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# Abbreviations

AG	Advocate General
ECJ	European Court of Justice
ECR	European Court Reports
EIPR	European Intellectual Property Review
EPC	European Patent Convention
EPO	European Patent Organisation
EU	European Union
IIC	Studies in Industrial Property and Copyright Law

# 1 Introduction

A fundamental objective of the European Union is to create one common market where goods are circulated freely. The progress in this area of Community law has been successful. The case law from the Court of Justice has proven to be an effective remedy against national measures restricting trade. Consequently, the marketing of a product in Europe today is generally done throughout the entire Union. However, in trade with goods protected by patents and other intellectual property rights the situation is more complex. Although the goods are traded within the Union irrespective of national borders, the patents covering the same goods are still governed by national law limited to the territory of the member state. More exactly, patent rights are today litigated in national courts throughout the Union. There does not exist a Community Patent Court delivering judgements with effect over the entire Union. Hence, within the Union there exists a conflict between the international exploitation of patents and the national enforcement of the same.

It is clear that enforcing patents on a European scale would be a more rational way of solving this situation. However, it is also fully clear that there does not exist a supranational court today where such enforcement can be made. According to the latest developments, an agreement is reached with the aim of creating a Community Patent Court by 2010. Thus, the enforcement of patents in Europe today is still done in national courts. In international disputes the rules governing jurisdiction are set out in the Brussels Regulation, which replaced the Brussels Convention in 2002. The Brussels Regulation is not an instrument specifically aimed at patent litigations. An overview will be made of its application in these situations, focusing on the possibilities under the current judicial system for national courts to deliver judgements on patent infringements with effects outside the territory of the state of the court.

# 2 Patent law

## 2.1 The basics of patent law

This thesis will be focused on the enforcement of patent rights rather than the patent right itself. A brief overview of the basics of patent law is however justified. A patent gives the patentee a monopoly to commercially exploit the invention for a period of time, usually 20 years. In return for this right, the patent application is published and made public. An invention is patentable if the invention is new, non-obvious and industrially exploitable.<sup>1</sup> The aim of patent law is to promote innovation in society. This objective is *inter alia* reached by conferring a monopoly upon the innovator which creates incentives for investments in research and development.<sup>2</sup> A requisite for fulfilling this function is that the patent rights are enforced. Patent rights are enforced in courts if not the actors involved agree on a different solution.

Patent law has until today been based on nation-states and the principle of territoriality. Patents are granted nationally and the effects of these are limited to the territory of the state. When enforcing the patents, courts have according to the principle of territoriality traditionally only determined whether the national patent had been infringed by acts within the state. Thus, a Swedish court would only answer the question whether a Swedish patent had been infringed by acts carried out in Sweden. The reasoning above is only applicable to the main question of a dispute. A court seized may be forced to answer also other questions in order to deliver a judgement in the main dispute. The principle of territoriality does consequently not prevent the court from answering such preliminary questions, which are not covered by the legal force of the judgement.

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<sup>1</sup> Bernitz, Ulf, et al, *Immaterialrätt*, p. 71.

<sup>2</sup> *Ibid*, p. 74.

## 2.2 Patent law in Europe

### 2.2.1 Introduction

There does not exist any patent law as such within the Union today. Patents in Europe today are still to a large extent governed by national law, although the national law has been harmonised to a large extent. All member states of the European Union have signed the European Patent Convention, which although not being part of Community law has led to substantial harmonisation of the national patent laws of the Member States.<sup>3</sup> However, this convention has mainly simplified the application procedure when applying for patents. Apart from this centralised application procedure, patents in Europe are still based on national law. Obtaining a patent in Europe today can be done in two different ways. First of all there exists a possibility of applying for national patents throughout the Member States. The second possibility is to file an application for a European patent at the European Patent Office in Munich, which is established under the European Patent Convention. The European Patent is applied for and granted centrally and then divided into national patents.

Regarding enforcement there is no system apart from the different national courts. Each of the EPO member states has its own independent judicial system. As a consequent there could be a situation where a patentee, holding parallel patents covering the same invention throughout the Union, is forced to go to court in every Member State to be able to enforce all his patent rights. The proceedings before the national courts may, in spite of the harmonised national patent laws, reach different outcomes following from the still existing differences in procedure. The result of this is that the same European patent can be held to be infringed in some parts of the Common market and not infringed in others following from the same activities. Hence, today's system of patent enforcement in Europe is combined with

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<sup>3</sup> Convention on the grant of European Patents of 5 October 1973.

substantial legal uncertainty. Moreover, the language problem within the Union has made European patents very expensive. Today, a European patent must be translated into all official languages of the Union to be valid throughout the same. Due to this, the cost of an average European patent, covering eight Member States, is today approximately 50 000 euro compared to 10 000 euro in the United States.<sup>4</sup> This difference in cost is considered to be an important barrier to investments within the Union.

### **2.2.2 Recent developments**

The problems arising out of the current situation in Europe have been recognised by the Union and its Member States for a long period of time. Already in the 1960's the idea of creating a Community patent, valid in all Member States, was launched. In 1973 the European Patent Convention entered into force, establishing the European Patent Organization with the European Patent Office in Munich. The convention was signed by all Member States, but was not part of the Community law as such. In 1975 efforts from the Member States led to the signing of the Luxembourg Convention, with the aim of creating a community patent. The convention was based on the idea of resolving disputes concerning the Community patent in national courts within the existing judicial system. The judges in national courts would be able to declare a Community patent invalid not only within the territory of the state of the court, but also throughout the entire Community. The legal uncertainty following from this system of enforcement of the proposed Community patent was heavily criticised.<sup>5</sup> Furthermore, a major problem in designing the Community patent was the language issue. Due to the fact that the application for a Community patent had to be interpreted into all official languages of the Union, the costs for a Community patent became unbearable. Hence, the legal uncertainty following from this system and the problem of translation costs were the

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<sup>4</sup> COM(2000) 412, p. 11.

