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HARMONIZATION ENFORCEMENT: THE REALITY BEHIND THE PANACEA

W. DAVID WESTERGARD*

INTRODUCTION

Patent harmonization has as its grand design the creation of uniform standards to govern the international procurement and enforcement of patents.¹ The Draft Treaty attempts to circumscribe all of the substantive provisions necessary to achieve this objective in one civil law construct.

Most of the literature discussing the advisability of the United States entering into a harmonization treaty is overly enthusiastic on the subject.² Published reports herald the benefits achieved by harmonization, but refuse to acknowledge potential pitfalls and harm to the interests of the United States.³ For example, the Advisory Commission on Patent Law Reform, in proposing changes to United

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1. *Draft Treaty Supplementing the Paris Convention for the Protection of Industrial Property as Far as Patents Are Concerned* ("Patent Law Treaty"), WIPO, Preamble, Doc. PLT/DC/3 (Dec. 21, 1990) [hereinafter PLT], reprinted in *Records of the Diplomatic Conference for the Conclusion of a Treaty Supplementing the Paris Convention as Far as Patents are Concerned*, WIPO, Diplomatic Conference, pt. 1 (1991) [hereinafter *Records*]. All citations to the Treaty refer to the Draft reprinted in the *Records of the Diplomatic Conference*.

2. See generally William T. Fryer, *Patent Law Harmonization: The Current Situation and Alternatives Available* (pts. 1 & 2), 72 J. PAT. & TRADEMARK OFF. SOC'Y 242 (1990). If the object to be achieved by United States' ratification of the Treaty was to benefit United States inventors in foreign markets, perhaps the enthusiasm for the Treaty is justified. However, the fundamental underpinnings of the United States patent system are to promote the progress of the useful arts in the United States. Establishing correct priorities suggests caution before entering into a system where we provide tremendous advantages to foreign nationals in the United States and obtain little benefit to United States nationals in foreign markets. Perhaps harmonization, on balance, is good for the United States. However, if existing patent law provides greater benefits to the United States than does harmonization, we stand to lose, on balance.

3. See STEPHEN P. LADAS, *PATENTS, TRADEMARKS AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION* 15 (1975).

[H]armonization has to be viewed realistically. The trend toward viewing 'harmonization' as a good thing no matter what the problems are, as an end in itself, is subject to a fair degree of qualification. In certain areas it may be simply undesirable or impractical from a country's national point of

States patent law which would bring United States law into conformity with provisions in the Treaty, argues that "everybody else is doing it."⁴ This rush to conform forces a less than thorough evaluation of the Treaty's intended objectives and also leaves doubt as to whether the existing provisions adequately accomplish those objectives.

On the one hand, the Treaty attempts far more than is required simply to facilitate procurement of an international patent.⁵ On the other hand, the Treaty attempts far too little, while appearing comprehensive, for effective international enforcement of patents. While the Treaty goes a long way to establish uniform standards to govern resolution of substantive patent issues in enforcement proceedings, its goals are not realized. The complete lack of uniform discovery, evidentiary or procedural standards renders illusory the benefits derived from the uniform substantive provisions.

This Article compares and contrasts proposals for the international harmonization of patent enforcement provisions with existing standards in the United States. Based on this comparison, this Article attempts to evaluate the impact of a harmonized enforcement law on existing patent law precedent. Should the United States enter into a treaty which forces it to give up much of the considered precedent which has guided existing and developing

view, since the concessions that would have to be made to achieve agreement may not be worth it.

Id.

4. See THE ADVISORY COMMISSION ON PATENT LAW REFORM: A REPORT TO THE SECRETARY OF COMMERCE 11 (1992) [hereinafter ADVISORY COMMISSION REPORT]. The Commission states that "other countries appear unwilling to change their [patent] systems absent acceptance of first-to-file by the United States" as the justification for abandoning the highly beneficial first-to-invent United States system. *Id.* The Commission's awareness that "many countries have adopted or intend to adopt" a 20 year patent term is reason enough for the United States also to adopt a 20 year term. *Id.* at 12. Finally, the Commission presupposes that simply because, "[e]arly publication of applications is common to nearly every other country in the world," the United States ought to abandon its long-held practice of maintaining secret all applications until such time as they issue into patents. *Id.* See also, Edward G. Fiorito, *The WIPO Harmonization Treaty*, 19 AIPLA Q. J. 1, 2 (1991) ("[T]he proposed Treaty would result in the abolition of the first-to-invent system, which is regarded by a number of practitioners as the 'Holy Cow' which cannot be sacrificed, *although the United States is the last country where this system has survived in its present form.*") (emphasis added).

This type of superficial analysis displays a myopic view of the United States' objective in the entire harmonization debate. Of course, if our goal is simply to complete a treaty, we must concede on several fronts. However, the better question is whether we should enter into a treaty at all.

5. The European Patent Convention ("EPC"), arising from the Convention on the Grant of European Patents taking effect in October 1977, provides a workable model for the procurement of international patents. CONVENTION ON THE GRANT OF EUROPEAN PATENTS (EUROPEAN PATENT CONVENTION) done at Munich on Oct. 5, 1973, *reprinted in* 3 Common Mkt. Rep. (CCH) ¶ 5503 (1974).

United States patent law since the first patent act of 1793?⁶

Finally, this Article suggests that, prior to adopting the Treaty, the United States should seek provisions harmonizing evidentiary and procedural standards that will govern infringement suits in the international arena.⁷ Without such uniform procedural guidelines, the same substantive standard on patent enforcement may yield dramatically different results depending on the forum having jurisdiction.

I. IMPACT OF HARMONIZED ENFORCEMENT LAW ON UNITED STATES PRACTICE

A. *Present United States Patent Enforcement Provisions*

1. *Infringement: Literal or by Equivalents*

Sections 271 and 272 of chapter 28 of the United States Patent Act, establish the substantive standards that govern infringement of a United States patent.⁸ Under the statute, "whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefore infringes the patent."⁹ The statute does not explain how to determine whether a defendant has misappropriated the patented invention. However, a rich history of case law reveals that infringement can be found in one of two ways: literal infringement or infringement under the doctrine of equivalents.

