

**COMMUNITY PATENT REGULATION**

**UNICE DETAILED COMMENTS**

**II. COMMENTS ON THE PROPOSED ARTICLES**

**1. CHAPTER I - GENERAL PROVISIONS**

**Article 1: Community patent law**

UNICE has always supported coexistence in the EU of Community Patents with national patents and European patents, with the users expecting a completely flexible two-way conversion option available up to grant, as long as the latter designate all EU States. This is reflected in the third paragraph of Section 2.4.6 of the explanatory memorandum but not in article 1. UNICE would like to suggest a new wording for this article (See annex) that also takes account of PCT<sup>1</sup>cases and of article 59 EPC.

Finally, with regard to future enlargement of the EU to new Member States, UNICE recommends that the EU thinks about a transparent ruling for cases of prior acquired (national) rights in those States.

**2. CHAPTER II - PATENT LAW**

**Article 4(2): Right to the patent**

It is not clear which law shall apply in case of several inventors employed in different States for e.g. Germany and Austria. In UNICE's view, it is necessary to clarify in these cases according to which law the right to the Community Patent will be determined.

**Article 6: Effect of change of proprietorship of the Community Patent**

UNICE wonders whether this article is intended to apply where there is an ownership dispute which results in a transfer to co-owners of which the original owner is one (see the reference in article 6(1) to a "complete change of ownership" of the patent and in article 59(2) to "part of the Community Patent").

If a licensee has not acted in bad faith, UNICE does not see why he should have to request a licence from the new owner. UNICE wonders whether it would not be more just for him to continue operating under the original licence in such circumstances.

This article raises a number of additional questions. If the licensee is required to obtain a new licence, the question is raised which Court is to decide its terms. Ownership disputes

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<sup>1</sup> Indeed it is noted that a majority of EP applications are filed now through the PCT route. However the PCT does not yet provide for designating a CP. In this connection some countries like Belgium, France, Italy, the Netherlands can only reserve national patent protection through PCT by designation of a European Patent.

appear to be subject to the jurisdiction of national Courts and it can be assumed that the terms of the new licence will be as well. Is this appropriate?

**Article 9: Limitation of the effects of the Community patent**

In relation to article 7 CPR it is standard ruling in the EU to prohibit direct use of the invention, e.g. by offering or stocking patented products before the patent expires in view of commercialising them after expiration (so-called “springboard activities”).

**Article 10: Community exhaustion of the rights conferred by the Community patent**

UNICE insists to insert the term “express” in article 10<sup>2</sup>. This insertion is to avoid disputes of any implied consent that is not easy to prove e.g. because it is not clearly defined between the proprietor and a third party (claiming the exhaustion) how an “implied consent” has to be interpreted.

**Article 11: Rights conferred by the Community patent application after publication**

UNICE is of the opinion that these articles need further study regarding the language the defendant/alleged infringer understands (art. 11), whether he knew or should have known he infringes (art. 44) and the general criterion of good faith.

It would greatly improve legal certainty if the same criteria and mix of knowledge, understanding and good faith were used for liability to pay compensation and damages. The burden of proof for each of these needs to be carefully allotted. UNICE would appreciate a detailed discussions with the Commission and the European parliament on this subject.

UNICE considers that articles 11(2) and 44(3) should also make reference to an infringer who has no residence or principal place of business in the Community. UNICE is of the opinion that this article should be clearly linked with article 44.

**Article 12: Right based on prior use of the invention**

European industry truly needs a good Europe-wide prior use right with proper safeguards for both the patent owner and the prior user. The stipulations should be the same in both the Community Patent Regulation and the EPLA.

**Article 19: Contractual licensing**

It is of course expected that contractual licensing applies also to patent applications before their grant as a Community patent. UNICE therefore recommends an explicit provision or clarification to that effect in Article 19.

**Article 20: Licences of right**

**General Comments on compulsory licences and licences of right**

UNICE is of the opinion that responsibility for compulsory licensing (and determination of the terms of licences of right) should rest, not with the Commission, but with the Community Patent Court (“CPC”)

**UNICE notes with satisfaction that the article has been revised to refer only to the Community Patent Court.** The Commission should have a right to make observations in any proceedings. Appeals from first-instance decisions of CPC should be to its appeal Chamber.

