

PATENTS AND ANTITRUST: AN INTEGRATED APPROACH IN THE EUROPEAN ECONOMIC COMMUNITY

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INTRODUCTION

The plans of the European Economic Community (EEC) in the field of industrial property, and the influence that the Community's evolving policies on restrictive business practices will exert on these plans, are best understood if the nature of the association is kept in mind. The charter of the EEC was not designed to oversee a tariff or customs union; rather, the six member countries sought to build an economic union.¹ The Iron and Coal and the Euratom Treaties are limited in scope, but the Rome Treaty creating the European Economic Community was a bold and visionary step toward ultimate political integration.²

An economic union requires common policies. It is not surprising, therefore, that the Treaty of Rome lays down as some of its principal goals the elimination of distortions of competition and the abolition of obstacles to the free movements of persons, services and capital within the Community.³ There would be no purpose in abolishing tariff barriers within the Community if the community market could also be dissected by tax privileges, state aids, the use of national industrial property rights, or private agreements and monopolistic abuses which restrain the free flow of goods.⁴

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¹ Professor Walter Hallstein, President of the Commission of the European Economic Community, delivered an excellent series of lectures on the origin, posture and aspirations of the EEC in 1962 at Tufts University. They are reprinted in the CCH Common Market Rep. ¶ 9001. See generally, 1960 Institute on Legal Aspects of the European Community, Fed. Bar. Assoc., Washington, D.C.

² Hallstein, *supra* note 1. But see, Coing, Interpretational Problems of Article 85, 38 N.Y.U.L. Rev. 441 (1963).

One of the best references on the European Community, although it was published in 1960, is the two volume set: *American Enterprise in the European Common Market—A Legal Profile* (Stein & Nicholson ed. 1960). The CCH Common Market Reporter is excellent and includes a rather complete bibliography. There is also a German Treatise on the Community which ranks with the Stein and Nicholson set: Wohlfarth, Everling, Glaesner & Spring, *Die Europäische Wirtschaftsgemeinschaft, Kommentar zum Vertrag* (1960).

³ Cf. EEC Treaty, art. 3, CCH Common Market Rep. ¶ 3471E, reprinted in Treaty establishing the European Economic Community and connected documents, European Community Information Service, Washington, D.C.; and CCH Common Market Rep. in official French and German texts and in English.

⁴ See generally Froschmaier, Progress Toward the Proposed Conventions for a

The drafters of the Rome Treaty knew that a uniform approach in a number of fields was necessary to forge an economic union.⁵ Since divergent industrial property systems based on national boundaries can and do impede the free movement of goods between the Member States, harmonization or a single patent system was bound to be urged.⁶ This is not meant to detract from the impressive plan for a single patent system proposed by representatives of the six member countries, but merely emphasizes that it was to be expected inasmuch as the Treaty of Rome designates free competition—much as the United States did in an earlier day—as the principal regulator of the economic system.⁷

To make competition work requires that restrictive business practices be controlled. It was only natural for the founders of the Community to consider the effect that national patent systems in the Community would have on the free flow of goods and the rate of technological progress; and in what way these diverse, national systems would have to be controlled, harmonized, or otherwise coalesced to promote rather than impede the underlying economic policies of the Community.

While the push toward uniform patent systems or a single system in the European Community was implicit in the concept of freeing commerce between the Member States, this does not mean that other forces—having starting points independent of the EEC movement—have not also encouraged the Member States to draft a blueprint for a European patent system promptly.⁸

For many years, plans have been proposed and debated which looked toward a regional or supranational patent system in Europe. Starting as early as 1909, a single world-wide patent was suggested. In 1919, proposals were revived for a single patent to cover the British Commonwealth. In 1920, an arrangement for an international patent was actually drafted in Paris, although it never went into operation. During World War II, a number of detailed proposals were published in Germany, and, in the post-World War II years, proposals for the

European Patent and for a European Trademark, 6 Patent, Trademark, & Copyright J. Res. & Ed. 477 (1963), [hereinafter referred to as PTC J. Res. & Ed.]

⁵ See Stein, *An American Lawyer Views European Integration: An Introduction*, in *1 American Enterprise in the European Common Market—A Legal Profile* (Stein & Nicholson ed. 1960).

⁶ See Spencer, *A European Patent: An Old and Vexing Problem*, 42 J. Pat. Off. Soc'y 371 (1960).

⁷ See the Statement by Judge Loevinger, the then Assistant Attorney General in charge of the Antitrust Division of the Dep't of Justice, before the Subcommittee on Antitrust and Monopoly, Senate Committee on the Judiciary, March 14, 1963 (Reprinted in CCH Common Market Rep. ¶ 9049); Lecture of Mr. Pieter Verloren van Themaat, Director General of the Competition Dep't of the EEC Commission, *Current Antitrust Developments in the European Common Market and the Relation thereto of Industrial Property Rights*, 6 PTC J. Res. & Ed. 427 (1963).

⁸ See the text discussion at notes 13, 14 *infra*.

creation of a single European patent office were made.⁹ More recently, the Council of Europe attempted to devise a European patent system but abandoned the attempt in favor of efforts at harmonization.¹⁰

Aside from the need to eliminate conflicts between the various national patent laws so that they will not distort competition in the economic and political union envisaged by the Treaty of Rome, and the academic interest in supranational systems, the simple question of economics has also acted as an accelerating catalyst for the proposal of a common patent system in the European Community.

The present United States Commissioner of Patents and his predecessor have spoken on numerous occasions about the difficulties of running the United States examination system efficiently.¹¹ The spectacular increase in the volume and complexity of technical information that has to be classified, stored, and ultimately retrieved in order to determine properly the novelty of an invention, and the continuing difficulty of obtaining qualified people to serve as examiners, training them, and then keeping them are well-known.¹² Even assuming sufficient numbers of technically trained persons are available to act as patent examiners and that attractive enough salaries are offered to divert them from industry, in the long run even this may not be enough if the volume and complexity of technology continue to increase so rapidly.¹³

These problems are not unique to the United States patent system. The Germans and the Dutch, who have had two of the best examining systems in the world, have been finding it increasingly difficult to stay ahead of the tidal wave. As examining offices encounter these obstacles, they look for ways to reduce duplication, increase

⁹ See Robbins, *The Proposed New European Patent*, 5 PTC J. Res. & Ed. 217 (1961). These early plans and the immediate background to the decision to draft a European Patent Law are reviewed by Ladas, *Industrial Property*, in 1 *American Enterprise in the European Common Market—A Legal Profile* 235 (Stein & Nicholson ed. 1960).