Literal infringement occurs when a person appropriates every element of at least one claim of a patent. This requires a two-step analysis: first, interpretation of the claims (a legal determination); and second, assessment of whether the properly interpreted claims cover the accused device (a factual determination).¹⁰ Claims are interpreted in light of the specification, prosecution history, other claims and expert testimony. Once interpreted, the fact finder de-

6. Patent Act of 1793, 1 Stat. 318.

7. Art. 2(3) of the Paris Convention reserves to member states the right to enact provisions of law "relating to judicial and administrative procedure and to jurisdiction. . . ." *Paris Convention for the Protection of Industrial Property*, WIPO, Doc. 274(E) (1992) [hereinafter *Paris Convention*], reprinted in *INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY* 21 (Marshall A. Leaffer ed., 1990).

8. Patent Act, 35 U.S.C. §§ 271, 272 (1988).

9. *Id.* § 271(a). Section 271 also provides for infringement liability for persons who actively induce infringement, *id.* § 271(b), and for contributory infringers, *id.* § 271(c). In addition, section 271 sets out other ramifications of infringement.

10. See *Hormone Research Found., Inc. v. Genentech, Inc.*, 904 F.2d 1558 (Fed. Cir. 1990) (upholding summary judgment on the interpretation of the claim after de novo review); ROBERT L. HARMON, *PATENTS AND THE FEDERAL CIRCUIT* § 6.2, at 159 n.11 (2d ed. 1991).

termines whether the claims cover the accused device; i.e., whether the accused device incorporates each element of the claim.

An accused device that does not meet each claim literally, may still infringe under the doctrine of equivalents if it performs substantially the same function in substantially the same way to achieve substantially the same result.¹¹ A significant body of law has been developed on what constitutes infringement by equivalents.¹²

2. Damages—Not Less Than a Reasonable Royalty

The United States Patent Act assures the patentee a minimum level of damages. The patentee's damages must be "adequate to compensate for the infringement but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court."¹³ Therefore, a reasonable royalty is a minimum which establishes a damages floor.

The inventor can obtain damages from the infringer regardless of the infringer's culpability or pre-infringement awareness of the patent. However, United States law limits the extent to which the patentee can recover damages. If the patent owner fails to provide some indication on the patented article that the article is protected by a United States patent ("mark" the patented article), "no damages shall be recovered . . . in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recov-

11. See generally Linda Susswein, *The Patent Law Equivalency Doctrine and Reduced Instruction Set Computing Technology: If It Computes Like a Duck, Is It Still a Duck?*, 16 RUTGERS COMPUTER & TECH. L.J. 571 (1990); William E. Plyer, *Elemental Equivalence: Interpreting "Substantially the Same Way" Under Pennwalt After Corning Glass*, 71 J. PAT. & TRADEMARK OFF. SOC'Y 546 (1989).

12. See *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605 (1950) (holding that substitution of silicates in a welding flux is an infringement by equivalents); *Charles Greiner & Co. v. Philadelphia Cervical Collar Co.*, 962 F.2d 1031 (Fed. Cir. 1992) (holding that no infringement occurs when a competitor's sales representatives use trademark where there is no showing of confusion about the source); *London v. Carson Pirie Scott & Co.*, 946 F.2d 1534 (Fed. Cir. 1991) (holding that luggage clamp that grasped hanger shanks did not violate patent of clamp that grasped hanger hooks); *Wilson Sporting Goods Co. v. David Geoffrey & Assoc.*, 904 F.2d 677 (Fed. Cir. 1990) (holding that no infringement by equivalents can occur if the asserted range of equivalents of the claim limitations would ensnare prior art); *Corning Glass Works v. Sumitomo Elec. U.S.A., Inc.*, 868 F.2d 1251 (Fed. Cir. 1989) (holding that an equivalent must be found for every limitation somewhere in the accused device, but not necessarily in the corresponding component); *Pennwalt Corp. v. Durand-Wayland, Inc.*, 833 F.2d 931 (Fed. Cir. 1987) (holding that infringement requires that the substantial equivalent of each element be found in the accused device).

13. 35 U.S.C. § 284 (1988).

ered only for infringement occurring after such notice.”¹⁴

On the other hand, if the patent owner does mark the patented article, the infringer is charged with notice of the patent. This constructive notice of the patent opens the door to damages. Under these circumstances, the infringer’s actual ignorance of the patent will not limit the patent owner’s right to damages.

Additionally, United States law also allows a court to award damages for infringement “up to three times the amount found or assessed.”¹⁵ Courts have not increased damages under this provision except in cases of willful infringement. Increased damages act to deter willful infringement and to punish the willful infringer.¹⁶

3. Challenges to Validity in Patent Litigation

United States law presently allows an accused infringer to challenge the validity of the patent-in-suit as a defense to the infringement accusations. The infringer can base these challenges on the patentee’s failure to comply with any of the statutory requirements for obtaining a patent. For example, an accused infringer will often attempt to avoid infringement liability by proving that the patent is invalid for reasons of novelty or obviousness.

Novelty implicates the patent law requirement that the patented subject matter be new.¹⁷ A patent fails the novelty test if the subject matter was known or used in this country before the date of invention, or if the subject matter was in public use or on sale in this country more than one year before the filing date.¹⁸ A patent is

14. *Id.* § 287. Section 287 also provides that filing the infringement suit constitutes notice of infringement. Section 286 of the Patent Act imposes a time limitation on damages recovery: “[N]o recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action.” *Id.* § 286.

15. *Id.* § 284.