<sup>5</sup> COM (2000) 412 final, p. 5.



main reasons why the Luxembourg Convention never was ratified by all Member States and therefore never entered in to force.

In the last years efforts have once again been made to create a single patent valid throughout the Union. In 1997 the Commission launched a Green Paper on the issue.<sup>6</sup> These efforts have now lead to the Council of the European Union agreeing in March 2003 on a common approach to establishing a community patent.<sup>7</sup> According to this common approach, there will be a Community Patent Court established in the year 2010. The court, which will be established within the framework of the Court of Justice in Luxembourg, will have exclusive jurisdiction in disputes relating to the infringement or validity of Community Patents. The European Patent Office in Munich will be responsible for the examination of applications and the grant of Community Patents. If and when the Community Patent Court is established it will be possible for a patent holder to enforce his right in one centralised procedure. The Community trademark, created in 1996, can serve as comparison to the proposed Community Patent.<sup>8</sup> The Community Trademark provides a single registration covering all the member states of the Union. Community Trademark registrations exist alongside national trademark registrations and provide an alternative to national registration. There does not exist a Community Trademark Court, but the Member States have designated national courts that are competent to hear Community Trademark disputes.

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<sup>6</sup> COM (97) 314 final.

<sup>7</sup> Press release 6874/1/03 (Presse 59).

<sup>8</sup> Council Regulation 40/94.

# 3 Brussels Regulation

## 3.1 Introduction

The Brussels Regulation entered into force in March 2002, thereby replacing the almost identical Brussels Convention from 1968.<sup>9</sup> The convention, signed by the six original members of the Rome Treaty, was not part of Community law as such but a multilateral agreement between Member States. Although not being part of the Community law, the national courts were able to request for interpretations of the convention from the Court of Justice.<sup>10</sup> When setting the objective of creating a common market in Europe, it was recognised that the number of disputes with an international character would increase. Article 293 of the Rome Treaty consequently stated that the Member States should take measures to create a free movement of judgements throughout Europe. In the Maastricht Treaty judicial cooperation in commercial matters was recognised as an area of common interest for the Union and the entering into force of the Regulation has now incorporated this area of law to Community law.

The Regulation contains, apart from rules on jurisdiction, provisions concerning recognition and enforcement of judgements within the Union. The recognition and enforcement of judgements is outside the scope of this thesis. Focus will be solely on the jurisdictional issues in patent litigation in Europe.

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<sup>9</sup> Council Regulation 44/2001 of the 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. In the following referred to as the Regulation.

<sup>10</sup> When references are made to case law from the Brussels Convention, the new numbering of the Regulation will be used consequently in the text.

## 3.2 Jurisdiction

### 3.2.1 General jurisdiction

According to article 1, the Regulation only applies to civil and commercial matters. Although it has never been held by the Court of Justice, it is clear that the enforcement of patent rights is covered by the scope of the Regulation.<sup>11</sup> It should be noted that according to article 4.1, the Regulation is only applicable where the defendant is domiciled within the Union.<sup>12</sup>

The main rule of the Regulation, expressed in article 2, states that a person domiciled in a Member State shall be sued in the courts of that state, regardless of the nationality of the person in question. This main rule is an expression of the principle of “*actor sequitur forum rei*”. As a consequence of the territoriality principle of patent law described above, courts have traditionally been reluctant to deliver judgements over foreign patents.<sup>13</sup> However, the Brussels Convention and later the Regulation created a demarcation from this tradition by setting up objective criteria to determine the jurisdiction of disputes with an international character. According to the main rule of the Regulation, someone infringing a patent shall be sued in the courts of the state where he is domiciled irrespective of where the patent is registered.<sup>14</sup> A court grounding its jurisdiction on the place of the domicile can deliver judgements with effect outside the territory of the state. The territoriality principle only limits the effects of the patent right, not the jurisdiction of the court. It is thus possible under this provision for a patentee to enforce more than one parallel patent in one proceeding. As will be shown below the main rule of conferring jurisdiction to the courts in the state where the defendant is domiciled is not without exceptions.

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<sup>11</sup> Lundstedt, L. *Jurisdiction and the Principle of Territoriality in Intellectual Property Law: Has the Pendulum Swung Too Far in the Other Direction?* 2001 IIC p. 124 and Case 288/82 Duijnste v Goldenbauer [1983] ECR 3663, para. 23.

<sup>12</sup> The Regulation is not applicable to Denmark.

<sup>13</sup> See chapter 2.1.

### 3.2.2 Special jurisdiction

The exceptions from the main rule in article 2 are found in articles 5 to 24. Of greatest interest, in the situation of patent infringement, is first article 5.3 which is an expression of the principle of *forum delicti* and states that:

*A person domiciled in a Member State may, in another Member State, be sued:*

...

*3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;*

Article 5.4 deals with civil claims for damages or restitution based on acts giving rise to criminal proceedings. Since the infringement of a patent under certain conditions has been criminalised, it should be noted that this provision can come into play in patent disputes.<sup>15</sup>

Article 6.1 is concerned with the situation where there are several defendants:

*A person domiciled in a Member State may also be sued:*

*1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings;*

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<sup>14</sup> According to article 60.1, a legal person is domiciled at the place where it has its a) statutory seat, or b) central administration, or c) principle place of business.

