

# **12<sup>th</sup> EIPIN Congress 2011**

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## **TOPIC 2. THE EUROPEAN LEGAL FRAMEWORK**

### **European Intellectual Property within a Broader Institutional Context**

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1. In my intervention I shall understand the terms “European Legal Framework” as referring to the form in which most of the legislative activity concerning IP rights at European regional level takes place. This Legal Framework is the result of a development characterised in a first phase by a traditional intergovernmental approach, followed from 1980 onwards by a growing European Communities (EC), later on European Union (EU), legislative approach. The most important part of this activity has been and is being carried out today in the framework of the EC, now EU. The intergovernmental approach, which was at the origin of one of the most successful achievements, the creation of the European Patent Organisation, continues to play some role also today. The two approaches have strongly influenced each other and continue to do so at present as witnessed by the current initiative to create an international Patent Court to decide actions concerning European Patents and EU patents.
2. It goes without saying that this regional activity must be assessed in connection with the international activity at worldwide level, mainly in the framework of WIPO, but lately also of WTO. The peculiar nature of the IP rights, the principle of territoriality that characterises them, has made of this specific sector of law a favourite object of international cooperation. The age of the Paris and Bern Conventions and the number of special agreements which have been concluded under these two Conventions witness to the level of international cooperation that States have established. The drafting of national laws, a matter of exclusive sovereignty of each State, has been strongly influenced by the various international instruments of which the States were becoming parties. This explains the homogenous character of most of these legislations, with differences persisting mainly due to specific national interests or to differing legal traditions.
3. After the 2nd World War the cooperation in IP matters at European level followed quite naturally the traditional pattern of multilateral negotiations. Early results of this cooperation are:
  - the Convention of 6 June 1947 setting up the “Institut International des Brevets” at the Hague, concluded between France and Benelux and successively extended to several other European countries and eventually absorbed in the European Patent Organisation in 1976,

- the Convention of 27 November 1963 on the Unification of Certain Points of Substantive Law on Patents for Invention concluded in the framework of the Council of Europe.
4. In 1958 the 6 original EEC Member States adopted the view that there was no Community competence to deal with IP rights under the new EEC Treaty. This resulted explicitly from Art.295 EEC<sup>1</sup> and from the derogation of Art. 36 EEC<sup>2</sup> from the fundamental rule on the free circulation of goods, which was justified by the protection of IP rights. According to this view IP rights remained entirely a subject of national sovereignty. To avoid the risk that the functioning of the “Common Market” be hampered by these national territorially limited rights the 6 Member States envisaged the conclusion of conventions unifying the law of patents, trademarks and design.
  5. The 6 Member States set up in 1958 three Intergovernmental Working Parties. Each Working Party was composed of national experts and appointed its own President. The Commission took part in the work. The Working Parties reported in 1962 to the Governments, but their reports have been considered by the Ministers and the Commission meeting within the EEC Council. The ambiguity of this activity, institutionally separated but functionally linked to the Community, is already present from the entry into force of the EEC.

Two of these Working Parties, on Patents and Trademarks<sup>3</sup>, produced preliminary Draft Conventions aiming at the creation of a unitary “Community IP right”, granted and managed by a “Community Office”. The Draft Convention on Patents was received with high interest at the political level of the Ministers, but in 1964 failed to be adopted for political reasons (the wish that the UK should accede to the Convention clashed with the French veto putting an end to the first negotiations for accession of the UK to the European Communities).

6. From 1964 to 1968 no IP rights negotiations took place at European regional level. The interest was concentrated on the worldwide WIPO initiative on Patents which was going to lead in 1970 to the PCT.

In 1968 the positive conclusion of the future PCT was clearly in view and, at Community level, the accession of the UK to the EC appeared close-at-hand. There

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<sup>1</sup> Now Art. 345 TFEU: *The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.*

<sup>2</sup> Now Art. 36 TFEU: *The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of ..... the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.*

<sup>3</sup> The Working Party on Design was unable to reach any common view and it is only almost 40 years later that a unitary solution could be found in the framework of the EU (European Parliament and Council Directive of 13 October 1998 on the legal protection of Design and Council Regulation of 12 December 2001 n. 6/2002 on the Community Design)

was a need for a patent initiative at broader European level, more far reaching than the PCT. This need found expression in a French initiative presented in the EEC Council. The French initiative was based on the well-known dichotomy between European and Community Patents, both to be realised by internationally negotiated conventions. The initiative has been approved by the 6 Member States and the Commission.

7. The preparation of the European Patent Convention (EPC) was entrusted to a European Conference to which 21 European States had been invited. It has operated at Luxembourg from 1968 to 1972. The Commission took full part and the EEC Council and EFTA put at disposal their secretariats. The negotiations knew therefore again a functional but no institutional link with the EEC.

The working method was strictly inter-governmental. The President and Vice-Presidents of the Conference had been appointed by the Conference which had its own Rules of procedure. Each delegation contributed with proposals. The results of the deliberations of the Conference were translated into draft provisions of the future Convention by a permanent Drafting Committee and submitted to the Conference. The progress was ensured by the personal involvement of the heads of the main national patent offices, who contributed the best practices of their offices. The interested circles were regularly invited to the meetings, following the practice of WIPO negotiations. The result was a Draft Convention which became the basic document for the Diplomatic Conference held in Munich in 1973, where the EPC was concluded and opened to signature.