16. *See* *Avia Group Int’l, Inc. v. L.A. Gear Cal., Inc.*, 853 F.2d 1557 (Fed. Cir. 1988) (finding that one of the purposes of the Patent Act is to deter willful patent infringement). To support a finding of willful infringement, the fact finder must determine that the accused “infringer had no reasonable basis for believing it had a right to do the acts in question.” *HARMON, supra* note 10, § 12.4(b), at 436 (citing *Rosemount, Inc. v. Beckman Instruments, Inc.*, 727 F.2d 1540, 1548 (Fed. Cir. 1984)). “The test is whether, under all the circumstances, ‘a reasonable person would prudently conduct himself with any confidence that the courts might hold the patent invalid’ or not infringed.” *Id.* (citing *Central Soya Co. v. Geo. A. Hormel & Co.*, 723 F.2d 1573, 1577 (Fed. Cir. 1983)).

17. 35 U.S.C. § 102 (1988). Section 102 imposes on patent law the requirement that patented subject matter be new in the United States. *Id.* While “publications outside the United States also qualify as anticipating disclosures [this is based on the] assumption of the larger availability of such information to United States nationals, rather than any focus on the worldwide nature of the advance sought to be patented.” R. Carl Moy, *Essay: Patent Harmonization, Protectionism, and Legislation*, 74 J. PAT. TRADEMARK OFF. SOC’Y 777, 784 n.23 (1992).

18. 35 U.S.C. § 102(a), (b).

invalid as obvious if the patented subject matter would have been obvious at the time the invention was made to one having ordinary skill in the art to which the subject matter pertains.¹⁹

Further, section 112 of the Patent Act also provides other defenses to infringement. Proof of the patentee's failure adequately to describe the invention, to enable the practice of the invention, or to set forth the best mode of practicing the invention will invalidate the patent during litigation.²⁰ Therefore, the accused infringer has several courses of action to defend against the inventor's claim.

B. Enforcement Provisions in the Treaty

The Harmonization Treaty does not contain provisions directly related to enforcement. Rather, the Treaty simply defines the rights granted by a patent, including the patent owner's rights *vis a vis* third parties. Under the Treaty, the first true inventor to file an application for patent is entitled to the patent.²¹ The Treaty adopts requirements of utility, absolute novelty,²² and non-obviousness.²³

Having obtained a patent, the Treaty provides the right to prevent third parties from making the patented product or from offering the product for sale. In the case of a patented process, the patent owner can prevent third parties from using the process or from offering for sale a product made by the process.²⁴ The threat of monetary damages and injunctive relief provide the muscle to secure these rights to the patent owner.

19. *Id.* § 103.

20. The Commission on Patent Law Reform recommends eliminating the defenses of best mode under 35 U.S.C. § 112 and the "on sale" bar under 35 U.S.C. § 102(b). ADVISORY COMMISSION REPORT, *supra* note 4, at 100. According to the Commission, these requirements are "never considered during [the] examination of the patent." *Id.* In addition, "failure to meet these requirements does not necessarily lead to some objective harm to the public." *Id.* Compliance with the best mode requirement is difficult to assess in the *ex parte* examination of the patent, is very subjective, and is fraught with potential for abuse. *Id.*

21. PLT, *supra* note 1, art. 9 (holding that when two or more inventors make the same invention, the patent is given to the inventor who first files a patent application). This assumes, of course, that other requirements of patentability are satisfied.

22. "An invention shall be considered novel if it does not form part of the prior art." PLT, *supra* note 1, art. 11(2). Prior art includes everything which has been made available to the public anywhere in the world, before the filing/priority date. *Id.* This provision differs significantly from the United States definition of novelty under section 102 of the Patent Act. 35 U.S.C. § 102. See *supra* note 17 for a discussion of United States novelty requirements.

23. An invention involves an inventive step (is not obvious) if "it would not have been obvious to a person skilled in the art at the [filing/priority] date . . . of the application claiming the invention." PLT, *supra* note 1, art. 11(3).

24. *Id.* art. 19. Subparagraph (3) of Article 19 provides certain exceptions to the rights granted in paragraphs (1) and (2). *Id.* The author's discussion of enforcement provisions in the preceding text and footnotes assumes the existence of rights conferred by subparagraphs (1) and (2).

1. *Infringement and Claim Interpretation*

A fundamental proposition of patent enforcement is that a patent's claims define the invention.²⁵ Thus, whether a product or process infringes the patent claims largely depends upon how a court interprets the claims. Article 21 of the Treaty acknowledges the fundamental proposition that the claims define the invention.²⁶ It goes on to provide guidelines for claim interpretation that are consistent with United States law.

Specifically, under Article 21, the court interprets the claims in light of the description and drawings. The claims

shall not be interpreted as being confined to their strict literal wording. Neither shall the claims be considered as mere guidelines allowing that the protection conferred by the patent extends to what, from a consideration of the description and drawings by a person skilled in the art, the owner has contemplated, but has not claimed.²⁷

Article 21(2) of the Treaty also codifies the United States doctrine of equivalents²⁸ by stating that claims shall be broad enough to cover not only the express elements set out in the claim, but also any equivalents to those elements.²⁹ An element is equivalent if, *at the time of the infringement*, it "performs substantially the same function in substantially the same way and produces substantially the same result as the [claimed] element"³⁰ The Treaty, however, proposes an alternative definition of equivalents: An element can be equivalent if it is obvious to a person skilled in the art that the same result can be achieved by the equivalent element.³¹ Pre-

25. See, e.g., *Leeds v. Commissioner*, 955 F.2d 757, 759 (D.C. Cir. 1992) (asserting that "[p]atent claims define the invention for the purpose of applying the conditions of patentability"); *Ashland Oil, Inc. v. Delta Resins & Refractories, Inc.*, 776 F.2d 281, 293 (Fed. Cir. 1985) (asserting that "[t]he claims of a patent define the invention").

26. PLT, *supra* note 1, art. 21(1).

27. *Id.* art. 21(1)(b). This explanation of claim interpretation, while expressed in loose terminology, is basically consistent with United States case law where claims are interpreted in light of the specification and prosecution history, and the principle that the patentee is his own lexicographer. See *supra* notes 25-32 and accompanying text for a discussion of claim interpretation. However, United States law allows other aids to claim interpretation, such as expert testimony. See, e.g., *Texas Instruments, Inc. v. United States Int'l Trade Comm'n*, No. 92-1168, 1993 WL 63006, at *4 (Fed. Cir. Mar. 10, 1993) (asserting that "[c]laim interpretation involves a review of the specification, the prosecution history, the claims . . . and, if necessary, other extrinsic evidence, such as expert testimony").