<sup>15</sup> See for instance the Swedish Patent Law, chapter 9 article 57.

### **3.2.3 Other provisions of interest**

In the following, a brief overview of other provisions in the Regulation that often come into play in international patent litigation will be done. First of all it should be noted that the Regulation contains a jurisdictional provision specially aimed at patents. Article 22.4 states that in proceedings concerning the registration or validity of patents, the courts of the Member State in which the registration has been applied for have exclusive jurisdiction regardless of domicile. Although the question of validity of a patent is separate from a patent infringement, this provision is commonly brought up in infringement proceedings.

The Regulation also contains rules covering the situations where there are several proceedings between the same parties concerning the same cause of action. These *lis pendens* rules are found in articles 27-30, and have proven to be of great importance in patent litigation in Europe.

# 4 Objection of validity

## 4.1 Introduction

As noted above, the Regulation contains only one provision directly aimed at patents. Article 22 states:

*The following courts shall have exclusive jurisdiction, regardless of domicile:*

...

*4. in proceedings concerned with the registration or validity of patents... the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place. Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State...*

Furthermore, article 25 holds that a court seized with a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction, shall declare of its own motion that it has no jurisdiction. The main rule, or any other rule on special jurisdiction, is consequently not applicable in situations where a court is faced with proceedings concerned with the registration or validity of a patent. The consent of the parties is not relevant in these situations. Furthermore, a judgement given in breach of this provision cannot be enforced, according to article 35.

So far, there is only one case delivered from the Court of Justice dealing expressly with article 22.4. In *Duijnstee* a dispute had arisen between an employer and his employee concerning the ownership of a patent.<sup>16</sup> The Court held in its judgement that the term “proceedings concerned with the registration or validity of patents” should be regarded as an independent concept intended to have uniform application in all contracting states.<sup>17</sup> The Court then held that article 22.4 did not cover disputes concerning the ownership of patents in the current situation. In reaching this conclusion the Court held that the provision, being an exception from the main rule in article 2, should be interpreted restrictively. The Court also referred to the *travaux préparatoires* of the Brussels Convention, in which it was stated that “other actions, including those for infringement of patents, are governed by the general rules of the Convention.”<sup>18</sup> This further underlined the exceptional character of article 22.4, according to the Court.<sup>19</sup>

## 4.2 Patent infringements

The question of validity is often raised as a defence in patent infringement cases. The argument that it is not possible to infringe an invalid patent is often the only defence an alleged infringer is capable to bring forward. As seen above, when the case becomes concerned with the validity of the patent there is no room for jurisdiction for the courts outside the Member State where the patent is registered. The question then arises at what point the infringement proceedings become concerned with the validity of the patent and what measures the seised court has to take if this is the case. Although this defence is commonly raised, the Court of Justice has never delivered a judgement on the topic. However, the issue has been dealt with in several national courts within the Union.

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<sup>16</sup> Case 288/82 *Duijnstee v Goldenbauer* [1983] ECR 3663.

<sup>17</sup> *Ibid.*, para. 19.

<sup>18</sup> *Ibid.*, para. 23.

<sup>19</sup> *Ibid.*

The situation arose before the British High Court in *Coin Controls*.<sup>20</sup> The plaintiff was holding parallel European patents covering the same invention in several Member States and sued the defendants in England for infringing the English, German and Spanish patents.<sup>21</sup> The alleged infringers of the foreign patents argued before the English court that the foreign patents were not patentable, i.e. the objection of validity was raised. The High Court held that considering articles 22.4 and 25 of the Regulation, when such a defence is raised the courts of the state where the patent is granted have exclusive jurisdiction. With support from the *travaux préparatoires* of the Brussels Convention the court reached the conclusion that once the validity is in question and not only as an incidental matter, the case becomes principally concerned with the validity within the meaning of article 25. Furthermore, the infringement and the validity of a patent were found to be so closely interrelated that they should be adjudicated by the same court. Consequently, the High Court found that it had to hand the complete proceedings over to the courts having exclusive jurisdiction over the foreign patents namely the German and the Spanish courts.

This interpretation of article 22.4 has not been followed in national courts throughout the Union. In the Dutch courts the approach towards this defence has been different. When the question of validity has been raised during infringement proceedings concerning a foreign patent, these courts have stayed the proceedings until the courts in the state where the patents are registered have reached a conclusion on the validity of the patent.<sup>22</sup> After this has been done, the Dutch court has been able to deliver a final judgement on the infringement matter.

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<sup>20</sup> Cited as *Coin Controls*, [1997] 3 All ER 45 in Fawcett, J., and Torremans, P., *Intellectual Property and Private International Law*, Oxford 1998, p. 204.

<sup>21</sup> The plaintiff was able to centralise the proceedings into one by the application of article 6.1, see chapter 3.2 and 6.