¹⁰ The Council of Europe's Committee of Experts on patents has been more successful recently in reaching some consensus. See Goldsmith and Burnside, *Harmonization of European Patent Laws*, 46 J. Pat. Off. Soc'y 48 (1964), and text discussion at note 78 *infra*.

¹¹ See, e.g., Address of Commissioner Edward J. Brenner, *American Economy, The Patent System, and the Bar*, 46 J. Pat. Off. Soc'y 607 (1964); Address of the then Commissioner David L. Ladd, *The Patent Office—An Old Line Agency in a Modern World*, 43 J. Pat. Off. Soc'y 515 (1961).

¹² See Testimony of Robert C. Watson, Commissioner of Patents, United States Patent Office, Hearings on S. Res. 92, before the Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary, 84th Cong., 1st Sess. (1955) 161-66, 195-98; and the Annual Reports of the Subcommittee on Patents, Trademarks and Copyrights, Senate Committee on the Judiciary for the 85th, 86th, 87th and 88th Congresses (Comm. Prints 1957-64).

¹³ See 1961-62 Management Survey of the U. S. Patent Office Study, Subcommittee on Patent, Trademarks and Copyrights of the Senate Committee on the Judiciary, 87th Cong., 2d Sess. (Comm. Print 1962).

efficiency and, in many cases, cut out unnecessary operations. There is much talk in international patent circles, at the present time, of cooperation between patent offices in searching, evaluation, and information retrieval.¹⁴ Our own Patent Office is interested in finding ways to avoid examining applications filed for defensive protection only, and a Presidential Commission to study the patent system seems certain to be appointed in 1965.¹⁵

Still another means for reducing the economic burden of examination, proposed first in France and the Netherlands and more recently in the EEC, is to defer examination until it is clear that commercial utilization is likely to occur. It is believed that this will reduce the number of applications that have to be examined, and concomitantly, reduce the load on inadequately staffed examining offices.¹⁶ Obviously, the elimination of national offices would also reduce costs.¹⁷

The aim of any European patent system proposal, therefore, is to reduce duplication, to economize on resources while doing a better job overall, and, in the context of the European Community, to regulate the protection of industrial property rights so that a proper balance between competition and legally authorized monopolies is maintained, if not always harmoniously, at least not injuriously.

DRAFT CONVENTION FOR A EUROPEAN PATENT SYSTEM

Rather than tackle the question of industrial property protection at the time the Treaty of Rome was signed, the member countries left it to possible harmonization or unification by separate treaty.¹⁸

Originally, some persons thought that the most desirable way to effect uniform treatment of industrial property in the Community was to seek to harmonize the national laws of the six member coun-

¹⁴ See Glaser et al., *Research and Development Notes from the Patent Office*, 46 J. Pat. Off. Soc'y 387 (1964); Ladd, *ICIREPAT-Progress, Pitfalls and Prospects*, 46 J. Pat. Off. Soc'y 39 (1964).

¹⁵ See Address of Dr. William A. Easton, Deputy Assistant Secretary of Commerce for Science and Technology, *The Patent System and Economic Growth*, 46 J. Pat. Off. Soc'y 833 (1964).

¹⁶ The Netherlands has recently put its deferred examination system, which was a model for the Common Market patent law, into operation. Although the results of the experiment will not be able to be gauged, even tentatively, for some time, the system will be watched closely for comparisons of predictions and facts. For an early draft of the Dutch Revision, see *Proposed Draft Law for Revision of Dutch Patent Law*, 43 J. Pat. Off. Soc'y 784 (1961).

¹⁷ See Froschmaier, *The Draft Convention on Patents in the Common Market*, 11 Int'l & Comp. L.Q. (Supp. 1962, No. 4 at 50).

¹⁸ Article 36 of the EEC Treaty expressly provides that the preceding articles will not be obstacles to restrictions which are justifiable on the basis that they protect industrial property. Article 100, CCH Common Market Rep. ¶ 3476E, of the EEC Treaty specifically requires the EEC Council to seek harmonization of the laws of the Member States where they directly affect the establishment or operation of the Common Market. Article 3(h), CCH Common Market Rep. ¶ 251, of the EEC Treaty also emphasizes harmonization. See Froschmaier, *supra* note 4.

tries.¹⁹ Yet others recognized at an early date that a slow, tedious path would have to be followed to harmonize laws that are not only different enough in themselves, but further, operate in social, economic and political institutional frameworks which are disparate.²⁰ And, even assuming similar laws, the territorial coverage of patents and trademarks would raise serious obstacles to the free flow of goods in the Community. Thus, the basic decision was made to seek to draft a common patent law which would incorporate all the substantive and procedural provisions necessary to form an integrated patent system for the Community.²¹

The Coordinating Committee established by the governments of the Six to coordinate the working parties selected to draft conventions for patents, trademarks and designs²² met in October 1962, along with the Undersecretaries of States of the Member States. The purpose of this meeting was to consider the Draft Convention for a European Patent Law which had been submitted by the working group, headed by Dr. Haertel of the Federal Ministry of Justice of West Germany. The Committee decided to publish the Draft without official consideration so that opinions of interested groups could be solicited, and the proper authorities of the member countries could examine it as to form and substantive content.²³ Although it has been published in an official text only in French and German, the British Board of Trade has provided an unofficial English translation of the Draft.²⁴

The Draft Convention is divided into 12 parts, includes some 217 articles, and constitutes an entire patent code similar to our Patent

¹⁹ It has been suggested that the emphasis may have now swung back toward harmonization, see Goldsmith and Burnside, *supra* note 10.

²⁰ Froschmaier, Patents, Trademarks and Licenses within the Community, 10 *Int'l & Comp. L.Q.* (Supp. 1961, No. 1 at 58); Unpublished remarks of Dr. Kurt Haertel (delivered by Dr. Klaus Pfanner) at the Joint FBA-Villanova-Georgetown Conference on Patents and Antitrust Problems in the European Economic Community, April 1963, Philadelphia, Pa. Dr. Haertel is now President of the German Patent Office. See also Action Program for the Second Stage of the Common Market, CCH Common Market Rep. (SD-306) ¶ 214.

