UNICE
THE VOICE OF BUSINESS IN EUROPE

UNICE RESPONSE TO THE COMMISSION QUESTIONNAIRE ON THE FUTURE PATENT SYSTEM IN EUROPE

MARCH 2006

I. INTRODUCTORY REMARKS

Before responding to the specific questions of the Commission questionnaire, UNICE would like to make some preliminary introductory remarks.

A policy to protect intellectual property in general and inventions in particular is a vital need for Europe. It is an essential element of innovation policy and of the programme for implementation of the Lisbon strategy to promote growth and jobs and strengthen Europe's competitiveness. The United States has long had such a policy, while Japan recently made this its first priority. As for Europe, it is still far from having a clearly defined and proactive policy in this area. Europe continues to oppose patents and the general interest, whereas Europe's general interest requires a strong R&D policy based on an effective patent system that is accessible to all innovators.

Establishment and maintenance of a strong and effective patent system responds to several fundamental objectives of public policy in the general interest of society:

- Encouragement of innovation by giving innovators the prospect of obtaining a return on their R&D investment thanks to exclusive exploitation of the innovation over a certain period of time.

- Diffusion of technical knowledge through publication of patent applications, allowing research to be pursued by others thanks to dissemination of technical progress.

- Facilitation of technology transfers thanks to these transfers being based on solid legal foundations.

- Support for European R&D thanks to global protection of its results through implementation of international conventions on intellectual property.

Today this is an essential weapon in international competition. Far from having to be subject to other public policies on principle, the European Union's intellectual property policy must be regarded as a fully fledged public policy which ranks equal with other public policies.

II. RESPONSE TO THE QUESTIONNAIRE

SECTION 1 – BASIC PRINCIPLES AND FEATURES OF THE PATENT SYSTEM

1. *Do you agree that (1) clear substantive rules on what can and cannot be covered by patents, balancing the interests of the right holders with the overall objectives of the patent system; (2) transparent, cost effective and accessible processes for obtaining a patent; (3) predictable, rapid and inexpensive resolution of disputes between right holders and other parties; and (4) due regard for other public policy interests such as competition (anti-trust), ethics, environment, healthcare, access to information are the basic features required of the patent system?*

The first three elements identified are key features of a well-functioning patent system. The patent system is a foundation for Europe's prosperity and competitiveness. In a globalised economy, a robust system for stimulating and protecting European innovation will become even more important so as to ensure that Europe continues to be a global centre of knowledge, innovation and job creation.

The current patent system in Europe reflects to a great extent the above-mentioned features. Nevertheless, companies need improvements to the current system in terms of costs and legal certainty regarding litigation procedures.

Patent costs are extremely high in Europe compared in particular with the US and Japan, due mainly to wide-ranging translation requirements. Those high costs make access to the patent system particularly unattractive and difficult for SMEs. Patents granted in Europe are roughly three times more expensive than in Japan and even five times more than in the US. For European patents translation costs account for about one third of their total cost.

In this context, the London Agreement reducing translation requirements for European patents will greatly help decrease patent costs. Its ratification by all Contracting States of the European Patent Organisation is imperative and will contribute to the competitiveness of European companies. All efforts to accomplish its ratification by those countries that still have not done so, in particular France, whose ratification is essential for the Agreement to enter into force, should be supported and intensified.

Patents in Europe are currently enforced at national level. This can lead to divergent interpretations by different national courts and increases costs as well as legal uncertainty for companies. Industry must be confident that legal certainty can be guaranteed by the jurisdictional system. UNICE has consistently supported setting up an integrated judicial system for litigating European patents with the European Patent Litigation Agreement (EPLA). The issue of patent litigation in Europe will be addressed in greater depth in the relevant part of the questionnaire.

Substantive patent law in Europe has been harmonised to a great extent through the European Patent Convention (EPC) and the patent laws of the EPC Contracting

States. UNICE sees no need for further legislation at European level relating to substantive rules of patentability.