Compulsory licences should only be granted where they are necessary to alleviate defined circumstances and are likely to make a material contribution to doing so. In other words,

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<sup>2</sup> Article 28 of the Luxembourg Convention states that the rights conferred shall be exhausted after the patented product has been put on the EU-market by the proprietor or with his express consent.

issues of the proportionality between the problem and the remedy of compulsory licensing must be considered by CIPC in relation to whether a compulsory licence should be granted at all, whether it should be granted to a particular applicant, and the scope and duration of grant. That this is the case is apparent from articles 31.1(a), (c), and (g) TRIPs. The following provisions should be explicitly provided for in the Regulation:

- Each application for a compulsory licence shall be considered on its individual merits;
- A compulsory licence may only be granted if it is established, in the case of a particular application, that a ground set out in the Regulation exists;
- A particular applicant should only be granted a compulsory licence if he can establish that he will make a material contribution to alleviating the circumstances which led to the compulsory licence being available;
- The scope of the licence<sup>3</sup> and its duration shall be limited to that which is necessary to make a material contribution to alleviating the circumstances which led to the licence being available.

Third-party interests should be taken into account in deciding whether to grant a compulsory licence and the terms of any compulsory licence that is to be granted. Any third party affected by the application for a compulsory licence should have a right to intervene in the proceedings and where third parties have interests noted in the Register, they should be informed of the application on the date that it is made. It should be made clear that neither the grant nor the exercise of any compulsory licence can give rise to the patent owner becoming liable to any third party.

As far as exhaustion is concerned, it should be expressly stated that where a compulsory licence is limited in geographical scope (for example, in the case of dependent patents, crisis or extreme urgency), there would be no exhaustion of the Community Patent right in the Community. This is consistent with article 45 CPC and *Pharmon-v-Hoechst*.

**The implementing regulations should only set out the procedures for granting licences of right; they should not set out the “conditions” of the licences which may vary from case to case. Similarly, the implementing regulations should not set out when the licence becomes effective which should be at the date of final adjudication of its terms.**

#### **Article 21: Grant of compulsory licensing**

##### **Article 21-1**

UNICE notes that very wide discretion is given to the granting authority under Article 21.1 as currently drafted. It should be explicitly stated that no compulsory licence may be granted where the patent owner (or its licensee) has offered to make available any product the subject of the patent (including, where process or method claims are to be used, products of the process or products to be used in the method) in sufficient quantities to satisfy to a material degree demand for such product in any substantial part of the Community.

It must be made clear that if one product the subject of a patent has been made available as set out above, no compulsory licence may be granted in respect of other products that may be encompassed by the patent.

Furthermore, non-exploitation four years after filing the patent application is in view of actual developments in specific sectors like for e.g. the pharmaceutical sector much too short and therefore not acceptable.

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<sup>3</sup> which must be stated to include the scope of the acts authorised, the geographical area in which the acts are authorised and the purpose for which the authorised acts may be performed.

Clarification is also needed on what is meant by “has not exploited the patent in the Community”. A community-wide compulsory license for non-working is only acceptable if working in one member state is clarified to represent working in the Community.

UNICE is of the opinion that the mention “reasonable terms” is incorrect. The requirement should not be that the patent has not been exploited on reasonable terms but that the patentee has refused to grant a license on reasonable terms.

### **Article 21-2**

UNICE believes that the following clarifications are required:

- Where the second (dependent) patent is a national (or series of national) patents, the scope of the compulsory licence under the first (Community) patent shall extend only to the territory in which national patents exist and there shall be no exhaustion of rights in respect of compulsory licensed products;
- If the second patent lapses, expires or is revoked, the compulsory licence under the first patent for the relevant territory must be immediately terminable by the proprietor;
- Exhaustion of rights should apply in respect of products licensed under the second patent;
- The scope of the compulsory licence must be limited to enabling exploitation of the second (dependent) patent, and is not a broader licence to produce other products covered by the first patent;
- The terms of the cross-licence referred to in Article 21.2 are to be determined (if the first patent owner so requests) at the time of the application for the compulsory licence.

UNICE is also of the opinion that the second sentence of the Article should be deleted and that the rules of CPC should provide for such matters.

### **Article 21-3**

The Regulation should provide that only the Council has the power to declare, acting by unanimous vote, that such a situation exists throughout the Community but that, to the extent that such a declaration would give rise to a power to grant compulsory licences, the declaration must be subject to speedy review by ECJ. National Governments may declare the existence of such situations in their territories, again subject to a right of speedy appeal, this time to national Courts. Therefore, the reference in a new Article 21.3a to a potential role for the Commission in granting compulsory licenses in times of crisis or other situations of extreme urgency is strongly opposed.