<sup>22</sup> Bender, G., *Clash of the titans: The Territoriality of Patent Law vs. The European Union*, *Journal of Law and Technology*, 2000 49.  
[www.idea.piercelaw.edu/articles/40/40\\_1/2.Bender.pdf](http://www.idea.piercelaw.edu/articles/40/40_1/2.Bender.pdf)



The practical difference between the English and the Dutch approach is that an objection of validity in a patent infringement proceeding including parallel patents will prevent the English court from delivering a judgement over the infringement of the foreign patent, but only delay the Dutch. Article 22.4 is not applicable when the question of validity of a patent is raised only as a preliminary question. In line with the Dutch interpretation, it has been argued that an objection of validity raised in infringement proceedings should be regarded as such a preliminary question and not automatically strike out the jurisdiction of other courts than those of the country where the patent is registered.<sup>23</sup>

The Court held in *Duijnstee* that the objective of the jurisdictional provisions of the Regulation is to strengthen the legal protection of the citizens of the Union.<sup>24</sup> It could be argued that the English solution described above weakens the legal certainty to a larger extent than the Dutch. Under the English solution, the jurisdiction of the court cannot be established until the defence is pleaded by the defendant.<sup>25</sup> The result of the English solution is that the idea expressed in the *travaux préparatoires* of treating patent infringements under the general rules of the Regulation is practically neglected since the objection of validity is normally raised in infringement proceedings.<sup>26</sup>

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<sup>23</sup> See Pålsson, L., *Brysselkonventionen, Luganokonventionen och Bryssel-I Förordningen*, p. 161.

<sup>24</sup> Case 288/82 *Duijnstee v Goldenbauer* [1983] ECR 3663, para. 12.

<sup>25</sup> Wadlow, C., *Enforcement of Intellectual Property in European and International Law: the New Private International Law of Intellectual Property in the United Kingdom and the European Community*, para. 3-97.

<sup>26</sup> See note 15. Also, Blumer, F., *Jurisdiction and Recognition in Transatlantic Patent Litigation*, Texas Intellectual Property Law, vol. 9 2001, p. 329 at p. 369.

# 5 Forum delicti

## 5.1 Introduction

Article 5.3 confers jurisdiction in matters relating to tort, delict or quasi-delict, to the courts of the country where the harmful event occurred or may occur and provides an alternative to the main rule in article 2. The expression “the place where the harmful event occurred” should according to the Court have an interpretation independent of national law. The Court held in *Bier* that the expression covers both the place where the damage occurred and the place where the event, which caused the damage, took place.<sup>27</sup> In reaching this conclusion, the Court stated that the place where the harmful event occurred almost always coincides with the place of the domicile of the defendant. For the *forum delicti* rule to provide a real alternative to the main rule, the plaintiff should be given the opportunity to sue the defendant either where the damage occurred or where the event which caused the damage took place.<sup>28</sup>

In *Shevill* the Court gave its view on how to apply the *forum delicti* provision in a case concerning defamation.<sup>29</sup> The defendant in this case was the French publisher Presse Alliance, which had published an article in a French publication on a drug raid where Ms Shevill was mentioned. Ms Shevill, who was English but temporarily working in Paris, sued Presse Alliance for libel in an English court. Questions arose whether or not England was the place “where the harmful event occurred” within the meaning of article 5.3, and the House of Lords referred the question to the Court of Justice. The Court confirmed the interpretation of article 5.3 made in *Bier* conferring jurisdiction to the courts of the place where the damage occurred as well as to the courts of the place where the event giving rise to

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<sup>27</sup> Case 21/76 *Bier v Mines de Potasse d’Alsace* [1976] ECR 1735, at para. 19.

<sup>28</sup> *Ibid.*, para. 20.

the damage took place.<sup>30</sup> In this case, the place of the event giving rise to the damage, the defamation, was France since this was where the publisher was established. The Court held that the damage occurred where the publication was distributed and the victim was known. Since the publication in the United Kingdom, albeit in a limited number of copies, damage had thus occurred there.

The wording of this provision was changed with the Regulation. In the Brussels Convention, there was nothing explicitly said about the application of the provision in cases where damage not yet had occurred. The question was not without practical importance and was a topic for debate in literature.<sup>31</sup> Consequently, the wording of the Regulation was changed and the *forum delicti* provision now also confers jurisdiction to the courts of the state where the place where the harmful event “*may occur*”. The Court has also recently held in *Henkel* that the *forum delicti* provision of the Brussels Convention is to be interpreted as to cover also these situations of imminent damage.<sup>32</sup>

## 5.2 Patent infringements

It has never been held by the Court of Justice whether or not patent infringements are covered by this provision. However, a number of national courts throughout the Member States have reached this conclusion and this view is also generally accepted in literature.<sup>33</sup> In *Kalfelis* the Court stated that the expression “matters relating to tort, delict or quasi-delict” shall be interpreted autonomously.<sup>34</sup> In the same judgement the Court defined the expression as “covering all actions to seek liability of a defendant which are

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<sup>29</sup> Case 68/93 *Shevill v Presse Alliance SA* [1995] ECR 415.

<sup>30</sup> *Ibid.*, para. 20.

<sup>31</sup> See Lundstedt, L., p. 124.

<sup>32</sup> Case 167/00 *Verein für Konsumenteninformation v Karl Heinz Henkel* [2002] ECR 8111.

<sup>33</sup> Pålsson, L., *Brysselkonventionen, Luganokonventionen och Bryssel-I Förordningen*, p. 112.

<sup>34</sup> Case 189/87 *Kalfelis v Schröder*, [1988] ECR 5565, para. 16.

not related to a “contract” within the meaning of Article 5.1”.<sup>35</sup> With regard to this wide interpretation of the definition of article 5.3 there can be little doubt that patent infringements fall within the scope of the provision. However, license agreements fall outside the same provision.