28. For a general discussion of the Treaty's application of the doctrine of equivalents, see Heinz Bardehle, *Equivalents and International Patent Law Harmonization*, 20 AIPLA Q. J. 119 (1992); Dr. Jochen Pagenberg, *The WIPO Patent Harmonization Treaty*, 19 AIPLA Q. J. 1 (1991).

29. PLT, *supra* note 1, art. 21(2).

30. *Id.* art. 21 (2)(b).

31. The Treaty contains no provisions on the types of permissible claims, such as means plus function claims contemplated by 35 U.S.C. § 112(6). How-

sumably, the codification of the doctrine of equivalents will eliminate the two-tiered approach to infringement utilized by United States courts in favor of a literal infringement analysis where claims literally include their equivalent elements.³²

2. Enforcement of Rights

Under Article 23 of the Treaty, the patent owner can seek an injunction, damages, or both against any person who infringes the patent. The right, under the Treaty, to restrain the manufacture or sale of a product (or the use of a patent process or sale of a product made by the process) is substantially the same as the United States right under 35 U.S.C. section 283 to prevent the violation of any right secured by a patent.³³ However, the patent owner's right to damages under the Treaty may differ significantly from the damages provided under United States law.

a. Damages Under the Treaty

Under Article 23 of the Treaty, the owner of the patent "shall have at least the right (ii) to obtain damages, *adequate under the circumstances*, from any person who, without . . . [his] authorization, performed any of the acts [proscribed by Article 19]."³⁴ This provision changes United States law in two significant respects.

As noted above, in the United States, a "reasonable royalty" provides a floor for patent damages.³⁵ This floor adequately rewards individual initiative without imposing on the patent owner

ever, analyzing the scope of means plus function claims under Article 21 will likely result in the same interpretation as analyzing the scope of such claims under section 112 of the Patent Act. See 35 U.S.C. § 112 (1988).

32. In *London v. Carson Pirie Scott & Co.*, 946 F.2d 1534, 1538 (Fed. Cir. 1991), the Federal Circuit cautioned that resort to the doctrine of equivalents should not be automatic in every infringement case. Rather, the court suggested that the doctrine of equivalents should be reserved to combat culpable piracy. *Id.* at 1538. If the Federal Circuit intends sharply to reduce application of the doctrine of equivalents, someone must inform United States participants involved in the WIPO negotiations. In any event, the United States' adoption of the Treaty will nullify the Federal Circuit's unjustified attempt to limit the scope of patent protection.

33. Under 35 U.S.C. § 283, a court "may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by [a] patent." 35 U.S.C. § 283 (1988).

34. PLT, *supra* note 1, art. 23.

35. In *Fromson v. Western Litho Plate & Supply Co.*, 853 F.2d 1568, 1574 (Fed. Cir. 1988), the Federal Circuit noted the importance of achieving a "[truly] fair and reasonable royalty." The Federal Circuit sought to avoid the perception that "blatant, blind appropriation of inventions patented by individual, nonmanufacturing inventors is the profitable, can't-lose course The right to exclude conferred by a valid patent thus deserves the same respect when that right is in the hands of an individual as when it is in the hands of a corporation." *Id.* at 1575.

the obligation of manufacturing and marketing the claimed invention on her own behalf. It also provides a significant disincentive for would-be infringers. Were damages limited simply to the patent owner's lost profits, infringers could ignore with impunity a small inventor's license solicitations or even threats of infringement litigation.³⁶ By not suggesting a standard by which the minimum amount of damages is determined, Article 23 of the Treaty creates ambiguity on the appropriate amount of recovery to which a patent owner is entitled by virtue of the infringement.³⁷

The Treaty also introduces an important limitation on the rights of the patent owner to recover damages at all. Under the Treaty, damages are only available if the accused infringer "[was] or should have been aware of the patent."³⁸ The Treaty, however, provides no hint as to what will qualify under the "should have been aware" prong of Article 23(1)(ii). Unfortunately, various constructions of this provision are possible. The Treaty may be attempting to introduce a "willfulness" limitation on the patent owner's right to recover damages. If this is the case, the evidence required to show entitlement to damages may be difficult to adduce, especially if the burden of proof to show willful infringement is clear and convincing as in the United States.³⁹

Logic would suggest that an infringer "should have been aware" of the patent if patented articles of the sort the infringer was making or selling were circulating about in the marketplace bearing the patent number.⁴⁰ However, because the Treaty does

36. *Id.* at 1574.

37. Granted, even the determination of a reasonable royalty in the United States is less than precise. In *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970), *modified on other grounds*, 446 F.2d 295 (2d Cir. 1971) the court considered fifteen factors as impacting the valuation of a reasonable royalty. In *Fromson*, the Federal Circuit noted that "[d]etermining a fair and reasonable royalty is often . . . a difficult judicial chore, seeming often to involve more the talents of a conjurer than those of a judge." *Fromson*, 853 F.2d at 1574. However, while the United States standard may be imprecise, it is more concrete than no standard at all. With time, case law under the Treaty would begin to provide some indication of a minimum damages threshold, if any. However, in the interim, patentees would question whether the monopoly granted in exchange for the disclosure of their inventions is empty.

38. PLT, *supra* note 1, art. 23(1)(ii). As noted *supra*, United States law imposes a notice requirement, but a patent owner satisfies this requirement simply by marking the patented article and, thus, giving constructive notice of the patent.

39. Because United States law encourages building upon disclosures of published patents (designing around a patent), resort to increased damages for willful infringement should not be permitted unless the infringer's culpability is proven by clear and convincing evidence. *E.I. du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 849 F.2d 1430, 1439 (Fed. Cir. 1988).