²¹ See, e.g., Finnis, Industrial Property and the Common Market, 11 *Int'l & Comp. L.Q.* (Supp. 1962, No. 4 at 47); Weiser & Behrman, The Convention for European Industrial Property Rights, 5 *PTC J. Res. & Ed.* 233 (1961); Robbins, The Proposed New European Patent, 5 *PTC J. Res. & Ed.* 217 (1961).

²² The trademark and design drafts under Dr. de Haan, President of the Dutch Patent Office, and Professor Roscioni, President of the Italian Patent Office, respectively, are underway. See de Haan, The Protection of Trademarks, 11 *Int'l & Comp. L.Q.* (Supp. 1962, No. 4 at 60). A general convention is also being drafted. It is expected that drafts will be published in 1965.

²³ For some comments, see Robbins, The European Patent Convention—Some Present Viewpoints of the European Patent Profession, 45 *J. Pat. Off. Soc'y* 295 (1963).

²⁴ Draft Convention Relating to a European patent law, translated by the British Board of Trade (1963), [hereinafter referred to as the Draft Patent Convention]. The Draft is also reproduced in CCH Common Market Rep. ¶¶ 3471-84L, and 45 *J. Pat. Off. Soc'y* 182 (1963).

Title 35 of the United States Code. Since there are no laws or institutions now in existence which could organize and operate a European patent system of the kind proposed, it was necessary to spell out all of these details.²⁵ While the Draft Convention would continue many arrangements that are well known in European patent laws, such as renewal fees and the like, it also contains some novel procedural and substantive features.

The System

The Draft Convention, if it is ratified by each of the contracting countries of the European Community, will create a multi-nation system that grants a single patent which has legal effect in all six Member States, much as United States patents have effect in all fifty states.²⁶ The European patent will be subject only to the provisions of the new Draft. Moreover, it will be issued by a European Patent Office and certain legal aspects of the patent grant will be determined by an independent or supranational patent court. The official languages will be English, French and German.²⁷

The European Patent Office will be an administration office common to all the contracting States and will contain examining divisions, a board of appeal for initial appellate review, and revocation boards to adjudicate questions of validity referred to it by national courts of the contracting States. This office will also have jurisdiction over compulsory licensing.²⁸

The proposed European patent system is characterized by a deferred examination system which represents a compromise between the full examination system of the Germans and the registration system of the French. The granting procedure will comprise two stages: the first stage will terminate with the grant of a provisional patent, and the second stage with confirmation of a final European patent, or a final refusal to confirm.

The first stage will commence with the filing of the European application.²⁹ The office will examine the application to see if it meets

²⁵ A summary analysis of the Draft Patent Convention is provided by the indefatigable United States expert on foreign patent laws, Mr. P. J. Federico of the United States Patent Office, in 45 J. Pat. Off. Soc'y 153-81 (1963).

²⁶ Professor Hallstein draws this parallel in his lectures at Tufts University, *supra* note 1. Of course, the EEC proposal is not the first viable Common Market of nations. Many argue the English Commonwealth was the first effective multi-national patent system. See, e.g., Harris, *The First Modern Common Market: A Reinterpretation of the [British] Commonwealth Experience in Industrial Property*, 6 PTC J. Res. & Ed. 199 (1962).

²⁷ Draft Patent Convention, art. 34, CCH Common Market Rep. ¶ 3473C.

²⁸ Draft Patent Convention, arts. 31-65, CCH Common Market Rep. ¶¶ 3473-74J.

²⁹ Draft Patent Convention, arts. 66-67, CCH Common Market Rep. ¶¶ 3475-75A. This filing can be in the European Patent Office or in one of the national patent offices in certain cases.

all the formalities as to patentable subject matter, completeness of specification and drawings, etc.³⁰ If these are satisfied, a novelty report will be requested from the International Patents Institute at The Hague.³¹

The novelty report will thereafter be sent to the applicant. He is given a final chance to revise his claims in view of the prior art discovered. The provisional patent will then be granted and published, along with the novelty report. This phase may take up to 18 months.³²

The provisional patent will remain in force for five years from the date of its publication.³³ However, if the validity of the provisional patent (or a final European patent for that matter) is questioned in an infringement action, it must be examined and confirmed (the second stage) before the patent can be held to be infringed.³⁴

The second stage commences with a request for examination of the provisional patent by the provisional patentee or by a third party.³⁵ As mentioned previously, unless the request is made during the five year life of the provisional patent, the patent will lapse. A request for examination will be published and the examining divisions of the Office will consider the novelty of the invention and its inventive merits. A final European patent will then be confirmed or finally refused.

After the provisional patent is published and until a specified time after a request for examination has been made, a limited, or what is often called a "poor man's" opposition will be available to third parties. Under this device, publications and other information may be submitted to the Office for consideration if and when the second stage examination for confirmation is initiated.³⁶ No elaborate interpartes opposition proceeding, as is now permitted in Germany, will be provided since it was felt by the drafting group that such proceed-

³⁰ Draft Patent Convention, arts. 68-71, 76, CCH Common Market Rep. ¶¶ 3475B-75E, 3476.

³¹ Draft Patent Convention, art. 78, CCH Common Market Rep. ¶ 3476B. The International Patents Institute was established by a treaty between France and the Benelux countries in 1947 (five other countries have adhered since its inception). Using the facilities of the Dutch Patent Office, it makes searches and provides novelty reports for the member countries or private individuals upon request.

Some persons find it difficult to see how a deferred examination system is going to reduce costs if a thorough novelty report is going to be requested in every case. It may be just a question of whom the applicant has to pay for the search.

³² Draft Patent Convention, arts. 79-82, 84-86, CCH Common Market Rep. ¶¶ 3476C-76F, 3476H-76K.

³³ Draft Patent Convention, art. 125, CCH Common Market Rep. ¶ 3479A.

³⁴ Draft Patent Convention, arts. 176-77, CCH Common Market Rep. ¶¶ 3482B-82C.

³⁵ Draft Patent Convention, art. 88, CCH Common Market Rep. ¶ 3476M.

