

Response to Questionnaire on the Patent System in Europe Filemot Technology Law Ltd

Background Information

This response has been prepared by Barbara Cookson, the managing director of [Filemot Technology Law Ltd](#) and practices as a patent attorney. I am a member of the EPI. I have also reviewed comments made by FFII. In the last six months I have made a particular study of the legal services being made available to entrepreneurial companies and the focus of my responses is the interests and concerns of European based entrepreneurial companies that are basing their business on technology.

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Stakeholder information

(a) In which Member State do you reside / are your activities principally located?

I reside in practice in the United Kingdom

(b) Are you involved in cross-border activity?

I act for overseas clients as well as clients based in the United Kingdom and my UK-based clients are involved in cross-border activities.

(c) If you are a company: how many employees do you have?

One employee

(d) What is your area of activity?

Filemot Technology Law Ltd is a patent attorney. It has acted entrepreneurial clients involved in the packaging industry and the civil engineering industry. We are also interested in software as Filemot is a supplier of an IP database. As a patent attorney, I also have a particular interest in software and electronics patents as I am a Chartered Electrical engineer. I have also taken an interest in Bioinformatics and medical devices.

(e) Do you own any patents? If yes, how many? Are they national / European patents?

No. The entrepreneurial clients I represent do own patents. These are national UK patents and European patents for territories outside the UK.

(f) Do you license your patents?

I have clients who licence and more we would like to licence and have little hope of doing so successfully.

(g) Are you a patent licensee?

No

(h) Have you been involved in a patent dispute?

I have advised on numerous patent disputes and was a principal solicitor in a case before the Patents County Court as well as supporting colleagues in High Court actions in the UK.

(i) Do you have any other experience with the patent system in Europe?

I frequently search the patent literature and do due diligence on patent portfolios.

Section 1 - Basic principles and features of the patent system

1.1 Do you agree that these are the basic features required of the patent system?

Suggesting that the patent system should support quality of life for the benefit of all in society is taking matters too far. The patent system allows its users, those who invent new technical solutions to problems that face society, to benefit from the investment they make in bringing forward those solutions to the market. Those solutions may and we hope will improve the quality of life in society but that is a remoter consequence.

It is noted that the patent system allows research organisations having no exploitation activities to derive benefit from the results of their R&D activities. Currently the patent system does do that but it should not be regarded as a particularly attractive feature. The purpose of the patent system is to encourage exploitation. Society derives no benefit from this feature of the system.

I agree with and support the bulleted items.

1.2 Are there other features that you consider important?

It is an essential function of the patent system to **disseminate and make available technical information** that can be accessed by all and exploited after the expiry of any patent rights. This feature seems to have been lost in the note of basic principles, yet it is the consideration the patentee gives to society in exchange for his monopoly right

The system could be improved by placing more emphasis on exploitation. Features such as the annuity fee system and licenses of right that were intended to ensure exploitation are failing. The presence of large numbers of unexploited and redundant but active patents makes it difficult for an entrepreneurial company to appreciate whether or not it is free to operate.

1.3 How can the Community better take into account the broader public interest in developing its policy on patents?

The considerable publicity given to trivial software/business method patents that are perceived, particularly in the software industry as excluding access to ideas that are properly in the public domain, overwhelms public appreciation that where technologies require investment to make them available, the patent system is essential. Since little or no investment is needed to implement a design feature of software, the benefit of the patent system where investment is essential is being obscured.

The community needs to focus the system in the simplest possible way on encouraging investment and exploitation.

The standard requirements for inventive step and industrial applicability should be used to exclude trivial patents in the software field.

Section 2 – The Community patent as a priority for the EU

2.1 By comparison with the common political approach, are there any alternative or additional features that you believe an effective Community patent system should offer?

I welcomed the March 2003 political approach.

The translation requirements remain a burden. I have sympathy with those who do not have access to the text of relevant patents. However, the translations of those that are currently filed are not made available effectively. A considerable industry exists creating these translations which are housed inaccessibly and totally fail to fulfil their intended purpose. This is nothing short of a scandal.