40. If this is true, then the Treaty makes no substantive change from present United States law.

not contain a specific provision to that effect, each Contracting Party is left to decide the effect of this "harmonized" enforcement provision on a claimant's rights within the Contracting Party's jurisdiction.

b. Right to Sue on Published Applications

Article 23 of the Treaty opens up new possibilities for a patentee to obtain damages from an infringer. The patent applicant has the right to obtain "reasonable compensation" from any person who commits the proscribed acts of Article 19 with respect to an invention claimed in a "published application."⁴¹ In this instance, the Treaty appears to require a showing of "willfulness" before damages may be recovered. Pursuant to the Treaty, the infringer must have actual knowledge or have received written notice "that the invention that he was using was the subject matter of a published application"⁴²

The determination that the accused actually infringed the application can only be made on the basis of claims that are eventually issued in the patent. Thus, Article 23 permits Contracting Parties, at their option, to preclude any suit until after the issuance of the patent. Unless the issued claims are identical with those of the application, the narrower claims as issued govern the infringement determination.⁴³

This section of the Treaty invites abuse. Under this section, the applicant can request early publication in order to forestall potential infringement of a third party. The "infringer" may employ legitimate efforts to avoid the claims of the published application only to find that the applicant modified the claims during the pendency of the examination to track the "infringer's" design-around efforts. Moreover, the "reasonable compensation" promised by subsection 2 seems to suggest a different measure of damages for infringement of a published application than for infringement of a patent where

41. Under Article 15 of the Treaty, a Contracting Party's Office "shall publish the application as soon as possible after the expiration of 18 months from the filing date or, where priority is claimed, the priority date." PLT, *supra* note 1, art. 15(1)(a). Article 15 also gives the applicant the right to request earlier publication. *Id.* art. 15(2).

42. *Id.* art. 23(2)(i), (ii).

43. This section of the Treaty suggests the United States doctrine of intervening rights. A person who makes, purchases or uses anything patented by a reissue patent has no liability unless the thing made, purchased or used infringes a valid claim of the reissue patent which was in the original patent. 35 U.S.C. § 252 (1988). See also *Slimfold Mfg. Co. v. Kinkead Indus., Inc.*, 810 F.2d 1113, 1115 (Fed. Cir. 1987) (asserting that claims in the reissue are considered "in the original patent" if they are without substantive change in scope).

the measure is "damages, adequate under the circumstances."⁴⁴

c. Defenses to a Charge of Infringement

In the United States, the accused infringer can defend against an infringement allegation on the grounds that the patent-in-suit is invalid for failing to comply with a condition of patentability.⁴⁵ Thus, much of the United States law on obviousness, novelty or compliance with the provisions of section 112 of the Patent Act comes from the context of post-issuance validity determinations in infringement litigation.⁴⁶

The Treaty contains no provisions at all relating to potential defenses to an infringement lawsuit. However, Article 18 of the Treaty provides for administrative revocation of a patent.⁴⁷ According to Article 18, "any person shall have the right to request the competent Office to revoke the patent . . . [if] the conditions of novelty or inventive step are not satisfied."⁴⁸ Article 18 expressly excludes revocation on other grounds such as failure to comply with formal or procedural requirements.⁴⁹ The Treaty contemplates only novelty and non-obviousness (inventive step) as grounds for revocation.⁵⁰

However, whether an accused infringer could seek administrative revocation during litigation is doubtful in light of the provisions of Article 18. Subsection (1)(b) of Article 18 invites each Contracting Party to establish a fixed time period from the announcement of the patent grant, not less than six months, during which a person may petition for revocation.⁵¹ This provision, together with subsection (2) of Article 18 which prohibits pre-grant opposition, seems to suggest that any administrative revocation would take place early in the 20 year life of the patent. In any event, Contracting Parties who establish early dates under subsection (1)(b) by which requests for revocation must be made will be precluded from resorting to this procedure during litigation in the latter years of the patent. Moreover, whether litigation could be stayed during

44. PLT, *supra* note 1, art. 23(1)(ii), (2). This provision of the Treaty exemplifies potential pitfalls associated with a less-than-comprehensive civil law model for patent law. Professor Moy counsels caution in attempting to make numerous fundamental changes in the United States patent system by fiat rather than with the aid of common law traditions. See Moy, *supra* note 17, at 29-35.

45. 35 U.S.C. § 282(3) (1988).

46. See, e.g., *supra* notes 10, 12, and 16 for United States cases addressing infringement.

47. PLT, *supra* note 1, art. 18.

48. *Id.* art. 18(1)(a).

49. *Id.* art. 18(1)(c).

50. *Id.* art. 18(1)(a).

51. *Id.* art. 18(1)(b).

the pendency of administrative action on the request for revocation would presumably be up to each Contracting Party.⁵² Therefore, Article 18's role as a defense to a charge of infringement under the Treaty has its difficulties.

II. ABSENCE OF EVIDENTIARY AND PROCEDURAL STANDARDS

Prior to the creation of the Federal Circuit, patent litigants in the United States perceived advantages or disadvantages associated with each of the different regional circuits. A patentee would seek to file suit in a forum friendly, or at least benign, to patents. The accused infringer would seek declaratory relief of invalidity or non-infringement in a regional circuit having a penchant for invalidating patents. Judge Henry Friendly described this race to the courthouse of choice as "mad and undignified."⁵³ Patent litigants evaluated their odds in different courts notwithstanding a unified procedural and substantive law. Not only did the perceived attitude toward patents affect the choice of forum, but differing procedural or evidentiary rules impacted the litigants' burden of proof or access to evidence in the different regional circuits.⁵⁴

The issues involved in determining whether an invention was invalid as obvious illustrate the dilemma well. Section 103 of the United States Patent Code provides that an invention is obvious "if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious . . . to a person having ordinary skill in the art to which said subject matter pertains."⁵⁵ In the famous case *Graham v. John Deere Co.*,⁵⁶ the United States Supreme Court identified four factors necessary to an obviousness determination: the scope and content of the prior art; the differences between the prior art and the claims at issue; the level of ordinary skill in the art; and, secondary considerations such as commercial success, long felt needs, etc.⁵⁷

52. Providing Contracting Parties with options such as this, or such as the proposed alternatives to many of the articles of the Treaty, begs disunity. A litigant, with no right to assert invalidity after a specified time period, may not even risk doing business with the Contracting Party if the litigant's only hope to avoid substantial patent infringement liability is a non-infringement argument. The obvious solution is to permit validity defenses in infringement litigation. However, because Article 18 limits revocation to the failure to meet novelty or inventive step requirements, patent litigants have no clear guidance on their right to challenge validity on other grounds. PLT, *supra* note 1, art. 18(1)(a).