³⁶ Draft Patent Convention, arts. 88-104, CCH Common Market Rep. ¶¶ 3476M-77C. The third party must give his reasons for believing a final European patent should not be granted. The provisional patentee is given a chance to controvert the arguments.

ings were too lengthy, involved and expensive.³⁷ Moreover, a patent will always be subject to attack upon the discovery of any new or previously undiscovered anticipating reference.³⁸

Aside from the deferred examination concept, which was first suggested by the French and which is incorporated in the new Dutch patent law,³⁹ the validity of European patents will be determined by the European Patent Office and European Patent Court, while the national courts of the contracting States will have jurisdiction over questions of infringement.⁴⁰

The conditions of patentability⁴¹ require that the invention be susceptible of industrial application, be novel and involve an inventive step. The field of industrial application includes agriculture. Certain additions to the kinds of inventions that can be patented constitute steps forward with respect to the national legislation of some Member States.⁴² Patents cannot be granted for inventions contrary to public order or morality. In addition, plant or animal varieties, or essentially biological processes for producing them, are excluded.⁴³

The conditions of novelty follow the French concept of absolute novelty.⁴⁴ The state of the art, therefore, comprises everything made available to the public by written or oral description, by use, or by any other way before the filing date of the application for a European patent. This is a more stringent novelty requirement than that of the German and American laws (foreign public use not there being a bar), and, while it does not include prior national applications and patents in the state of the art unless published prior to the filing date, it does include earlier filed European applications.

The inventive step requirement is similar to United States patent law in that it requires the invention to be "unobvious"; it is adopted from the German and Dutch patent laws.⁴⁵ The claim language determines the extent or scope of the protection but the description and drawings are to be used to interpret the claims.⁴⁶

³⁷ See the Working Group's Note on third party oppositions following Article 91 of the Draft Patent Convention, CCH Common Market Rep. ¶ 3476Q.

³⁸ Draft Patent Convention, art. 127, CCH Common Market Rep. ¶ 3479C.

³⁹ See text *supra* note 16. See also Weiser & Behrman, *The Convention for European Industrial Property Rights*, *supra* note 21.

⁴⁰ Draft Patent Convention, arts. 174, 177, CCH Common Market Rep. ¶¶ 3482, 3482C.

⁴¹ Draft Patent Convention, art. 9, CCH Common Market Rep. ¶ 3472.

⁴² Federico, *The Proposed European Patent Law—A Summary Analysis*, 45 *J. Pat. Off. Soc'y* 153, 158 (1963).

⁴³ Draft Patent Convention, art. 10, CCH Common Market Rep. ¶ 3472A.

⁴⁴ Draft Patent Convention, art. 11, CCH Common Market Rep. ¶ 3472B.

⁴⁵ Compare Article 13, CCH Common Market Rep. ¶ 3472D, of the Draft Patent Convention with 35 U.S.C. § 103 (1952).

⁴⁶ Draft Patent Convention, art. 21, CCH Common Market Rep. ¶ 3472Q. This is

Discussion of Specific Features

1. DEFERRED EXAMINATION: As noted earlier, the idea of a deferred examination system finds its origin in French and Dutch proposals, but its use is also dictated by economic necessity.⁴⁷ It is not a panacea for all patent problems, but it holds out the possibility of (i) providing rapid protection for an inventor without impeding his competitors, (ii) publishing the inventive contribution promptly, and (iii) reducing the burden on national examining offices. It attacks the heart of the problem, although there are conflicting views as to whether this prescription is the best cure.⁴⁸

Both in Europe and in the United States, statistics indicate that in the period of four to six years after the grant of a patent, many of the patented inventions are commercially dead. For example, a sample study⁴⁹ by The Patent, Trademark and Copyright Research Institute of the George Washington University found that approximately 50% of the inventions covered by patents are commercially exploited at one time or another. Of this 50%, about 40% are used before the patents are filed, about 50% went into use during pendency of the applications, and an additional 8% are put into use during the first five years of the patents' life. This means that over 98% of all the use has, at least, begun by the time a patent has been issued five years.

Such patterns of use, which are also reflected in the statistics on the payment of renewal fees in the European countries,⁵⁰ no doubt made the patent working group believe that if a full scale examination could be deferred for a period up to approximately five years, it might eliminate the need for examining and issuing a substantial proportion of the patents for inventions that will never find their way into use.

It is also true that the five year interval has the further advantage of providing a period during which the patent owner can assess his commercial prospects and, if they do not appear to bear out his orig-

similar to present German and Dutch law but is a marked departure from the French use of a "Résumé" rather than claims.

⁴⁷ Commentary to Proposed Modification of Dutch Patent Law, 43 J. Pat. Off. Soc'y 743 (1961).

⁴⁸ For example, a debate was held at the Annual Meeting of the American Patent Law Association in January 1965 with respected and experienced lawyers agreeing on the existence of the problems deferred examination is supposed to cure but disagreeing on the usefulness of the technique.

⁴⁹ Sanders, Sources and Uses of Patented Inventions, 5 PTC J. Res. & Ed. 25 (Conference No. 1961).

⁵⁰ See the statistics on the payment of renewal fees by selected foreign countries which are incorporated in the Statement of the Commissioner of Patents on Fee Bill H.R. 10966, Hearings before Subcommittee No. 3 of the House Committee on the Judiciary, 87th Cong., 2d Sess., at pp. 81, 104-05 (1962). See also Federico, Renewal Fees and Other Patent Fees in Foreign Countries, Study No. 17 of the Subcommittee on Patents, Trademarks and Copyrights, Senate Committee on the Judiciary, 85th Cong., 2d Sess. (Comm. Print 1958).

inal optimism, allow the provisional patent to lapse without incurring the substantial additional cost of a complete examination.⁵¹

The deferred examination system proposed by the Draft Convention does not prevent an applicant from asking for an immediate examination. Instead, it merely gives him the option to defer it for the first five years if he so desires, provided no third party requests it. If a third party requests an examination, the third party will bear a substantial part of the cost.⁵² This, in itself, will reduce the expense to the applicant.

The requirement of a novelty report to accompany the provisional patent is a compromise designed to safeguard competitors to some extent. It will identify art that has been uncovered so that competitors can make some reasonable assessment of the probability of the provisional patent being confirmed as a final European patent. If a third party is still uncertain and cannot afford to wait five years to see if the provisional patent will be allowed to lapse, he may request the examination.

2. INVALIDATION PROCEDURE: Invalidation and revocation procedures⁵³ will be available irrespective of whether an infringement action has been brought. The final European patent will be cancelled if the description is inadequate or the invention was not patentable. A final decision of revocation will apply to the patent retroactively. Moreover, anyone may ask that a patent be revoked, including a Member State which intervenes in the public interest. The proceeding will take place before Revocation Boards of the European Patent Office as of right.