In patent infringements the place of the event causing the damage is generally the place where the infringing products are manufactured or commercialised. Since at least products aimed at consumers are put on the market of several Member States, damage in these situations occur in many jurisdictions. Applying the *Bier* principle to these cases would confer the plaintiff a wide option of forums where he could choose to sue the defendant. However, the judgement in *Shevill* contained limitations concerning the jurisdiction of the court seized with a case under article 5.3. The Court found that the English court only had jurisdiction over the defamation that had occurred in England and nowhere else. Article 5.3 did not in this case confer jurisdiction to deliver judgement over foreign patents to the court where the damage had occurred. In his opinion to the Court, the advocate general Darmon compared the case at hand with the rules on patent infringements.<sup>36</sup> Considering that the Luxembourg Convention contained a limitation of the jurisdiction in patent infringements to cover only the damage that occurred in the state of the court, the advocate general held that the principle of territoriality should be upheld and that article 5.3 should not be interpreted to confer jurisdiction over foreign patents. Thus, the Court seems to have ruled out the possibilities of delivering judgements on foreign patents under article 5.3.

However, Dutch courts have reached the opposite conclusion.<sup>37</sup> In these judgements the courts have expressed the view that in order for article 5.3 to

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<sup>35</sup> Ibid, para. 17.

<sup>36</sup> Opinion by AG Darmon in case 68/93 *Shevill v Presse Alliance SA* [1995] ECR 415, para. 88.

<sup>37</sup> Pertegás Sender, M., *Cross-border Injunctions in Patent Litigation: Ingenious Tactics or Misuse of Private International Rules?*, p. 4.  
<http://www.law.kuleuven.ac.be/jura/37n4/pertegeas.htm>

provide a real alternative to the main rule in article 2, it must be possible to deliver judgements over foreign patents also under this provision. If article 5.3 is given this meaning, the plaintiff is given a powerful tool. In patent disputes, the damage occurs wherever the infringing products are marketed or commercialised. Hence, such a wide interpretation of article 5.3 opens up for plaintiffs taking advantage of the system and concentrating the proceedings at the court they consider optimal. Such activity, generally referred to as *forum shopping*, is one of the effects that the regulation aims at eliminating. Accordingly, this interpretation was not upheld by the Court of Appeal in the Hague, which in 1998 held back the earlier Dutch approach in *EPG v Boston* where it stated that article 5.3 does not confer jurisdiction over foreign patents.<sup>38</sup> This more moderate interpretation of article 5.3 was in line with interpretations made in other national courts of the Union.<sup>39</sup>

It could be argued that the reasoning in *Shevill* left no opportunities for a wider interpretation of article 5.3. Further support for this view can be found in the case law from the Court of Justice. In *Dumez*, the Court held that in order for article 5.3 to be applicable, there must exist a particularly close connecting factor between the dispute and courts other than those of the defendant's domicile, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings.<sup>40</sup> Such a close connecting factor can hardly be said to exist between a court and patents registered in another state than the court seized with the proceedings. Thus, the possibilities for a patentee to be able to enforce his patent on a multi-national level based on the *forum delicti* provision are very limited although no certain answers can be given before the Court of Justice is given an opportunity to deliver a judgement on the issue.

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<sup>38</sup> Cited as *Expandable Grafts, Ethicon & Cordis Europe v Boston*, The Hague Court of Appeal, 23 April 1998, I.E.R. 1998, 170, in *Pertegás Sender*, p. 3.

<sup>39</sup> *Pertegás Sender*, p. 4.

<sup>40</sup> Case 220/88 *Dumez France SA v Hessische Landesbank* [1990] ECR 49 at para. 17.

# 6 Plurality of defendants

## 6.1 Introduction

Article 6.1 provides another alternative where a defendant risks being sued in a court outside the state where he is domiciled. According to this provision, the courts of a Member State have jurisdiction over a defendant domiciled in another Member State where he is one of a number of defendants. Hence, the provision provides an efficient way for a plaintiff suing multiple defendants domiciled in several Member States having the proceedings centralised into one. The ground for jurisdiction in the first place must be place of domicile, i.e. the defendant around which the other defendants are centralised must be domiciled in the state of the court which is seised with the matter.<sup>41</sup> The other defendants must also be domiciled within the Union for the provision to be applicable. According to its wording, it can only be applied when “the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings”. This was first held by the Court in *Kalfelis* and has now been expressed in the Regulation.<sup>42</sup> This criterion for the applicability of article 6.1 used by the Court in *Kalfelis* is the same as the definition for related actions under the rules of *lis pendens* in article 28.3.<sup>43</sup> Thus, for article 6.1 to be applicable the different claims from one plaintiff have to be related. It should in this aspect be remembered that article 6.1 is just as article 5.3 an exception to the main rule and should therefore be interpreted restrictively.

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<sup>41</sup> Pålsson, p. 132.

<sup>42</sup> Case 189/87 *Kalfelis v Schroeder* [1989] ECR 5565.

<sup>43</sup> See chapter 7.1.

## 6.2 Patent infringements

Just as a plaintiff has an interest in being able to centralise the proceedings, a defendant has an interest in being able to foresee in which countries he runs the risk of being sued due to his activities. Giving the provision a broad interpretation would however not only give the plaintiff the opportunity of enforcing his patents more efficiently. Under such conditions, the plaintiff would have ample opportunities for *forum shopping* and placing the proceedings in a court at his choice. The Court has not delivered any judgment covering the provision in a patent litigation situation. Striking the balance between these interests has consequently so far been left for the national courts of the Member States. It is clear that the provision is applicable when related defendants infringe the same national patent. Following the principle of territoriality described above, one could argue that since the patents are limited to the territory in which they are registered there can not be any risk of irreconcilable judgements resulting from the separate proceedings in a case concerning parallel patents. This point of view was also put forward in *obiter dicta* by the High Court in *Coin Controls*.<sup>44</sup> The European patents are however identical to such an extent that the application of article 6.1 seems to be justified under certain circumstances also when parallel patents are infringed.<sup>45</sup>

Applying the provision to patent infringement proceedings has shown to be complicated. The provision is generally regarded not to be applicable where the defendants merely infringe different fractions of the same European patents by independent activities. Although the parallel patents may be considered identical and the infringing activities may be the same, the connection between the different claims is not regarded as strong enough to deviate from the main rule of the defendant playing at home.