53. HENRY FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 155 (1973).

54. See Rochelle C. Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 30 (1989) (discussing some of the statistics revealing the frequency with which courts found patents valid and infringed).

55. 35 U.S.C. § 103 (1988).

56. 383 U.S. 1 (1966).

57. *Id.* at 17.

The regional circuits, called upon to implement this standard, did so without consistency.⁵⁸ Some treated the entire question of obviousness as a legal question. Others found the question to be factual, while still others found the question to be a mixed question of law and fact.⁵⁹ Whether the question was factual or legal affected burdens on a subsequent appeal.⁶⁰

To ameliorate this intercircuit conflict and confusion over substantive patent law, Congress enacted the Federal Courts Improvement Act of 1982.⁶¹ Under this Act, the Court of Appeals for the Federal Circuit was created to "strengthen the United States patent system" and to foster greater certainty in patent law, encouraging "technological growth and industrial innovation."⁶²

Notwithstanding the uniformity which the Federal Circuit has brought to the substantive patent law, confusion continues in non-substantive areas. For example, sections 1295 and 1338 of Title 28 of the United States Code give the Federal Circuit jurisdiction to hear appeals from district courts where the district court's jurisdiction arose in whole or in part under acts of Congress relating to patents.⁶³ In a straightforward patent infringement suit, this jurisdictional grant raises no questions. However, when patent questions appear with other issues, the Federal Circuit's jurisdiction is not clear.⁶⁴ Moreover, the Federal Circuit has long refused to adopt its own procedural law, deferring instead to the law of the regional circuit from which the appeal originated.⁶⁵

58. See Howard T. Markey, *The Phoenix Court*, 10 AIPLA Q. J. 227, 231-35 (1982) (Dean Markey, then first Chief Judge of the Federal Circuit, discusses the conflict among the circuit courts, including listing case citations on this and other patent questions).

59. In addition, the regional circuits inconsistently ruled on other patent law questions: Is synergism a condition of patentability?; can failure to disclose the best mode of practicing the invention be shown without proving intent to conceal?; under what conditions was a sale for experimental purposes?; what is the burden of proof to establish a public use bar? See Charles W. Adams, *The Court of Appeals for the Federal Circuit: More Than a National Patent Court*, 49 MO. L. REV. 43, 57-58 (1984) (discussing conflicts in patent ownership in the federal courts).

60. In accordance with Rule 52(a) of the Federal Rules of Civil Procedure, factual questions cannot be set aside unless clearly erroneous. FED. R. CIV. P. 52(a). Legal questions are reviewed *de novo* on appeal.

61. Pub. L. No. 97-164, 96 Stat. 25 (1982).

62. The Ninth Annual Judicial Conference of the Court of Customs and Patent Appeals, 94 F.R.D. 350, 358 (1982)(statement of Rep. Hon. Robert W. Kastenmeier).

63. 28 U.S.C. §§ 1338, 1295 (1982 & Supp. 1992).

64. See Dreyfuss, *supra* note 54, at 30-31. One recent case reveals the Federal Circuit's liberal application of its jurisdictional mandate. Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc., 986 F.2d 476 (Fed. Cir. 1993).

65. See *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1574-75 (Fed. Cir. 1984) (*per curiam*). The Federal Circuit will apply regional circuit law to procedural matters that are not unique to patent issues. *Id.* at 1574. Profes-

To avoid both venue disputes and a return to the "race to the courthouse," any attempt to harmonize patent enforcement law should consider adoption of an international patent court system having exclusive jurisdiction over matters arising under the Treaty.⁶⁶ The European Community Patent System⁶⁷ and its "Protocol on Litigation"⁶⁸ provide a model for consideration.⁶⁹ The Community Patent Convention ("CPC") creates a "common system of law" and a "unitary, autonomous and therefore supranational" court system for the application, grant and enforcement of patents granted for the Contracting Parties.⁷⁰ The CPC court system functions much like the federal system in the United States without regard to national boundaries.

A. *The Importance of Uniform Procedural Guidelines*

The Treaty's lack of provisions relating to jurisdiction, discovery, evidence or procedure renders consistent application of uniform substantive provisions impossible. By analogy, the United States' attempt to create the Federal Circuit reveals the monumental task remaining even after adoption of a harmonized treaty containing substantive provisions. In the United States, the same substantive provisions yielded different results in the various regional circuits. The creation of the Federal Circuit eliminated the inter-circuit conflict by removing the source of the problem. The Treaty contains no provisions for eliminating the source of future problems such as adopting a common judicial body having jurisdiction over all patent disputes arising in any contracting state. As a practical matter, and as a matter of national sovereignty, creating a multi-tiered court system with one or more supranational courts having world wide appellate jurisdiction over decisions from na-

sor Dreyfuss gives a detailed analysis of the "substance/procedure" dichotomy in her article. See generally Dreyfuss, *supra* note 54.

66. In the United States, federal district courts have exclusive original jurisdiction of cases arising under "any Act of Congress relating to patents . . ." 28 U.S.C. § 1338 (1982 & Supp. 1992). The Federal Circuit has exclusive jurisdiction to hear appeals from any district court, if the jurisdiction of that court "was based, in whole or in part, on section 1338 of this title . . ." *Id.* §§ 1295(a)(1), 1292(c).