The invalidation procedure will be similar to the revocation procedure. In both cases, validity will be considered to be an interpretation of the Convention which will come under the exclusive jurisdiction of the supranational authority.⁵⁴

Where an infringement action is instituted, whether on a provisional or a final European patent, and if the defendant questions the validity of the patent, the national court will suspend the infringement action and refer the question to the European authority. In other words, once invalidity is raised as a defense, the infringement action will be suspended and a revocation or confirmation proceeding will be conducted in the European Patent Office with a right of appeal to the European Patent Court. In fact, when it would be decisive in an

⁵¹ Froschmaier, *supra* note 4.

⁵² Draft Patent Convention, arts. 164-68, CCH Common Market Rep. ¶¶ 3481L-81Q.

⁵³ Draft Patent Convention, arts. 127-35, CCH Common Market Rep. ¶¶ 3479C-79L.

⁵⁴ Draft Patent Convention, arts. 177, 179, CCH Common Market Rep. ¶¶ 3482C, 3482E.

infringement suit, an interpretation of any provision of the Convention can be obtained by a declaratory judgment action or, on reference, by a preliminary decision of the European Patent Court.⁵⁵ For example and judging from American experience, when the scope of a claim is uncertain, even though the patent has been held to be valid, the European authority may have to determine the scope of the claim in order to assure uniform treatment throughout the Community.

3. COEXISTENCE OF EUROPEAN AND NATIONAL PATENTS: For an indefinite period of time, it is envisaged that the European patents and national patents will coexist,⁵⁶ although if a party has filed for a European patent, he will not be allowed to obtain the other because the European patent will be treated as a national patent (the contrary is not true). Even though both will be obtainable in some cases, they will not both be enforceable in the same geographical area.

As has been suggested before, one of the reasons for having a common patent system is to permit national patent systems to be discarded as soon as feasible. But for an indefinite period of time, it will be necessary for them to coexist. During this period, efforts will be made to harmonize the national laws, insofar as possible pursuant to Article 100 of the Rome Treaty.⁵⁷ While some argue national patents will always be useful,⁵⁸ it is generally believed that as soon as the European patent system is in full operation, provided the other institutions of the Community appear permanent, most of the member countries will eliminate their national patent systems—for the same set of economic reasons that led them to adopt a deferred examination system in the first place.

4. COMPULSORY LICENSING: The Draft Convention provides for compulsory licensing under certain conditions.⁵⁹ Although the members of the working party discussed the pros and cons of compulsory licensing extensively and disagreed, the majority decided that compulsory licenses should be granted by the European Patent Office and that they should have effect in the whole of the Market.⁶⁰ Article 136 of the Draft Convention provides for the granting of compulsory licensing in three situations: (i) in case of insufficient manufacture or utilization of the patented invention, (ii) in the case of dependent patents, and (iii) in certain cases provided for in the treaty establishing Euratom.

⁵⁵ Draft Patent Convention, arts. 180-81, CCH Common Market Rep. ¶¶ 3482F-82G.

⁵⁶ Draft Patent Convention, arts. 6, 185-205, CCH Common Market Rep. ¶ 3471H, ¶¶ 3483-83V.

⁵⁷ See, e.g., Draft Patent Convention, art. 207, CCH Common Market Rep. ¶ 3484A.

⁵⁸ Robbins, *supra* note 22.

⁵⁹ Draft Patent Convention, arts. 136-52, CCH Common Market Rep. ¶¶ 3480-80R.

⁶⁰ Draft Patent Convention, art. 144, CCH Common Market Rep. ¶ 3480H.

As to the first situation, after three years from the grant of the provisional patent, or four years after its filing date if later, the compulsory license may be applied for if the invention covered by the patent has not been manufactured or utilized within the territory to an extent sufficient to meet the combined needs of the Member States. Meeting the Community needs by importation (*e.g.*, from an American manufacturer) will *not* be sufficient, although legitimate reasons for not complying will be accepted. Actual manufacture within the Community will be required.⁶¹

As to the second situation, if an invention is protected by a patent but cannot be exploited without infringing a dominating patent, a compulsory license will be granted to the owner of the later patent to the extent necessary for him to exploit the invention covered by his own grant. The license will require the subservient holder to license the dominating patent holder if the inventions have the same industrial objective. This sort of compulsory license can be obtained even though the dominating patent is a national patent.⁶²

In applying for a compulsory license for any reason, the applicant must show that he could not obtain a license from the patentee on reasonable terms, and he must offer a guarantee that he will adequately work the invention if the license is granted.⁶³

Compulsory license requests will be handled by an Invalidity Board of the European Patent Office. Any compulsory license will be non-exclusive, on reasonable terms, and may include any reasonable restrictions or conditions. In operation, the compulsory license grant will be treated much as equity decrees are treated by American courts; changes in circumstances will always justify reopening the matter to consider the continuance of the license, the amount of the royalties, or the territoriality and conditions of the grant.⁶⁴

It will also be possible for a member country to request that a compulsory license be granted in the public interest, but if granted, it will be limited to the country asking for it.⁶⁵

5. RIGHTS CONFERRED BY EUROPEAN PATENT: Since one of the main reasons for proposing a single European patent system is to prevent national industrial property systems from splitting up the Common Market, it is not surprising that the working party and the officials of the member countries have been careful to evaluate the

⁶¹ The working group split on this requirement. See Note following art. 136, CCH Common Market Rep. ¶ 3480, of the Draft Patent Convention.

⁶² Draft Patent Convention, art. 137, CCH Common Market Rep. ¶ 3480A.

⁶³ Draft Patent Convention, arts. 139-40, CCH Common Market Rep. ¶¶ 3480C-80D.

⁶⁴ Draft Patent Convention, arts. 141, 143, CCH Common Market Rep. ¶¶ 3480E, 3480G.

⁶⁵ Draft Patent Convention, art. 144, CCH Common Market Rep. ¶ 3480H.

effect of the proposed common patent on Community markets.⁶⁶ European patents are to have effect on the whole of the territories of the contracting States,⁶⁷ and the majority view spells this out.⁶⁸

While territorial licensing will be permissible under the first variant of article 20—even when the territories are defined by the geographic boundaries of the Member States—such restrictions will apply only to the so-called “first sale,” and in all cases, the buyer cannot be held liable. Once an article has been put on the market in one of the contracting States by the owner, it cannot thereafter be restrictively controlled by way of a license agreement in that or any other country.⁶⁹ It is not without significance that the question of whether the Treaty of Rome will sanction restrictions on competition of any sort is intentionally left open by the published Draft.