Other public policy interests (competition, ethics, environment, healthcare, access to information) are addressed in special laws, which provide an appropriate balance to ensure respect of those interests. The patent system should be used to promote Europe's innovation rather than other policy interests.

1.2 Are there other features that you consider important?

Quality is an important element of a patent system in terms of both grant and enforcement processes. High-quality grant processes grant patents only on truly novel inventions with claims that accurately define the true scope of the invention. This leads to a safer environment for companies to conduct their business, facilitates licensing arrangements and avoids unnecessary litigation with the ensuing costs.

Furthermore, an applicant's freedom of choice between the various patent systems that exist or may be created in the future is another key element that should be fully ensured. Freedom of choice should also cover the litigation route a rightholder can use to enforce his patents.

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

Broader public interests are reflected through specific provisions in the current legal framework such as the "ordre public" exception or the use of the opposition proceedings in the European patent grant process. Also, European competition law and the WTO TRIPs Agreement provide safeguards. No new legislation is required in this respect.

The Community as well as the Member States, the European Patent Office and national patent offices have an important role to play in increasing efforts to improve and promote IP awareness and understanding both within the main target groups of the patent system as well as with policy-makers and society at large, for example by means of better IP education.

SECTION 2 – THE COMMUNITY PATENT 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?

UNICE is of the strong conviction that in order for the Community Patent to be effective and attractive, it must meet the needs of users in terms of quality, cost-effectiveness and legal certainty.

A Community Patent needs to have a truly unitary character for the whole EU. In addition, it has to be affordable and competitive in terms of cost and high quality, and should make use of and coexist with the present European patent system. The Community Patent should guarantee legal certainty for both infringement and validity issues by providing an appropriate court system.

The common political approach of March 2003 and subsequent texts debated by EU Member States fail to ensure those fundamental elements and cannot constitute the basis for creating a Community Patent that can fully meet the needs of users.

Furthermore, the affordability of the Community Patent has been brought into serious question by the obligation for the applicant, at the time of the grant of the patent, to file a translation, at his own costs, of the claims in all official Community languages, as reflected in the common political approach of March 2003 and the subsequent legal texts. These translations are rarely ever used and will result in an excessive cost increase with the effect that important segments of industry will simply not use such a Community Patent.

UNICE supports the use of English-only regarding the language arrangements for the Community Patent since it is the most cost-effective solution.

The unitary character of the Community Patent should not be brought into question. This means that for legal proceedings only the text of the language in which the patent was granted should be considered binding for litigation purposes. Current proposals on the table giving such an effect are unacceptable for industry and make it clearer that the current proposals on the table fail to meet the needs of users.

In addition, the current proposals regarding the Community Patent jurisdiction do not meet industry's needs and require a fundamental revision.

For UNICE, a reliable jurisdictional system for Community Patent litigation must satisfy the following requirements:

- A language regime that allows judges and parties of different nationalities to communicate directly without requiring unrealistic language skills among judges or extensive translations. An appropriate language of proceedings is the language of the litigated patent or preferably English only.

- Judges in both first and second instance must have solid experience as specialised patent judges, in order to ensure reliable and speedy litigation. The evaluation of both technical facts and law is central for patent litigation. Therefore, it is also crucial that the judges understand presentations of complex technical matters and that the procedure is appropriate for such presentations, both in writing and orally.

- Procedural rules are key for a coherent patent litigation. In view of the present disparities between national laws, it is a demanding task to establish a completely new system at Community level. Until the rules are clearly set out, industry cannot properly evaluate the proposed jurisdictional system

According to the European Commission's estimates, only half of the future European patents will be Community Patents. European patents will continue to co-exist with Community Patents. This means that for the foreseeable future, litigation concerning European 'bundle' patents will be more frequent than litigation concerning Community Patents. Lack of coordination between the proposed system and the judicial systems for patent litigation in Europe will result in a judicial dichotomy between Community Patents and 'bundle' patents that will be detrimental for industry.

The requirements mentioned above are of particular importance for SMEs, which would be negatively affected by the financial burden of the latest proposals, regarding in particular the obligation to translate claims into 20 languages.