67. Agreement Relating to Community Patents, Dec. 15, 1989, 1989 O.J. (L 401) 1. This Agreement grew out of two earlier agreements which resulted in the European Patent Convention (EPC) and the Community Patent Convention (CPC). *Id.* at 10; see 1 EUROPEAN PATENTS HANDBOOK: CHARTERED INSTITUTE OF PATENT AGENTS § 32.2 (2d ed. 1992).

68. Community Patent Convention Protocol on the Settlement of Litigation Concerning the Infringement and Validity of Community Patents 1989 O.J. (L 2985) ("Protocol on Litigation").

69. For a detailed discussion of the European Community Patent System, see Christian Hilti, *The Future European Community Patent System and Its Effects on Non-EEC-Member-States*, 18 AIPLA Q. J. 289 (1990).

70. *Id.* at 296.

tional patent courts is not likely to happen. Thus, any set of rules, regardless of how extensive, applied by national courts in each Contracting Party will not ensure a comfortable degree of uniformity.

Perhaps another solution to the United States crisis which resulted in the Federal Courts Improvement Act of 1982 would have been the creation of a detailed civil law codification of procedural and substantive law to govern patent disputes. Because they control access and use of evidence on which substantive law must act, procedural, evidentiary and discovery guidelines would have been essential to assure consistent application of the substantive standards. The Treaty tackles, at best, only one half of the complete job—the substantive law.

1. *United States Discovery Under the Federal Rules*

The underlying principle of discovery in the United States is that the parties in an adversary system are best suited to adduce the evidence on which to apply the substantive standard in such a manner that justice prevails. The Supreme Court has recognized that principle by acknowledging that each party may compel the other to disgorge whatever facts are in his or her possession to avoid surprise at trial.⁷¹ To that end, Rule 26(b)(1) of the Federal Rules of Civil Procedure permits discovery regarding any non-privileged matter involved in the pending action.⁷²

In the United States, attorneys will pursue every single will-o'-the-wisp in the vague hope that they will obtain some evidence to help their case, or out of trepidation that inaction will activate their malpractice insurance policy. When the only threshold to permissible discovery is the chance that the information sought *might lead* to the discovery of admissible evidence, very little stands in the way of broad discovery efforts.⁷³

Thus, attorneys in patent infringement suits will take depositions "till the cows come home." They take depositions of inventors, those involved in the research effort, attorneys who prosecuted the application, competitors, and even patent examiners to gather evidence impacting the validity of the patent. They also take depositions of accountants, executives and marketing experts

71. See *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (contending that the "cry of 'fishing expedition' [can no longer] serve to preclude a party from inquiring into the facts underlying his opponent's case").

72. FED. R. CIV. P. 26(b)(1). Under the Rules, discovery is not even "limited to the merits of a case." It is merely designed to help "define and clarify the issues" for trial. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

73. Indeed, judges of the Federal Circuit have wished for the day when "all relevant evidence is always fully considered before a final conclusion is reached on any issue" Markey, *supra* note 58, at 235.

to determine commercial success, lost profits and reasonable royalties. The list is only limited by the boundless ingenuity of lawyers.

After the depositions, parties still have rights to more discovery. Depositions on written questions,⁷⁴ interrogatories to parties,⁷⁵ production of documents, entry upon land for inspection and other purposes,⁷⁶ and requests for admission⁷⁷ round out the United States attorneys' arsenal to use against the opposing party. Of course, discovery on non-parties provides another opportunity to repeat the entire procedure.

2. *Discovery in Europe*

By comparison with discovery provisions in the United States, discovery in the rest of the world seems to be "a massive conspiracy of concealment masquerading as privacy."⁷⁸ For example, in France, as in many civil law countries, many view litigation as a private dispute between private parties. Because the dispute is private, a party should not be compelled to publicize information they do not wish to divulge, nor should a party trouble non-parties with the private affair. Litigation is not a search for absolute truth.⁷⁹

A short summary of discovery procedures in France reveals the marked contrast between the United States and foreign systems.⁸⁰ The most obvious distinction between permissible discovery in the

74. FED. R. CIV. P. 31.

75. *Id.* 33.

76. *Id.* 34.

77. *Id.* 36.

78. Andreas F. Lowenfeld, *Some Reflections on Transnational Discovery*, 8 J. COMP. BUS. & CAP. MKT. L. 419, 420 (1986). In fact, many European countries have enacted "blocking statutes" specifically to block broad based United States discovery requests. See Diana Muse, Note, *Discovery in France and the Hague Convention: The Search For a French Connection*, 64 N.Y.U. L. REV. 1073, 1076 n.14 (1989) (noting that some nations have deliberately passed laws to avoid United States discovery requests).

79. Muse, *supra* note 78, at 1087.

80. As transnational litigation became more pervasive, the power of courts in one country to order alien litigants to permit discovery of information in their homeland became more debatable. The inevitable conflict between discovery procedures in common law countries and in civil law countries came to a head in 1970, when the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters opened for signature. The Hague Convention attempts to bridge the differences between the systems by offering a compromise. Under the Hague Convention a party has three options to obtain evidence: [s]he can file a "Letter of Request" which is similar to letters rogatory; take evidence through a diplomatic officer or consular agent; or request a "competent authority" of the state to appoint a person to take evidence in that state. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, arts. 1-17 [hereinafter Hague Convention]. Even though the United States ratified the Hague Convention in 1972, the Supreme Court subsequently determined that Convention procedures were neither exclusive nor mandatory. Thus, a United States district court properly could order foreign nationals appearing before the court to produce documents in a foreign land, notwithstanding the

United States and discovery in France is that the French court, rather than the parties, controls the evidence gathering effort.⁸¹ Many of the civil law countries do not permit the broad document request permitted by Rule 34 of the Federal Rules of Civil Procedure. Rather, parties must identify specific documents which they want the other side to produce.⁸² In the event documents are produced, they go directly to the court and become part of the official record. A party does not have the option to review the document, and then ignore it if it contains information harmful to the requesting party's interest.⁸³ Moreover, if a party desires other written discovery, attorneys must make requests to the court.