6. THIRD PARTY RELATIONS: So far, comments on the Common Market patent have been restricted to its origin, substantive scope, and procedural innovations. Also of interest to Americans is the extent to which the common patent will be available to third party nationals.⁷⁰ Two main questions are raised by the Draft Convention as to third parties generally: (i) *availability* of the European patent to nationals of non-contracting States, and (ii) *accession* to the Convention or *association* with the Community by nations not privy to the Treaty of Rome.

Article 5 of the Draft proposes two extreme solutions on availability and suggests that intermediate solutions are possible. These are important to American nationals. Accession and association, which are covered in Articles 211 and 212 of the Draft Patent Convention, are of less immediate importance to American citizens.

The first variant of article 5 places no nationality restriction on an applicant for a European patent. It is similar to the United States patent law in that a national of any country can apply for a patent. The patent laws of most other countries are similar in this respect. Since this variant of article 5 does not distinguish between applicants on the basis of nationality, European patents could be applied for by nationals of any country, whether members of the EEC or not.

The second variant of article 5 would allow a European patent to be applied for only by a national of one of the contracting countries,

⁶⁶ Draft Patent Convention, arts. 18-22, 25-30, CCH Common Market Rep. ¶¶ 3472I-72R, 3472U-72Z.

⁶⁷ Draft Patent Convention, art. 18, CCH Common Market Rep. ¶ 3472I.

⁶⁸ Draft Patent Convention, art. 20, CCH Common Market Rep. ¶ 3472K, 1st Variant. The 2d Variant of article 20, CCH Common Market Rep. ¶ 3472P, would restrict the European patent to a scope commensurate with national patents.

⁶⁹ Draft Patent Convention, art. 20(a), CCH Common Market Rep. ¶ 3472L.

⁷⁰ See Weiser, *The European Common Market Patent Convention: The Right to Apply for a Common Market Patent*, 6 PTC J. Res. & Ed. 317 (1962).

and then, only if the applicant first files an application for a national patent in one of the contracting States.

If the second variant were in force, national patent offices could not be eliminated. Otherwise, nationals of non-contracting countries, even if they were members of the Paris Union,⁷¹ could not obtain any patent protection whatsoever. It also runs counter to the priority principle of the Convention.⁷² A knowledge of the history of the present Draft makes it hard to believe that the Member States want to assume the financial burdens of two systems, although other reasons are advanced for restricting availability.⁷³

Aside from the economics of dual patent systems, the second variant raises international legal questions since the six contracting States are members of the Paris Union. The United States and some forty-four other non-EEC countries are members of this Union, a convention which, among other things, requires *national treatment*, that is, it requires that each Paris Union member country grant the same industrial property protection to nationals of all the other member countries that it grants to its own nationals.⁷⁴

If the European Patent Convention is signed with this second variant, the contracting countries will offer to their own nationals *two* ways to protect inventions—national patents in the individual member countries, or a European patent—whereas the nationals of non-contracting countries will have only one avenue of protection, *i.e.*, under the national laws of the contracting States.

If the substantive rights under the common system and the national laws of each country were or are identical, it might be hard to argue real discrimination,⁷⁵ but since it is apparent that the scope of a European patent will be superior in some cases, *e.g.*, as to drugs, then inequality seems fairly clear.⁷⁶

⁷¹ The International Convention for the Protection of Industrial Property, which was signed in Paris in 1883 and last amended in Lisbon in 1958, is known as the Paris Union or Paris Convention.

⁷² The right of priority under the International Convention permits an applicant to obtain the priority date of his first filed application in other Convention countries if he files in the other countries within one year of his initial application.

⁷³ See Was, Access to the European Patent, 7 PTC J. Res. & Ed. 7 (1963); Roditi, An Argument Against Accession, 45 J. Pat. Off. Soc'y 310 (1963); Weiser, Patent and Antitrust Development and Prospects of the European Economic Community, 8 PTC J. Res. & Ed. 1 (1964).

⁷⁴ This is sought to be avoided by calling the Draft Patent Convention a special arrangement as permitted by Article 15 of the International Convention. See Draft Patent Convention Preamble.

⁷⁵ Ulmer, The Availability of European Patents and the Paris Convention, 2 Industrial Property 51 (1963).

⁷⁶ de Haan, The Proposed EEC Patent Convention: Problems and Prospects, in Doing Business in the Common Market, a special report by CCH reprinting addresses delivered at the European Common Market Conference, National Law Center, The

Persons who indorse this restrictive point of view justify it by calling it a special arrangement such as those concluded under Article 15 of the Paris Union. But the examples are inapposite. An applicant's substantive rights will be curtailed if he cannot apply for an EEC patent, whereas the special arrangements concluded to date under article 15 have been no more than procedural inconveniences to the non-contracting parties. *National treatment* and *priority* are the main principles of the International Convention, and both appear to be violated by this restrictive variant.⁷⁷

The winds of change are not limited to the European Economic Community. As alluded to earlier, they are being felt in the Council of Europe and in the Scandinavian countries. In the last few years, the Council of Europe has fashioned two minor conventions which have gone into effect, and its Committee of Experts on Patents has drafted a convention on the Unification of Certain Points of Substantive Law on Patents for Invention. These may not be too important standing alone but collectively they may presage greater successes.⁷⁸ The Scandinavian countries have recently put into effect a common patent granting system after marking time for a few years to see what the Member States of the Common Market intended to do.

Regional economic integration, particularly of the underdeveloped countries, has also led to the establishment of a regional patent office in Africa under the auspices of the African and Malagasy Organization for Economic Cooperation. Fourteen nations have ratified the agreement to subscribe to a common patent, trademark and design law.⁷⁹

ANTITRUST POLICY OF THE COMMUNITY AND INDUSTRIAL PROPERTY

The activities of the Member States of the Community are designed to convert six national markets into a single one. It is for this reason that the Six are considering dismantling barriers to interstate trade which result from, or are natural concomitants of, national patent systems. From this follows, too, the interest in practices that tend to restrict or distort trade among the contracting States—export

George Washington University, April 9 and 10, 1963 at p. 100; see also Froschmaier, *supra* note 17.

⁷⁷ The previous Commissioner of Patents, David L. Ladd, devoted most of his Address before the Annual Meeting of the Patent, Trademark and Copyright Section of the American Bar Association in San Francisco to these questions, reprinted in 44 J. Pat. Off. Soc'y 583 (1962).