The Regulation should make it clear that if a crisis or situation of extreme urgency has been validly declared, CPC must still consider, in determining whether to grant a compulsory licence and its scope, the issues addressed under the heading general comments (article 20). It must be clarified that this provision is limited to crisis/situations of extreme urgency in the EU (or a substantial part of the EU). Further, it must be specifically stated that if a crisis/situation of extreme urgency in part of the EU is the ground for grant of a compulsory licence, the licence must be restricted in scope to those acts necessary to supply that part of the EU for the purpose of alleviating the circumstances and that there is no exhaustion of rights in respect of compulsorily licensed products.

UNICE believes that compulsory licences under Community patent applications should not be available to remedy anti-competitive practices. However, if this not accepted, amendment of article 21.3 is needed to make it clear, in relation to anti-competitive practices, that this ground can only be invoked where there has been a breach of EU competition rules under the Treaty and subordinate legislation and only after final determination of such a breach.

The draft suggests that there is to be power to declare that compulsory licences are to be made generally available under a particular patent, which is unacceptable. As appears from what is said above, it must be made clear that authorisation under Article 21.3 can only be granted following an application by a prospective licensee<sup>4</sup> and judicial determination that the applicant is entitled to a licence on specific terms.

#### **Article 21-4**

In order to comply with Article 31 TRIPs, this provision must be amended so as to provide that where a licence for semi-conductor technology is granted in times of crisis/extreme urgency, the scope of the licence is limited to public non-commercial use.

#### **Article 21-5:**

Each applicant for a compulsory licence must satisfy the first sentence of Article 21.5 in all cases but it can be clarified in the Regulation that in determining whether a “reasonable period of time” has passed, CIPC can take into account the existence of a crisis or situation of extreme urgency. In order that applications in situations of urgency/extreme crisis should not be unduly delayed, provision should be made in the implementing regulations for expedition of such applications.

#### **Article 21-6**

Although it is appropriate to lay down the procedural rules for applications for compulsory licensing in the implementing regulations, it is not appropriate to have the “rules of application” of article 21.1 in the implementing regulations if the “rules of application” are intended to set out substantive rules as to how article 21 is to be interpreted. Substantive rules as to the meaning of article 21 should be in the Regulation itself.

### **Article 22: Conditions applicable to compulsory licences**

#### **Article 22-1**

The preamble to article 22.1 should state that the terms of any compulsory licence granted pursuant to article 21 shall, subject to conditions contained elsewhere in the Regulation, be those which would be agreed between a willing licensor and willing licensee of the patent in question and shall be based on the assumption that the patent is valid.

A new condition should be inserted to the effect that should the compulsory licensee challenge, or assist a third party in challenging, the validity of the patent which is subject to the compulsory licence, the licensor has the right to terminate the licence by immediate notice.

#### **Article 22-1(a)**

Article 22.1(a) states that the scope and duration of the licence shall be limited to the purpose for which it was authorised. It does not allow CIPC to take into account whether a licensee is likely to contribute to alleviation of the circumstances involved in determining whether to grant a compulsory licence. This has to be remedied.

#### **Article 22-1(b)**

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<sup>4</sup> as is the case under Article 21.1 and 21.2 and as is required by Article 31(a) TRIPs.

As the compulsory licence is to be non-exclusive, the compulsory licensee should have no right to bring infringement proceedings unless the proprietor consents and article 33.2 thus requires amendment. The same point arises in relation to licensees of right.

#### **Article 22-1(c)**

The benefit of the licence should not be assignable. If the part of the enterprise benefiting from the licence is assigned, the assignee should apply for a new licence.<sup>5</sup> In addition, there should be no right to sub-licence or sub-contract, and the licence should be terminable upon change of control of the licensee.

#### **Article 22-1(d) and (g)**

In UNICE's opinion; the licence shall only authorise supply of the internal market of the Community (or, where the licence is granted in respect of part of the Community, that part). UNICE believes that the provision in relation to anti-competitive practices should be deleted.

#### **Article 22.1(e)**

In UNICE's view it should be mandatory (not optional) that the compulsory licence is cancelled when the circumstances which led to it cease to exist. This appears to be required by a combination of articles 31.1(a) and (g) TRIPs;

The words "adequate protection of the legitimate interests" of the compulsory licensee are too vague. Provision should be inserted to the effect that, whatever the circumstances, the right to continue working the patent should terminate no later than six months after the final decision to terminate the licence. The words "and are unlikely to recur" should be changed to "unless those circumstances are likely to recur";

An expedited procedure for applying for cancellation of the compulsory licence should be provided for in the implementing regulations so that the proprietor of the patent does not suffer the consequences of the compulsory licence for longer than is absolutely necessary.