Equally antithetical to broad American discovery is German civil procedure which provides no general right to discovery evidence.⁸⁴ For example, in Germany, the relevancy standard is much more strict than Rule 26(b)(1) of the Federal Rules of Civil Procedure.⁸⁵ A party desiring certain evidence must substantiate the evidence by showing in advance the facts that the evidence is intended to prove. The rationale for this rule is that "no party is required to provide for his opponent's victory in court material which the opponent did not already have at his disposal."⁸⁶ Similarly, in France, a party must specifically identify the documents before the opponent is required to produce them.⁸⁷ In Germany, a "part[y] cannot be forced to testify, and [a] court will refuse to take the testimony of any witness" where a party simply wants to learn what the witness might "know about the facts in dispute."⁸⁸ Moreover, in both Germany and France, expert witnesses are neutral third parties called by the court and paid by the losing party after the trial.⁸⁹

In France, the right to a jury trial is reserved only for criminal

existence of a foreign blocking statute. *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct.*, 482 U.S. 522, 544 & n.29 (1987).

81. Civil law countries view interference with their courts' evidence gathering efforts by courts and citizens of a foreign country to be a violation of their judicial sovereignty. See *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 123 Cal. App. 3d 840, 852 (1st Dist. 1981) (finding that West Germany, for instance, holds the gathering of evidence as an exclusive state court function).

82. See *Muse*, *supra* note 78, at 1075 n.8.

83. See *id.* at 1088.

84. See John Reitz, *Essay: Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987, 1001 (1990) (noting the limited discovery opportunities for litigants in Germany):

85. FED. R. CIV. P. 26(b)(1).

86. Reitz, *supra* note 84, at 1002.

87. See generally Kent A. Lamber, *The Suffocation of a Legal Heritage: A Comparative Analysis of Civil Procedure in Louisiana and France—The Corruption of Louisiana's Civilian Tradition*, 67 TUL. L. REV. 231 (1992).

88. Reitz, *supra* note 84, at 1002.

89. *Id.* at 989.

cases.⁹⁰ In Germany, no jury trial right exists at all.⁹¹ Thus, in civil litigation, judges determine both facts and law with little distinction between issues of fact or law, or between rules allocating burdens of proof.⁹² Of course, in the United States, the Seventh Amendment guarantees the patent litigant's right to a jury trial.⁹³ In addition, whether an issue is factual or legal impacts greatly the burdens of proof on appeal.⁹⁴

Product liability litigation provides a good example of how different results could be obtained in civil law countries based on the very same substantive provisions. To succeed on a claim for products liability, the plaintiff must first prove the identity of the defective product and that it originated from the defendant. The plaintiff must then prove a causal nexus between the harm and the defect. Manufacturing, research and development information is essential to establishing the nexus because this information will reveal both the defect and the probability that the defect could cause the type of harm suffered. Without third party discovery or expert discovery, proving liability is extremely difficult. The European plaintiff loses, not because the substantive law is any different in Europe, but because European discovery procedures curtailed his access to proof.⁹⁵

The Proposed Treaty has no provisions whatsoever on the form of discovery intended to be applied in patent litigation. The Treaty does not address rights to jury trial, issues of fact or law, avenues of appeal, access to witnesses or documents, burdens of proof, collateral estoppel, or presumptions of validity. Presumably, each of the Contracting Parties will resort to their respective national law and existing procedures in the absence of specific direction in the Treaty. However, attempts to apply a harmonized substantive standard to wildly differing procedural and evidentiary standards will only exacerbate the existing conflict between common law and civil law countries.⁹⁶

90. Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 573 (1989).

91. Reitz, *supra* note 84, at 986.

92. See Muse, *supra* note 78, at 1080 n.31 for a discussion of judges' power in determining factual and legal issues in France.

93. U.S. CONST. amend. VII.

94. Rights of appeal and the type of review by the appellate court can greatly impact a litigant's substantive rights. In Germany, for example, courts of appeal are not bound by factual findings of lower tribunals. See Reitz, *supra* note 84, at 989 (analyzing Germany's system of civil procedure).

95. See Muse, *supra* note 78, at 1074. For a discussion of these and other differences between United States and civil law discovery systems, see generally Lowenfeld, *supra* note 78.

96. The ultimate goal in harmonizing patent enforcement laws would seem to be increased efficiency in litigation to enforce patents. *Blonder-Tongue Labs, Inc. v. University of Ill. Found.*, 402 U.S. 313 (1971) permits as a defense to an

IV. CONCLUSION

The enforcement provisions of the Harmonization Treaty reveal the fundamental shortcoming of the entire harmonization effort—harmonized substantive provisions alone provide no real assurances of harmonized results.

The enforcement provisions as written merely furnish a skeletal framework on which to build. While the underlying structure may be sound, much is needed to put flesh on the bare bones. The United States has no obligation to charge into a Harmonization Treaty with the naive anticipation of a “johnny-come-lately.”⁹⁷ Perhaps greater effort should be made to achieve a more comprehensive plan that provides uniformity, or harmonization, not only in the substantive provisions, but also in the evidentiary, procedural, and jurisdictional provisions. Only then will the seductive illusion of world-wide harmonization be a reality.

infringement allegation assertion of a prior determination of invalidity. Once a United States patent has been found invalid, it is invalid for all purposes. The patent owner does not have the option of choosing a different defendant in a new forum in the hope of receiving better luck at the hands of a new fact finder. The Treaty does not address the collateral estoppel effect of decisions by the various national courts. If present practice is any indication, national courts will be loathe to give collateral estoppel effect to a decision from a foreign court. Must litigation occur in every Contracting Party?

97. Ratification of the Treaty by the United States will require the legislature to enact laws consistent with provisions of the Treaty. Dissatisfaction with provisions in the Treaty are not easily remedied. Either the United States will have to achieve an international consensus or withdraw from the Treaty. See Moy, *supra* note 17, at 21.