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<sup>44</sup> Fawcett and Torremans, p. 173.

<sup>45</sup> Ibid, see also O'Sullivan, G., *Cross-Border Jurisdiction in Patent Proceedings in Europe*, [1996] 12 EIPR, p. 657 for the opposite view.

The application of article 6.1 is more motivated in situations where the different defendants are related.<sup>46</sup> A defendant infringing a patent can in these situations oversee in what countries he might have to go to court. In literature it is generally regarded that the provision is applicable where the defendants act together in the form of a chain from the producer to the distributor to the buyer.<sup>47</sup>

Dutch courts earlier gained a reputation throughout Europe for willingly delivering judgements over foreign patents. Concerning the application of article 6.1, the Dutch policy resulted in these courts applying the provision towards related companies infringing parallel European patents.<sup>48</sup> However, in 1998 in *EPG v Boston* the Dutch Court of Appeal gave its view on how to apply this provision.<sup>49</sup> According to the court, a sufficiently close connection between the proceedings existed when the different defendants were related and were selling identical products on different markets. In these situations, article 6.1 was applicable. Jurisdiction was however only conferred upon the courts of the state in which the European head office of the related companies was located. This is commonly referred to as the “spider in the web” theory, the defendants must form a web between them and the centralised proceedings must take place in the state where the main actor is domiciled. The place of domicile of the main actor is determined according to the national private international rules of the land of the court.<sup>50</sup>

Judgements from other national courts have instead focused on whether or not article 6.1 was used in an abusive way to ground jurisdiction. In *Akzo/Webster* the Webster group of companies, which were made of separate national companies controlled by a head office, were sued in Dutch

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<sup>46</sup> Blumer p. 375.

<sup>47</sup> Ibid.

<sup>48</sup> Fawcett and Torremans, p. 174.

<sup>49</sup> Cited as *Expandable Grafts v Boston*, The Hague Court of Appeal, 23 April 1998 in *Pertegás Sender* p. 3 .

<sup>50</sup> See chapter 3.2.1



courts under article 6.1.<sup>51</sup> The Dutch court seized with the matter considered the fact that 99,6 % of the infringing activities took place in the United Kingdom and held that a joinder of defendants to the Netherlands would be abusive and declined jurisdiction under article 6.1 for the foreign defendants.

Since the Court of Justice not yet has had the opportunity to deliver a judgement in these issues, the different approaches in national courts are all worth considering. The “spider in the web” approach can at first seem to be setting up more objective criteria for the determination whether or not the claims are sufficiently connected. However, since the domicile of the centre of management is to be defined according to the private international law of the forum state, the objectivity of this approach can be questioned and it could be argued that it creates more jurisdictional problems than it solves.<sup>52</sup> Due to the differences in national law in Europe in these matters, the determination of the domicile of a legal person can lead to several places of domicile for the same legal person in more than one Member State. In *Kalfelis*, the Court of Justice focused on the exceptional character of article 6.1 and did not attempt to set up objective criteria for the application of the provision. A strict application of the test used in *EPG v Boston* could lead to a plaintiff taking advantage of the differences in national law only to ground jurisdiction in certain courts. By instead focusing on the abusive use of the provision, such attempts at *forum shopping* could be prevented. On the other hand, the “spider in the web” theory seems to be well in line with the reasoning used by the Court of Justice in *Shevill*, where jurisdiction to give a judgement over all defamation was conferred only to the courts of the state of the seat of the publisher.<sup>53</sup> Faced with this question in the future, the Court of Justice probably will take both views into consideration. It should be noted in this aspect that the Court already has held that abusive use of

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<sup>51</sup> Cited as Rechtsbank The Hague December 23, 1997, *Akzo Nobel v Webster* in Wadlow, para. 1-54.

<sup>52</sup> O’Sullivan, p. 657.

<sup>53</sup> Straus, J., *Patent Litigation in Europe – A Glimmer of Hope? Present Status and Future Perspectives*, p. 413. [law.wustl.edu/journal/2/p403straus.pdf](http://law.wustl.edu/journal/2/p403straus.pdf)

Community law is not acceptable. In *Foglia v Novello* proceedings were instituted before the Court with the sole aim of submitting national law before the Court and were therefore deemed inadmissible.<sup>54</sup>

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Case 104/79 *Foglia v Novello* [1980] ECR 745 and 244/80 [1981] ECR 3045. See Franzosi, M., *Torpedoes Are Here To Stay*, IIC 2002, p. 161.

# 7 Lis pendens

## 7.1 Introduction

Where different proceedings concerning the same cause of action are brought in courts of different states, the *lis pendens* rules of the Regulation become applicable. In order to avoid irreconcilable judgements which could be the result of such parallel proceedings, the Regulation contains the following provision:

*Article 27: 1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the first court seised is established.*

*2. Where the jurisdiction of the first court seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.*

In addition to this provision, article 28 provides an alternative when the actions are not the same but related. In this situation a court may stay its proceedings. The criterion for deciding whether proceedings are related is the same as those for the application of article 6.1 described above.