#### **Article 22.1(f)**

UNICE is of the firm opinion that adequate remuneration is to be determined by reference to what would be agreed between a willing licensor and a willing licensee assuming the patent was valid. In addition, UNICE recommends:

- To make it clear that all circumstances of the case are to be taken into account, including the nature of the invention, the loss that will be caused to the proprietor by grant of the compulsory licence and the profit that the licensee can reasonably be expected to gain by grant of the compulsory licence;
- To delete the reference to the "economic value of the authorisation";
- To delete reference to any need to correct anti-competitive practices which should not be taken into account in determining what remuneration is adequate.

### **3. CHAPTER II A – COMPULSORY TRANSLATIONS OF THE COMMUNITY PATENT**

#### **Article 24b Consequence of the absence of compulsory translations and the option of a European patent designating one or more Member States**

Article 24b. 2 stresses that If a Community Patent is deemed to be void ab initio in accordance with paragraph 1 the holder of the patent may opt for the Community Patent to be considered as a European Patent designating one or more Member States, **under**

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<sup>5</sup> If this is not acceptable, the words "or goodwill" should be deleted as, from an ordinary lawyer's perspective at least, they are unclear in meaning.

**conditions and within the time limits specified by the implementing rules.** This clause results in creating uncertainty. It is necessary that the time limit and the effect of the absence of translations are discussed and decided before the Regulation is finally adopted.

**Article 24c: Authentic text of a Community Patent application or Community Patent**

Article 24c. 2 introduces the legal binding character of the translations of the claims in specific cases. UNICE is of the strong opinion that there should only be one authentic text for legal purposes and that should be the official EPO language text of grant. The translated claims should be of informative nature but not legally binding and differences between the original and translated claims should have no legal effect.

**UNICE is strongly against this newly introduced provision that puts into question the unitary character of the Community Patent. It should be strongly made clear that the authentic text of the patent claims is that of the language in which the patent was granted before the EPO.**

**3. CHAPTER III - RENEWAL, LAPSE AND VALIDITY OF THE COMMUNITY PATENT**

**Article 25: Renewal fees**

Provisions are needed allowing for restoration/restitution for failure to pay renewal.

**Article 26: Surrender**

The protection in article 26(3) of licensees against surrender of the patent in breach of licence needs to be strengthened; mere notice is not sufficient. Provision should be made to enable the licensee to challenge the surrender and to postpone the entry of the surrender until after the challenge has been dealt with by the appropriate courts.

**Article 27: Lapse**

Nothing in the draft Regulation addresses Supplementary Protection Certificates ("SPCs"). This must either be addressed in the Regulation, or Community legislation providing for SPCs must be amended to ensure that SPCs are available in respect of Community Patents.

Issues concerning, at least, infringement and validity of SPCs in relation to Community Patents should be litigated before the Community Intellectual Property Court in the same way as Community Patents.

The Regulation should explicitly provide for a twenty-year patent term, subject to payment of renewal fees and surrender.

**Article 29: Effects of invalidity**

It should be made clear in article 29.2(a) that, if a Community Patent is finally held to be invalid, injunctions granted to prevent infringement in previous cases will cease to have effect.

UNICE considers it illogical that damages paid in one infringement action before a Community Patent is subsequently declared invalid should not be repaid (article 29.1(a)) but that sums paid under a contract may be repayable if it is justified in the circumstances (article 29.1(b)).

**4. CHAPTER IV - JURISDICTION AND PROCEDURE**

UNICE has made clear that the judicial arrangements are key to the success of the Community patent system. The Treaty needs to be amended to allow creation of the

needed new specialised Intellectual property Court. Its precise nature and structure is not dealt with in the Regulation but will be set out in the Treaty and in the statutes of the Court. This must be defined before the Regulation is finally adopted.

An aspect of vital importance is the organisational structure of the first instance of this Court. A regional presence within the Community must be created, making the court accessible and allowing distribution within the Community of competence in patent litigation to be preserved – among practitioners as well as national patent judges. There should be links to patent courts handling litigation concerning European and nationally granted patents. In general, it is essential to create compatible judicial arrangements for Community patents and for European patents.

In order to have patent disputes resolved in an efficient and reliable way in two instances, UNICE considers it necessary that the Court includes judges with technical education. Further, UNICE believes that a system of preliminary rulings by the Court of Justice with regard to substantive patent law must not be introduced. It would preclude a timely resolution of patent disputes, if CIPC had to request such preliminary rulings. Questions of interpretation of substantive patent law are also not suitable to be answered *in abstracto* but must be judged together with the factual circumstances of the particular case.

