free movement' of judgments under the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters."

As the comparative analysis of the two distinct types of national patent systems within the EEC indicates, the complementary application of national law in actions for infringement of the Community patent could produce effects retrogressive to economic and politico-legal integration—\textit{a fortiori} if some of the EEC States exercise the Reservation and rule on the validity of the Community patent.

\section*{IV. Controlling the Complementary Application of Diverse National Laws To The Community Patent Through CPC Procedural Mechanisms}

Having analyzed the Community patent from the standpoints of an international, contextual history and a comparative analysis of the applicable national laws in the areas of compulsory licensing and infringements, it is evident that the application of national laws to the Community patent may not be "complementary." Though the CPC as a whole represents a document reflective of the integrative principles of the Rome Treaty, the quality of the unification achieved by the CPC is not the thoroughgoing one necessary for complete economic and politico-legal integration. Granted that the application of national law in actions respecting compulsory licensing or the infringement of the Community patent could have retrogressive or disintegrative effects, the question at this point becomes that of how to avoid or minimize such effects within the procedural regime established by the CPC.

As a general proposition, the CPC embodies several provisions designed to minimize disintegrative effects. First, where the CPC

\footnotesize{\textsuperscript{14} Id. para. 3.  \\
\textsuperscript{15} Id. para. 2.  \\
comes into conflict with provisions of the Rome Treaty, the Rome Treaty has precedence. Second, the CPC confers certain jurisdiction on the Court of Justice of the European Communities to deal with actions respecting the Community patent. With regard to proceedings for compulsory licensing and patent infringement which are brought before national courts of EEC Member States, the Court of Justice shall have jurisdiction to give preliminary rulings on the interpretation of the CPC, the interpretation of the provisions of the CPC binding on every Community patent in accordance with the CPC, and the validity and interpretation of the implementing provisions of the CPC enacted pursuant to it. This last area of the EEC Court's competence is limited, however, by language excluding national implementing provisions. Such provisions constitute a mandate for the Court of Justice to issue preliminary rulings on the interpretation of the CPC whether or not requested to do so by the national courts. In addition, where a question of CPC interpretation is raised before a national court, that court may request a ruling from the European Court where such a ruling from the European Court is necessary to enable the national court to give judgment.

These general safeguards, taken by themselves, are not enough where the complementary application of national law is mandated; hence, the specific procedural safeguards to ensure uniformity of result should be examined both in the areas of compulsory licensing and patent infringement. First, with regard to compulsory licensing, as discussed earlier, the EEC States covenanted by Resolution to promulgate common rules to govern this subject upon signing the CPC. Although the "Reservation on compulsory licensing" suspends the crucial articles encouraging the free movement of goods

247 Rome Treaty, supra note 2.
248 Community Patent Convention, supra note 4, art. 93.
249 Id. arts. 5, 73.
250 Id. art. 73, para. 1, subpara. (a).
251 European Patent Convention, supra note 6.
252 Community Patent Convention, supra note 4, art. 2, para. 3, art. 73, para. 1, subpara. (a).
253 Id. art. 73, para. 1, subpara. (b).
254 Id. art. 92.
255 Id. art. 73, para. 1, subpara. (b).
256 Id. art. 73, para. 2
257 See note 70 supra.
258 Community Patent Convention, supra note 4, art. 89.
where compulsory licensing is contemplated for non-exploitation, the language of the Reservation provides for its own automatic termination when the common rules take effect. Further, the CPC, to encourage uniformity in the complementary application of national compulsory licensing law, provides that "[a]s far as practicable national authorities shall notify the European Patent Office of the grant of any compulsory license in respect of a Community patent."

Second, with regard to infringement, the CPC added detail to and supplemented the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Specifically, the CPC prescribes the courts before which actions for infringement of the Community patent may be heard. Uniform jurisdictional priorities in infringement actions are established in the following order: (1) the court where the defendant infringer has his residence; (2) failing that, the court where plaintiff patentee has his residence; or (3) failing both, the courts of the Federal Republic of Germany. In addition, "actions for infringement may also be heard before the courts of the Contracting State in which an act of infringement was committed." One particular safeguard where the issue of validity is raised in an action for infringement in a national court is provided by the CPC. Where a decision depends on the patentability of the invention, the national court must stay the proceedings pending an opinion by the European Patent Office on the extent of protection conferred by the patent. Further, in certain circumstances, a national court may stay the proceedings relating to the Community patent, insofar as its decision depends upon validity. In such case, a Revocation Board of the European Patent Office shall issue an opinion to the national court on the extent of protection under the patent.