⁷⁸ See Goldsmith and Burnside, *Harmonization of European Patent Laws*, 46 J. Pat. Off. Soc'y 48 (1964).

⁷⁹ See *The Role of Patents in the Transfer of Technology to Underdeveloped Countries*, Report by the Secretary General, U.N. Eco. and Soc. Council (E/3861, E/C 5/52/Rev. 1), 9 March 1964 (pursuant to Gen. Assembly Res. 1713 XVI). This report is an excellent survey of the patent laws of the world and the viewpoints of the various national governments on patents and economic development.

clauses in exclusive distributorship agreements, forms of licensing agreements and the structure of joint ventures to name a few.⁸⁰

Although the antitrust aspects of the Community cannot be covered in detail in this article, the incidence of antitrust policies on patents, and the role patents often play in promoting restrictive business practices should be discussed here.⁸¹ Articles 85 and 86 of the Rome Treaty implement article 3 which sets forth certain activities necessary to the realization of Community goals; among these is "the establishment of a system ensuring that competition in the Common Market is not distorted."⁸²

We are mainly concerned with article 85⁸³ which covers distortion

⁸⁰ See van Themaat, *supra* note 7; Weiser, *Antitrust Policy and Industrial Property Policy in the European Economic Community*, 38 N.Y.U.L. Rev. 496, 506 (1963); see generally Weiser, *Antitrust Aspects of the Joint Venture in the European Economic Community*, 111 U. Pa. L. Rev. 421 (1963).

⁸¹ Cf. Ladas, *Antitrust Law in the Common Market with Special Reference to Industrial Property Agreements*, 23 Ohio St. B.J. 709 (1963); Weiser, *Antitrust Policy and Industrial Property Policy in the European Economic Community*, *supra* note 80. On the antitrust law of the Member States and restrictive business practice policy in general, see Riesenfeld, *The Protection of Competition*, in 2 *American Enterprise in the European Common Market: A Legal Profile* (Stein & Nicholson ed. 1960).

⁸² EEC Treaty, art. 3(f), CCH Common Market Rep. ¶ 251.

⁸³ Article 85, CCH Common Market Rep. ¶¶ 2005, 2031, 2051 reads:

1. The following practices shall be prohibited as incompatible with the Common Market: All agreements between enterprises, all decisions by associations of enterprises and all concerted practices which are liable to affect trade between the Member States and which are designed to prevent, restrict or distort competition within the Common Market or which have this effect. This shall, in particular, include:

- (a) The direct or indirect fixing of purchase or selling prices or of any other trading conditions;
- (b) the limitation or control of production, markets, technical development or investment;
- (c) market-sharing or the sharing of sources of supply;
- (d) the application of unequal conditions to parties undertaking equivalent engagements in commercial transactions thereby placing them at a competitive disadvantage;
- (e) making the conclusion of a contract subject to the acceptance by the other party to the contract of additional obligations, which, by their nature or according to commercial practice, have no connection with the subject of such contract.

2. Any agreements or decisions prohibited pursuant to this Article shall automatically be null and void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

any agreement or type of agreement between enterprises,
any decision or type of decision by associations of enterprises, and,
any concerted practice or type of concerted practice which helps to improve the production or distribution of goods or to promote technical or economic progress, while allowing consumers a fair share of the resulting profit and which does not:

of competition inasmuch as article 86 pertains only to abuses of a dominant position. Briefly, article 85(1) establishes a general prohibition for certain types of practices which are, or tend to be restrictive, while article 85(3) constitutes a legislative "rule of reason" designed in certain cases and under certain conditions⁸⁴ to ameliorate the harshness of the blanket prohibition contained in article 85(1).⁸⁵

The EEC Commission has issued regulations⁸⁶ and communications,⁸⁷ which among other subjects deal with patents,⁸⁸ designed to reduce the burden on the Commission and the registrants. The Commission has decided to grant exemptions for categories of restrictive agreements which would comply with the requirements of article 85(3) based on their characteristic features, and to establish principles of interpretation to avoid notification of agreements which, in the Commission's view, do not fall under the ban of article 85(1).⁸⁹

Pursuant to this philosophy, the initial communication listed a series of clauses in patent licensing agreements which were *not* considered to be prohibited under article 85(1). These are:

A. Obligations imposed on the licensee, the purpose of which is:

1. The limitation of the methods of exploitation of the invention provided for in the patent rights (manufacture, use, distribution) to certain persons;

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- (a) subject the concerns in question to any restrictions which are not indispensable to the achievement of the above objectives;
 - (b) enable such enterprises to eliminate competition in respect of a substantial part of the goods concerned.

⁸⁴ Before article 85(1) is even applicable, certain conditions must be present. There must be (i) an agreement between enterprises, decision or concerted practice, (ii) likely to affect trade between the Member States, which (iii) have as their object or effect the prevention, restriction or distortion of competition within the Common Market. Where an exemption under article 85(3) is sought, it must fit the conditions established therein.

⁸⁵ See generally Coing, *Interpretational Problems of Article 85*, 38 N.Y.U.L. Rev. 441 (1963); van Themaat, *Introduction*, 38 N.Y.U.L. Rev. 435 (1963).

⁸⁶ See Regulation 17 (1962), CCH Common Market Rep. ¶ 2401; Regulation 27 (1962), CCH Common Market Rep. ¶ 2651; Regulation 59 (1962), CCH Common Market Rep. ¶¶ 2441.10, 2461.10; Regulation 153 (1962), CCH Common Market Rep. ¶ 2694; Regulation 99/63, CCH Common Market Rep. ¶2635; Regulation 118/63, CCH Common Market Rep. ¶ 2461.10.

⁸⁷ Communication relative aux accords de license de brevets (December 24, 1962), CCH Common Market Rep. ¶ 2694D.

⁸⁸ Regulation 17 requires that agreements coming within the purview of article 85(1) be registered with the Commission. Although registration is a voluntary act, an exemption under article 85(3) cannot be obtained unless the agreement has been registered, and in a timely manner as required. See Mussard, *The Regulation of the Restrictive Business Practices Under the Common Market Treaty*, 11 Int'l & Comp. L.Q. (Supp. 1962, No. 4 at 16); Weiser, *Freedom of Competition in the European Economic Community: An Analysis of the Regulations Implementing the Antitrust Provisions*, 6 PTC J. Res. & Ed. 20 (1962).