### **Article 30: Actions and claims relating to the Community patent**

Article 30 allows for actions for declaration of non-infringement but not for an action by the patentee prior to an infringement having occurred.

It is essential that a genuine dispute regarding the scope of a patent can be resolved by an action brought by someone whom the patentee has alleged to have infringed the patent, be it in the past or by some future acts. However, it is equally essential that the patentee can bring an action when an infringement is threatening in order to prevent it from materialising. This is required by articles 50(1) and (2) TRIPs. The Regulation should allow for such an action.

UNICE is of the opinion that as far as damages are concerned, the losing party should pay the costs, including “delivery-up”.

Under article 42 and 43, CIPC will have the authority in an infringement action to grant injunctions under a penalty, preliminary as well as final. If such an order is not observed by the infringer, there will be a cause for a new infringement action. However, there must also be an action for the injunction having been violated, which should fall within the competence of CIPC.

Article 30 also mentions proceedings relating to use of the patent, which is confusing and unnecessary in UNICE's opinion.

### **Article 31: Invalidity action**

Article 31(2) provides that an action based on the fact that the proprietor is not entitled to the patent must, when more than one person is entitled to the patent, be brought jointly by all of them. A patent should not be declared invalid because the proprietor is only entitled to a part thereof. It is, however, not justified that a patent to which the proprietor has no title could not be declared invalid because one person of those entitled to the patent is not interested in being engaged in such an action.

Article 31(3) stipulates that an invalidity action may be brought even if opposition may still be filed or if opposition proceedings are pending before the Office. This may lead to parallel proceedings. It remains unclear what will be the legal consequences of differing decisions.



### **Article 32: Counterclaim for invalidity**

The Regulation should make it clear that the patent shall be declared invalid, if invalidity is counterclaimed and the court finds the patent to be invalid. In view hereof, the patentee should always be joined as a party to such an action but, if he is joined unwillingly, should have no cost liability.

### **Article 33: Infringement action**

Acts constituting infringement are defined in articles 7 and 8 and such acts are the basis for infringement actions. On the contrary, the facts referred to in article 19, i.e. that a licensee breaches a restriction in the licensing contract, do not *per se* constitute an infringement. UNICE believes that this article lacks clarity and should be redrafted.

UNICE would like to discuss article 33(2) further with the Commission. In UNICE's view, the beneficiary of a license of right or of a compulsory license should not have the right to bring infringement actions. His only right should be to terminate the license of right or the compulsory license.

### **Article 34: Action for declaration of non-infringement**

The bringing of a negative declaratory action should be subject to the condition that there is a genuine uncertainty as to the non-infringement, which should be specified in the Regulation. In particular, prior to bringing a declaratory action, the applicant must give sufficient details of his activities to the patent owner to enable the patent owner to assess whether the activities infringe.

Article 34(2) is unacceptable and should be deleted. It must be possible to raise invalidity issues as they can impact on the scope of any valid claim. The position in relation to negative declaratory actions should be no different from that of infringement actions.

### **Article 35: Proceedings relating to use of the invention prior to the grant of the patent**

An action relating to use of the invention prior to grant of the patent cannot be brought before grant of the patent, although once it is brought after grant, it can include acts performed before grant. However, the use of the words "the applicant" in Article 35 appears to suggest that proceedings can be brought before grant and these words should be deleted.

Any action based on pre-grant use should be analogous to an infringement action under Article 33, subject to the conditions of Article 11. **The applicant for the patent should not have a right to bring an action if he is not the same person as the proprietor of the patent. Similarly as already stated, the beneficiary of a license of right or of a compulsory license should not have the right to bring an infringement action.**

### **Article 37: Request for limitation**

Further to revision of EPC, it will be possible to restrict a granted European patent at the request of the patentee after the opposition procedure before the EPO. Such a uniform procedure is essential in order that the uniform scope of patents granted by EPO be retained after grant. Provided that this new procedure will be established, there is no need for and strong reasons against having a separate system under the Regulation.

The grounds on which limitations are to be allowed or refused should be specified. The only hint in the Regulation so far is the need to overcome an invalidity attack, which does not seem to allow for amendments, which do not limit, but merely seek to explain, clarify or correct.

UNICE believes that amendments should be made possible at any time, in the interest of judicial efficiency. The possibility of oppositions by third parties in respect of independent applications to amend should be considered.