## 7.2 Conditions for applying *lis pendens* provision

The *lis pendens* rule only comes into play where the different proceedings concern a) the same cause of action and b) the same parties.

### 7.2.1 The same cause of action

The cause of action is, according to the Court, equivalent to “the facts and the rule of law relied on as the basis of the action”.<sup>55</sup> It is not required that the cases are entirely identical. In *Gubisch v Palumbo* the Court found that an action for the declaration of unenforceability of a contract and an action for the enforcement of the same contract were to be regarded as the same cause of action.<sup>56</sup> Of importance was the fact that the two actions were based on the same contractual relationship and concerned the same subject matter, i.e. whether or not the contract was binding.

### 7.2.2 The same parties

Furthermore, the two proceedings must be between the same parties in order for the provision to be applicable. In *Tatry* the Court was asked to give a ruling where there were two proceedings in the courts of different Member States including several parties which were only partially the same.<sup>57</sup> The Court held that the second court was obliged to stay its proceedings only regarding the parties which were part of both actions.<sup>58</sup> Thus, the second court is not obliged to decline jurisdiction concerning an additional part, but has the possibility to do so if the actions are related according to article 28.

In *Drouot Assurances* two proceedings were initiated and question arose whether the different parties of the two proceedings could be regarded as the same within the meaning of article 27.<sup>59</sup> The specific question the Court was faced with was in short whether or not an insurer and the insured could be regarded as the same part. In its judgement the Court focused on the interests of the insurer and those of the insured and reached the conclusion

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<sup>55</sup> Case 406/92 *The owners of the cargo lately laden on board the ship "Tatry" v The owners of the ship "Macitej Rataj"* [1994] ECR 5439, para. 38.

<sup>56</sup> Case 144/86 *Gubisch Maschinenfabrik KG v Giulio Palumbo* [1987] ECR 4861.

<sup>57</sup> See note 47.

<sup>58</sup> *Ibid.*, para. 35.

<sup>59</sup> Case 351/96 *Drouot Assurances SA v CMI Industrial Sited and Protea Insurance and GIE Réunion Européenne* [1998] ECR 3075.

that since in this case these were divergent the *lis pendens* rule should not have the effect of precluding the parties the right to assert their rights.<sup>60</sup>

The Court used a teleological interpretation of the provision and focused on the interests of the parties. Although the Court in this case found that the interests were not identical, the reasoning could be used in a number of situations, for example in the relation between the subsidiary company and its mother company or between a patentee and an exclusive licensee.<sup>61</sup>

National courts have been criticised for their restrictive interpretations of the provision, not deviating from the wording of the provision.<sup>62</sup>

### 7.3 Italian torpedoes

Previously in this thesis the rules of the Regulation have been examined mainly from the perspective of a plaintiff trying to simplify the enforcement of his patent rights. The development described in this aspect with national courts delivering judgements over foreign judgements has in many ways made this enforcement somewhat less complicated. However, the Regulation also contains provisions which can be very useful for an alleged infringer of a patent. Instead of enforcing foreign patents the focus will here be on the opposite, the blocking of patent litigation throughout Europe.

In most jurisdictions there is under the national patent law a possibility to seek an action for declaration of non-infringement of a patent just as there is a possibility for a plaintiff to sue for infringement of the same right.<sup>63</sup> An application for such a declaration of non-infringement can, because of the *lis pendens* rules, create great difficulties in enforcing patent rights in Europe today. Following *Tatry*, a declaration of non-infringement should be regarded as the same cause of action as a declaration of infringement within

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<sup>60</sup> *Ibid.*, para. 20.

<sup>61</sup> Pertegás Sender, p. 9.

<sup>62</sup> *Ibid.*

the meaning of the *lis pendens* rule. Moreover, it is clear from the case law of the Court that the different procedural positions of the parties will not be in conflict with the requisite of same parties. Thus, if an alleged infringer applies for a declaration of non-infringement before the patentee sues for infringement the court second seised has to decline jurisdiction according to article 27.

First of all this gives an alleged infringer of a patent the advantage of choosing his forum before the patentee. However the major problem caused by filing an application for negative declaration of infringement is due to the time aspect. Generally, such proceedings last for several years and the *lis pendens* rule makes it impossible for the patentee to enforce his right during this time. The courts in Italy are known for their slow proceedings, which has led to alleged infringers filing an application for non-infringement there and thereof also the name.<sup>64</sup> An application for declaration of non-infringement with effect outside the state of the court must be filed at the courts of the state where the patentee is domiciled. However, even if an application is made in the courts of another Member State, the *lis pendens* rule makes a second court seized stay its proceedings until the first court has determined whether or not it has jurisdiction. The delay following such a stay creates substantial disadvantages for a patent holder trying to enforce his patent. The aspect of time is of great importance in patent litigation. Since a patent normally is valid for 20 years, the patent holder only has this period to recover his investments made in developing the patent. Thus, a couple of years of litigation during this period can make it impossible to recover these costs. Moreover, the Court recently held in *Gasser* that the *lis pendens* provision of the Brussels Convention cannot be derogated from even where the duration of proceedings before the courts of the state in which the court first seized is established is in general excessively long.<sup>65</sup> In reaching this conclusion, the Court held that giving the *lis pendens*

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<sup>63</sup> Franzosi, M., *Worldwide Patent Litigation and the Italian Torpedo*, EIPR 1997, 7, p. 382-385.

<sup>64</sup> *Ibid.*

provision another interpretation would be manifestly contrary both to the letter and the aim of the Brussels Convention. Thus, the possibilities of avoiding the application of the *lis pendens* provision by claiming that the court first seized is excessively slow are limited.