[259] Id. arts. 47, 81.
[260] Id. art. 89, para. 3.
[261] Id. art. 46, para. 3.
[262] Convention on Jurisdiction and Enforcement, supra note 246; [1976] 2 COMM. MKT. REP. (CCH) ¶ 9797, at 9771; Community Patent Convention, supra note 4, arts. 69, 70, 71.
[263] Community Patent Convention, supra note 4, art. 69; [1976] 2 COMM. MKT. REP. (CCH) ¶ 9797, at 9771.
[264] Id. para. 2.
[265] Id. art. 77, para. 1.
[266] Id.
[267] Id. art. 78.
[268]
The provisions of the CPC discussed above which trigger the operation of the Convention on Jurisdiction and the Enforcement of Judgments[249] are of cardinal significance regarding the institution of actions for infringement.[270] The action need only be brought once before the court at the infringer's place of residence, even where the acts of infringement occurred in several Member States.[271] Furthermore, "[t]he judgment in infringement cases is recognized in principle in all the Member States and can be enforced in simplified proceedings even outside the State in which it was delivered."[272]

Finally, it should be emphasized that the CPC provides the juridical basis for the unification of the distinct types of patent systems in the Common Market by providing that the national courts shall treat the patent as valid in actions for infringement.[273] However, as discussed above, the Reservation in respect of infringement actions[274] abrogates this provision, thereby permitting the partial territorial revocation of the Community patent within the EEC and the simultaneous validity and invalidity discussed above.

In fine, though the CPC provides some means for controlling the complementary application of diverse national laws on compulsory licensing and infringement, the presence of the two respective Reservations[275] as integral parts of the CPC undercuts the unifying effect of these provisions. The four Resolutions[276] addressing these problems, made a part of the Final Act of the Plenipotentiaries at the Luxembourg Conference, underscore the need for additional supplemental actions to ensure that the application of national law to the Community patent in the compulsory licensing and infringement contexts indeed will be "complementary."

V. CONCLUSION

The analytical trek through the contextual history of the Community patent, the comparative analysis of "complementary" national laws under the CPC to the areas of compulsory licensing and patent infringement, in the context of controlling the complemen-

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[249] Convention on Jurisdiction and Enforcement, supra note 246.
[271] Id.
[272] Id.
[273] Id. Community Patent Convention, supra note 4, art. 76.
[274] Id. art. 90.
[275] Id. arts. 89, 90.
[276] See notes 59, 70, 75, and 78 supra and accompanying text.
tary application of diverse national laws through CPC procedural mechanisms, has made several conclusions possible concerning the CPC and the complementary application of national law to the Community patent.

First, although the CPC constitutes a significant step along the way to the complete economic and politico-legal integration of Europe through its creation of a unitary patent law for the EEC, it does not constitute the thoroughgoing unification necessary to avoid possible retrogressive effects upon the free movement of patented products within the EEC and upon equal Market-wide conditions for competition. Provisions calling for the complementary application of divergent national laws to a juridical creature of the European Community perpetuate the principle of territoriality.

Second, as the comparative analysis of the national compulsory licensing law of the nine EEC Member States indicates, there is great divergency within the Community in three primary areas: compulsory licensing in the interest of public health, security or defense; compulsory licensing for the non-exploitation or insufficient exploitation of patents; and compulsory licensing where there are interdependent patents. As indicated, the application of this divergent body of law to the Community patent may produce effects which are contraposed to the integrative process.

Third, as revealed by the comparative analysis of the various types of patent systems in the EEC and their treatment of patent infringement, the complementary application of national infringement law to the Community patent on the basis of territoriality will create unequal conditions of competition in the various EEC states. This is especially true where the issue of patent validity is reached in the national infringement action. The specter of simultaneous validity and invalidity of the Community patent is raised.

Fourth, the CPC contains various procedural mechanisms and provisions which will tend to promote intra-Community uniformity in both compulsory licensing and infringement actions. Preliminary rulings by the Court of Justice of the European Communities in certain cases as discussed and the applicability of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, effective for most EEC Member States February 1, 1973, are especially helpful.

Fifth, as the Reservation on Compulsory Licenses and the Reservation in Respect of Infringement Proceedings demonstrate, the achievement of the CPC was a political battle between the forces
representing domestic industrial policies of particular Member States and the forces in favor of promoting the economic and politico-legal integration of Europe through the creation of a unitary patent system. Through exercising these Reservations, Member States can undermine the unitary nature of the Community patent in both the compulsory licensing and infringement contexts for a period of up to 15 years. The exercise of these Reservations by Member States will reflect their commitment to mercantile policies rather than the goals of the CPC and the principles of the Rome Treaty.

Sixth, as the four Resolutions discussed in the inquiry strongly suggest, there is a great deal of unfinished business for the EEC Member States if the goal of a thoroughgoing unitary patent system for the Common Market is to be achieved. Working Groups especially will work on the adjustment and approximation of national patent laws, the development of common rules to be applied by the Member States to the compulsory licensing of the Community patent, and the development of common standards to guide the litigation of the Community patent in the courts of the various EEC States, particularly in infringement actions. Such action will be necessary to supplement the CPC in order that the complementary application of national laws to compulsory licensing and infringement of the Community patent will not generate results which will be counterproductive to the economic and politico-legal integrative process through the creation of obstacles to the free movement of patented products within the EEC and the correlative intra-Community distortions of competition.

Our arrival at the end of the disquisition necessitates that our initial question be posed again: can the application of national laws to the Community patent be "complementary" to the Luxembourg Convention on the Community Patent? The answer to this fundamental question is a "qualified yes," and work remains to be done to remove that qualification.
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