#### **Article 39: Appeals**

Article 39(1) provides that first-instance judgments may be appealed. UNICE considers it as essential that decisions in provisional matters, in particular preliminary injunctions, and other final decisions than judgments on the merits of a case can also be appealed. UNICE believes that the presumption that, pending an appeal, an injunction should not be granted has to be reversed. Appeals should normally not suspend the enforcement of the judgment at first instance.

#### **Article 40: Commission's capacity to act**

In theory, there may be a public interest that an invalid patent is declared invalid. It is appropriate for the Commission to represent such a public interest. On the contrary, in patent litigation between private parties, as in other civil litigation, it is neither normal nor appropriate that a public body may intervene in order to influence the outcome.

#### **Article 42: Provisional or protective measures**

Article 42 allows CPC to take provisional and protective measures, leaving it to the statutes of the court to specify such measures and the conditions therefore.

It is of great importance for the operation of the Community patent system and has far-reaching consequences for the parties whether and under what conditions such measures, in particular preliminary injunctions, are granted. In view of the character of a fundamental element of said system, UNICE suggests that these measures are harmonised. It should in this connection be noted that national laws of the Member states widely differ in these respects and that new common arrangements require careful elaboration.

#### **Article 43: Penalties**

Under Article 43(a), an injunction may only be issued when the defendant is found to *have infringed* a Community patent. Such an order, in particular a preliminary injunction, may, however, also be required to prevent a threatening infringement from materialising.

#### **Article 44: Actions for damages**

For the operation of the Community patent system, it is essential to provide an effective remedy in the form of appropriate compensation for infringement. It should be noted that national laws of the Member states widely differ also in this respect and in many cases fail to provide such a remedy having the adequate reparative and preventive functions. This failure of national law in many countries is reflected in the provisions in this respect in TRIPs.

These provisions, however, represent an international minimum standard and not the standard required for the Community patent system to operate efficiently. A new common standard for the Community may never encourage infringement but must establish that it should not be profitable to infringe a Community patent.

For these reasons, UNICE is of the opinion that much more precise, yet balanced rules must be established in the Regulation and would appreciate the opportunity to discuss these rules with the European parliament and the Commission.

#### **Article 44.2**

UNICE is of the view, that the reference in Art 44.2 to behaviour and good faith being relevant to calculation of damages should be deleted for the following reasons. Damages

cannot be punitive, the effect of the provision is that damages can only be reduced below those, which the right owner has actually suffered. As one can see from experience relating to proof of willful infringement in the US, to introduce such concepts significantly complicates litigation.

Moreover, such a provision arguably infringes the requirements in Art 41.1 TRIPs that remedies should constitute a deterrent to future infringement and in Art 45.1 TRIPs that damages must compensate for the injury suffered by the right holder. Lastly, there is no such provision in the proposed Directive on enforcement of IP rights.

**For UNICE, it is important to ensure that the requirements of the proposed Directive on enforcement of intellectual property rights and all other future Community measures affecting national patents should apply equally to Community Patents.**

#### **Article 45: Period of limitation**

Article 45 raises a number of substantive and drafting issues, which UNICE would like to discuss further with the Commission.

These include:

- Whether it is appropriate to have a common limitation period of five years for a series of very different situations. In particular, UNICE believes that a claim or defence based on prior use (Article 12) should not be subject to any limitation and wishes to discuss whether a claim relating to use after publication but prior to grant should be subject to the five year limitation period;
- Whether the expiry of the limitation period should prevent proceedings for infringement generally (as the existing draft appears to suggest) or only prevent recovery of damages in respect of acts which occurred more than five years before proceedings for infringement commence

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**ANNEX**

**Article 1: Community Patent Law – proposed new wording**

This Regulation establishes a Community law on patents. This law shall only apply to a European patent granted by the E P O.. [throughout the entire area of the Community] and for which the applicant or joint applicants has or have requested that a single patent (hereinafter referred to as a Community patent) shall be granted.

For the purpose of ..... patents.

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**Article 21.1: Time when application can be made – proposed new wording**

The first sentence should be amended so as to read:

“ ..... to any person filing an application no earlier than four years after the patent application was filed or three years after the patent was granted (whichever is the later) if the patent proprietor has not ..... “.

Further, there appear to be some words missing from the current draft. It appears that the first sentence should read:

“ ..... if the patent proprietor has not exploited the patent in the Community, or has refused to grant a licence to do so on reasonable terms, or has not made effective ..... “.

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