Patentees are forced to make this investment yet they cannot benefit from it when they need to study foreign-language patents. It should be a condition placed on any national patent office that requires translations that they make these translations fully searchable and downloadable from the Internet.

Section 3 – The European Patent System and in particular the European Patent Litigation Agreement

3.1 What advantages and disadvantages do you think that pan-European litigation arrangements as set out in the draft EPLA would have for those who use and are affected by patents?

The EPLA appears to be a complex and expensive solution.

3.2 Given the possible coexistence of three patent systems in Europe (the national, the Community and the European patent), what in your view would be the ideal patent litigation scheme in Europe?

Each member state has a system for dealing with patent disputes. If we had a community patent then in principle parties could use the same system and receive a community wide judgment rather than a national one.

The quality of national court will always be criticised. The ECJ is much criticised. Losers in litigation always criticise.

Forum shopping should be controlled but not impossible. A defendant should be entitled to a court hearing in his own language that should be given the end ability to ameliorate the cost risk by accepting some use of common language.

Section 4 – Approximation and mutual recognition of national patents

4.1 What aspects of patent law do you feel give rise to barriers to free movement or distortion of competition because of differences in law or its application in practice between Member States?

The community plan was first promoted because it was perceived that non uniform patent protection was a barrier to free movement. This remains true.

4.2 To what extent is your business affected by such differences?

Removal of the requirement to go through a European Patent validation procedure in each member state would eliminate the huge volume of unproductive but costly work undertaken by patent attorneys. It would allow them to focus on work that is of more value to their clients.

4.3 What are your views on the value-added and feasibility of the different options (1) – (3)?

(1) Bringing the main patentability criteria of the European Patent Convention into Community law so that national courts can refer questions of interpretation to the European Court of Justice. This could include the general criteria of novelty, inventive step and industrial applicability, together with exceptions for particular subject matter and specific sectoral rules where these add value.

The ECJ currently spends a lot of time giving academic opinions on the trademark harmonisation directives. It seems unable to control the flow of questions. It seems unlikely to perform any more effective a function in relation to patent law. An academic court is not helpful in technical matters.

(2) More limited harmonisation picking up issues which are not specifically covered by the European Patent Convention.

There should be no significant issues on patentability that are not covered by the European patent Convention. The computer implemented inventions directive was essentially focus to giving the ECJ jurisdiction. It did not in truth fill any gap in the European Patent Convention.

(3) Mutual recognition by patent offices of patents granted by another EU Member State, possibly linked to an agreed quality standards framework, or "validation" by the European Patent Office, and provided the patent document is available in the original language and another language commonly used in business.

This idea has considerable attraction.

However, the European Patent Convention has the same idea of it at its heart. All that needs to be done is to implement the original plan that a European Patent granted for one member state should automatically become a Community Patent

4.4 Are there any alternative proposals that the Commission might consider?

Section 5 – General

We would appreciate your views on the general importance of the patent system to you. *On a scale of one to ten (10 is crucial, 1 is negligible):*

We have given answers that reflect the interests of our UK-based entrepreneurial clients

5.1 How important is the patent system in Europe compared to other areas of legislation affecting your business?

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5.2 Compared to the other areas of intellectual property such as trade marks, designs, plant variety rights, copyright and related rights, how important is the patent system in Europe?

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5.3 How important to you is the patent system in Europe compared to the patent system worldwide?

5

Furthermore:

5.4 If you are responding as an SME, how do you make use of patents now and how do you expect to use them in future? What problems have you encountered using the existing patent system?

We have clients who have made extensive use of the patent system and made considerable investments in it to support their investments in bringing the technology to market. They found it difficult to understand why tens of thousands of pounds are needed to prepare translations and pay annuity fees which seem no more than a tax on the innovation process and return no value to the patentee

5.5 Are there other issues than those in this paper you feel the Commission should address in relation to the patent system?

The commission should consider the way that the patent system is financed by the use of annuity fees and minimal application cost. The annuity fee payment industry in Europe is no more than a tax on innovation and serves no useful purpose at present. Italy got it right abolish it. Patent offices like their customers should give value for payments received. I appreciate that this may mean increasing the application fees but that could also have the benefit of stemming the deluge of applications filed by some applicants.