A way of getting around this problem is to apply for provisional measures under article 31 of the Regulation. According to this provision such an application can be made to the courts of a Member State even if the courts of another Member State have jurisdiction as to the substance of the matter. Such measures, which also include protective measures, are measures which are intended to maintain a factual or legal situation in order to safeguard the rights of the parties of a dispute. In a patent infringement situation, an injunction is often applied for with the aim of preventing further infringement until the court has delivered a judgement as to the substance of the matter. Thus, even if a court is prevented from giving a ruling in the matter because of the *lis pendens* rule, the same court is capable of giving an injunction. The question then arises whether or not such provisional measures can have effects outside the state of the court imposing it. According to the Dutch Court of Appeal in *EPG v Boston* such a measure can only have effect within the territory of the state of the court imposing it.<sup>66</sup> The Court of Justice has dealt with provisional measures in a number of judgements although never regarding patent litigation. In *Van Uden*, which concerned the interpretation of the provision in an arbitration situation, the court found that in order for article 31 to be applicable there must be a connection between the court and the object for which the measure is sought.<sup>67</sup> Consequently, it is probably not possible to overcome the problems caused by a cross-border declaration for non-infringement simply by seeking cross-border provisional measures.

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<sup>65</sup> Case 116/02 *Erich Gasser GmbH v MISAT Srl*.

<sup>66</sup> Straus, p. 416.

<sup>67</sup> Case 391/95 *Van Uden Maritime BV v Deco-Line* ECR [1998] 7109, at para. 40.

Consequently, a patent holder who believes his patent is being infringed should be quick to sue the alleged infringers. The traditional way of sending warning letters to infringers of a patent is not to be recommended, since the infringer might “torpedo” the infringement proceedings by filing an action for a declaration of non-infringement throughout the Union. This way of instituting legal proceedings in order to avoid being torpedoed of course results in an increased number of patent litigations before the courts of the Union, which in turn results in even longer proceedings and increased cost of enforcing patents.



## 8 Conclusion

Even though the national patent laws have been harmonised to a large extent, the system of enforcement of these rights has until now not undergone the same process. The Member States have so far been unwilling to hand over the competence to adjudicate patents to a Community institution. The effect of this is that the enforcement of patents in Europe today is made in national courts although the patents are exploited on one common market. The possibility of 15 different legal proceedings instituted in order to enforce a European patent throughout Europe is not desirable, especially since the different fractions of the European patent are to a large extent identical following from harmonisations made. Furthermore, with the coming enlargement of the Union, it is clear that the current system is not optimal. Patent enforcement before courts in Europe today is expensive and combined with substantial legal uncertainty.

As shown in this thesis, the absence of clarifying judgements from the Court of Justice has opened up for national courts interpreting the jurisdictional rules of the Brussels Regulation in different ways. A clear demarcation can be made between the Dutch courts on one side, and the English courts on the other. Dutch courts have, at least until *EPG v Boston*, often been willing to deliver judgments over foreign patents and in this way make the enforcement of patents more rational. The English courts have shown to hold on to the traditional view of the principle of territoriality, avoiding giving judgments over foreign patents. Without doubt, a judgement from the Court of Justice would in many aspects level some of these discrepancies. However, there are more fundamental problems to the current system of patent litigation, problems which cannot be solved by the case law from the Court of Justice. For the future there can be little doubt that the current system needs to be differently organised.

Opening up for national courts, like the earlier Dutch approach, interpreting the Regulation widely and delivering judgements over foreign patents frequently can hardly be the adequate solution to the current problems. The situation would in such a situation quickly become very much like the proposed system under the Luxembourg Convention, which was heavily criticised for its lack of legal certainty.

The proposal to set up a Community Patent Court appears to constitute a rational approach to the current situation. Certainly, the competence of the patent judges will be of great importance in order for the court to gain acceptance among patent litigators in Europe. A centralised court for patent litigation would automatically avoid the problems under the current system concerning conflicting judgements and also the problems rising out of the defendants objection of validity, however this solution would probably also give raise to new problems. There are indeed strong arguments for the establishing of an international court aimed at solving international disputes. The judgements delivered by such a court would be valid throughout the Union and consequently be more harmonised with the political and economical development of the Community. However, there is still a long way to go before such a court is established and as the efforts under the Luxembourg Convention has shown, uniting the Member States in these issues is difficult. As of today, the Community Court will be established by the year 2010. At least until then, holders of patents in Europe will be forced to tackle the rules of the Brussels Regulation. These rules are evidently not aimed specially at patent litigation. Their applications in such disputes are consequently sometimes complicated and have in many ways affected the shape and content of these. First of all, the conferring of exclusive jurisdiction in disputes concerning the validity of patents to the courts of the state where they are registered has given the defendant a useful instrument to direct the proceedings. As held above, a more restrictive interpretation of this provision than the one presented by the English courts would be in line with the objectives of the Regulation and also stop the defendant from determining the question of jurisdiction by the defence he raises.

Furthermore, the current rules have led to ample opportunities for a plaintiff to go *forum shopping* when instituting proceedings.

Although these activities are legitimate, they are still detrimental to a rational enforcement of patents in Europe. It is clear that the procedural aspects of patent proceedings are given too much importance under the existing rules. The activities described are only attractive as long as there exists differences between the national systems of patent enforcing. If no courts were considered as generally more willing to deliver judgements over foreign patents, or considered much slower, compared to other national courts the value of such activities would diminish. However, the existing differences are at least to some extent the effect of fundamental differences in procedural law and a total harmonisation is not possible within the near future.

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