⁸⁹ See van Themaat Lecture, *supra* note 7.

2. The limitation
 - (a) of the manufacture of the patented product,
 - (b) of the application of the patented process to specified fields of technical application;
3. The limitation on the quantity of the product to be manufactured or on the number of times the process is to be used;
4. The limitation on the utilization
 - (a) in time (license of shorter duration than the patent),
 - (b) in area (regional license for a portion of the territory in which the patent is valid, license limiting utilization to one location or to one specified factory),
 - (c) as to person (limitation on the power to dispose of the license, such as the prohibition to assign the license or to grant sublicenses).
- B. Obligations on the licensee to affix patent information on the product.
- C. Standards of quality or obligations imposed upon the licensee with respect to the obtaining of supplies of certain products, insofar as they are indispensable for a technically proper utilization of the patent.
- D. Agreements concerning the communication of know-how acquired during the utilization of the invention or the granting of licenses on improvements or on new uses; these, however, are valid with respect to obligations assumed by the licensee only if they are not exclusive and if the licensor has assumed similar obligations.
- E. Agreements by the licensor:
 1. not to authorize any other person to utilize the invention;
 2. not to utilize the invention himself.

The Commission was careful not to apply the exemption to agreements involving patent pools, reciprocal licenses, and multiple parallel licenses;⁹⁰ agreements relating to other rights of industrial property or to know-how;⁹¹ and, agreements which may include clauses other

⁹⁰ Communication, CCH Common Market Rep. ¶ 2694D, and van Themaat, *supra* note 7.

⁹¹ Van Notten, *Know-How Licensing in the Common Market*, 38 N.Y.U.L. Rev.

than the above listed ones.⁹² As to these latter types of agreements, the general rules set out in articles 85 and 86 are applicable and each decision will have to be based on a specific fact pattern.⁹³

The regulations also permit a party to request a negative clearance from the force of article 85(1) and article 86.⁹⁴ For negative clearances, the Commission has concurrent jurisdiction with the Member States.⁹⁵

It also must be emphasized that the guide lines established by official communications from the EEC Commission do not bind the Commission for all times, even where the agreements are other than independent or individual ones. Moreover, they do not restrict the Court of Justice in reaching its own conclusion. The Commission prefers to build up its antitrust law on a case-by-case basis, much as we have done in the United States.⁹⁶ On the other hand, the Commission wants to give interested parties some idea of its thinking about certain types and categories of restrictive provisions in agreements parcelling out rights in legally recognized patent monopolies.⁹⁷ The policy of the EEC Commission is conciliatory whereas the approach of the United States has relied nearly entirely on case-to-case adjudication.

525 (1963); Nash, *The Concept of "Property" in Know-How as a Growing Area of Industrial Property: Its Sale and Licensing*, 6 PTC J. Res. & Ed. 289 (1962).

⁹² A clause must not run afoul of the prohibitions in Article 36, CCH Common Market Rep. ¶ 3473E, of the EEC Treaty to the effect that the "prohibitions or restrictions" for the protection of industrial property shall not constitute either a means of arbitrary discrimination or a disguised restriction on trade. Paraphrasing article 85(3), CCH Common Market Rep. ¶ 2051, the "prohibitions or restrictions" must improve production or distribution of products or promote technical or economic progress while reserving to consumers an equitable share of advantages, and without imposing unessential restrictions on the enterprises and without enabling enterprises to eliminate competition with respect to a substantial portion of the products concerned.

⁹³ The law of unfair competition in the EEC and in the Member States is also intimately related to the lines of demarcation between legitimate patent monopoly and antitrust abuse. See Ulmer, *The Law of Unfair Competition and the Conflict of Laws*, 4 Am. J. Comp. L. 167 (1955); and articles on law of unfair competition in some of the Member States collected in 11 Int'l & Comp. L.Q. (Supp. 1962, No. 1).

⁹⁴ Regulation 17, art. 2, CCH Common Market Rep. ¶ 2411. "Negative Clearance" is a procedure for submitting an article 85(1) agreement to the Commission for an article 85(3) clearance in advance.

⁹⁵ Weiser, *supra* note 88.

⁹⁶ Additional light should be shed on Commission policy from the sort of fact patterns which prompt the Commission to grant negative clearances. Requests for negative clearances and the decisions published to date are: Grosfillex Co., CCH Common Market Rep. ¶ 7020; Convention Faience, CCH Common Market Rep. ¶ 7022; S. A. Mertens and Straet, CCH Common Market Rep. ¶ 7024; S. A. Nicholas Frères, CCH Common Market Rep. ¶ 7025; Dutch Engineers & Contractor's Association, CCH Common Market Rep. ¶ 7030; and Maison, Jallatte S.A., CCH Common Market Rep. ¶ 7031.

⁹⁷ In this respect, see also Written Questions Nos. 61 and 71 posed to the EEC Commission, CCH Common Market Rep. ¶¶ 7001, 7002; and First Commission Recommendation on Application of Treaty Article 85 (May 1964), CCH Common Market Rep. ¶ 7023.

CONCLUSION

The future of this common patent system is uncertain. Since publication of the Draft for comment in late 1962, the Member States have scheduled and deferred a number of meetings at which final decisions were to be made on disputed features of the system and time schedules established for putting it into operation. Much of the delay has been a result of the disagreement between the contracting States on the larger issues pertaining to the development of an economic and political union.⁹⁸ As and when these are resolved, we may expect this common patent system to take on new life.

The early momentum which bid fair to inaugurate the European patent system substantially as proposed has been dissipated. It is therefore quite likely that the divergent opinions, which were sublimated in the Draft Convention by the fast pace of the European Community in general, will dictate a number of changes in the final provisions. Nonetheless, the fact that the United States is going to consider various features of the proposed EEC system as possible solutions for some of its own problems, and the fact that the Dutch have already made substantial changes in their patent examination system along the lines of the Draft Convention, attest to the vitality and importance of the basic concepts.

A strong movement, probably an irreversible one, has been started by the Member States of the European Economic Community in the field of industrial property and the restrictive business practices related to it. Americans have no choice but to keep abreast of its ebb and flow if they are to compete successfully for the important European Market in the years ahead.

⁹⁸ This is the thrust of the interviews with EEC officials reported in Weiser, *Patent and Antitrust Development and Prospects of the European Economic Community*, 8 *PTC J. Res. & Ed.* 1 (1964).