Only a truly unitary and cost-effective Community Patent is going to be attractive to users, in particular SMEs. This is not possible with universal translation requirements and legally binding claims in different languages.

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?

A common litigation system including common rules of procedure and a common court of appeal, for litigating infringement and validity disputes concerning European patents is key for industry in order to provide consistent and efficient enforcement of European patents.

Currently, patent disputes in Europe can be decided differently in the different countries. This leads inevitably to more litigation, higher costs, increased possibility of different decisions on the same subject-matter in different countries, greater legal uncertainty.

Companies need a judicial system that can provide them with simple and transparent procedures, ensure legal certainty and consistency.

UNICE attaches great value to the draft European Patent Litigation Agreement (EPLA). EPLA is designed to adapt the European patent system to the needs of companies for legal certainty while avoiding the harmful effects of the current divergent national proceedings as described above.

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?

Coordination of the judicial systems for Community and European Patents is essential for industry in order to enhance consistency and efficiency in the enforcement of patents within the Community and among the EPC Member States. Only then would unambiguous and uniform handling of patent disputes relating to patents granted by the EPO come into effect.

Crucial factors in establishing a common judicial system acceptable to industry include a workable language regime and experienced patent judges in both instances, including technically trained judges. To be operational in patent litigation, the language regime must require neither extensive translations nor unrealistic linguistic abilities on the part of judges.

Existing judges must be used efficiently as a joint resource for deciding cases regarding European and Community patents. Judges will need to deal with European patent cases during the long period when the number of Community Patent cases will remain low. This will also contribute to developing consistent case law for Community and European patents, which will be essential for legal certainty.

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?

Differences between Member States are ultimately marginal in terms of creating barriers to free movement or distortion of competition and do not justify an intervention.

A partially different interpretation of the law by the courts of the EPO Member States cannot be avoided, as can be the case in various courts in one Member State. In this case, a common litigation system rather than a harmonisation initiative can provide an adequate solution.

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

UNICE does not believe that the options outlined in this part of the questionnaire bring added value to the debate regarding the future patent policy to develop a patent system reflecting the needs of users in Europe.

Mutual recognition of national patents is not feasible. Many national patent offices in Europe have never conducted substantive examination work. This would also negatively influence the quality of patents. A validation of national patents by the EPO does not make sense, as it would duplicate work and costs and would prolong examination even more.

Efforts need to focus on further improving the current patent system in Europe by ensuring the ratification and the entry into force of the London Agreement as well as successfully concluding EPLA. Positive developments in those two areas could help re-initiate the Community Patent discussions on a sounder basis to fully reflect the needs of users in Europe.

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

None.

SECTION 5 – GENERAL

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

UNICE will make some general comments without using the proposed ranking for these questions.

The patent system in Europe, as already indicated in the UNICE response to the Commission questionnaire is of key importance for Europe's innovation and competitiveness.

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?

All intellectual property rights are important and essential to contribute to a general framework environment conducive to innovation. Contrary to trademarks and design rights, where unitary EU-wide protection is available, there is regrettably still no EU-wide patent protection that fully corresponds to the needs of users.

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

A well-functioning patent system in Europe is key for European business. At the same time, the world-wide patent system is also important and UNICE supports efforts to harmonise substantive patent law rules to the benefit of the users of the patent system world-wide.

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?

UNICE and its member federations also represent SMEs and UNICE would like to make some remarks regarding the importance of intellectual property for SMEs to enhance their competitiveness.

Despite the importance of SMEs for the vitality of the economy and the potential offered by intellectual property for enhancing SMEs' competitiveness, intellectual property protection is often too complex and costly for them.

SMEs are primarily victims of the costly and complex procedures required to protect their intellectual property assets. This is why SMEs will benefit even more from further

improvements to the functioning of the patent system in Europe with the ratification of the London Agreement on translation costs and the setting-up of a common litigation system through EPLA. In addition, a truly unitary and cost-effective Community Patent will be of particular benefit to SMEs.

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

No.

* * *