8. The EPC sets up a new international organisation, the European Patent Organisation, of which the European Patent Office is an organ. This organisation had no institutional link with the Community, nor did the situation change when the EU succeeded to the EC. The Commission has always had so far a statute of observer in the meetings of the Administrative Council.

The EPC entered into force in 1976. The EPO started its successful operation in 1977. At present 38 European States, including the 27 EU Member States, are parties to it.

9. There have been clear advantages in the intergovernmental form of negotiations at the origin of the EPC, in the technocratic composition of the Administrative Council and in the institutional independence of the EPO from the EU.

The EPC is a wonderful fruit of technocratic cooperation. The EPO has made of Munich one of the world capitals for patents. It employs 7000 highly specialised officials from 38 European countries. It has made of the European Patent the most important tool for protection of any new development of technology in Europe.

Patent law is only occasionally a hot subject for politics. The negotiations of the EPC and, later on, the patent activity of the EPO have been largely preserved from the political troubles of the Community life. This has been confirmed by the way the

EPO has absorbed the EC results on the issue of biotechnology or the lack of results on the issue of patentability of software.

The low political profile has facilitated accession to the EPC of non-EU countries, those whose accession to the EU is still under consideration and those which do not wish or cannot yet file a request for accession to the EU.

10. The intergovernmental procedure followed to conclude the EPC continues to characterise more recent international instruments connected with this Convention, where the functional support is now ensured by the EPO. This procedure was used for the two revision conferences of the EPC held in 1991 and 2000 in application of Art. 142 EPC. The same procedure was followed for the 2000 London Agreement on the issue of translations and had been envisaged for the negotiation, now abandoned in this form, of the European Patent Litigation Agreement (EPLA), with the aim of instituting an international Court for litigation concerning European Patents. It is worth noting that the political difficulties now prevailing over the technocratic approach have compelled the negotiators to give these last instruments an optional character, thus instituting a kind of “enhanced cooperation”, or a “two speed Europe” among the parties to the EPC.
11. The second element of the 1968 French initiative was the creation of a Community Patent, a unitary European Patent designating all the EEC Member States, granted and managed by the EPO. The instrument instituting this Patent should have been a Convention restricted to the EEC Member States. The preparation was entrusted to a Working Party operating within the framework of the EEC Council, but making use of negotiating methods similar to those used by the Conference for the European Patent. The functional link with the EEC was much stronger, but from an institutional point of view the work had a very different nature from that of other Working Parties preparing Community secondary legislation. The Commission had full right of participation, but no monopoly of initiative. In fact its contribution was mainly concerned with the codification in the Convention of the principle of Community exhaustion of IP rights which was being developed by the Court of Justice around that period. For other aspects the technocratic approach of the experts in the delegations prevailed. The only problem having a real political dimension was the linguistic regime of the CP, which was to represent a kind of permanent curse hanging over the whole history of this project. A draft Convention was prepared by the Working Party according to a procedure very similar to the one used for the preparation of the EPC. The Drafting Committee had an important role.
12. A Conference of the 9 Member States<sup>4</sup> took place at Luxembourg in December 1975 and as a result the 1975 Community Patent Convention (CPC) was signed. A clever compromise was found to the problem of the linguistic regime (the number of languages involved was 6). The entry into force of the CPC, expected more or less at the same time than the EPC, was delayed by constitutional difficulties in Denmark and Ireland, linked with the ambiguous nature of this instrument. For the CPC was an

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<sup>4</sup> The UK, Ireland and Denmark had joined the EEC.

international Convention, but also an instrument aiming at a better functioning of the common market and giving new competences to some EEC institutions, particularly the Court of Justice, without any reference to a legal basis in a provision of the EEC Treaty.

The work continued in the same form during the eighties to take account of the accession of Greece, Spain and Portugal and to improve the text of the CPC, particularly concerning the litigation regime. Two further Conferences were held in Luxembourg in 1985 and 1989. The 1989 Conference adopted the Agreement concerning Community Patents, containing a revised version of the 1975 CPC and a Protocol of litigation.

The entry into force of the 1989 Agreement was dependent upon the ratification by all the 12 signatory Member States. This condition was never fulfilled, partly because of the excessively costly solution found for the linguistic regime (9 languages were now involved), partly because of the persistent ambiguous nature of the instrument with respect to Community law.

The Community Patent story does not end here, but it continues in the framework of the different model, the Community model, which takes over from the eighties onward.

13. The European cooperation in IP matters was based on the conclusion of conventions following the traditional procedure under public international law as a consequence of the firm belief that IP rights were national matters, entirely outside the scope of the Community competence.

This conviction, which was maintained by some Member States until 1995, when the Court of Justice swept it definitely away<sup>5</sup>, started however to lose its absolute character very soon, in the late sixties-early seventies. The Court clarified in a number of decisions that some EEC Treaty rules had a direct impact on the national IP rights.

- The Community rules on competition<sup>6</sup> also found application to the behaviour of undertakings based on the use of IP rights.
- The doctrine of Community exhaustion of these rights, directly enshrined in the text of the EEC Treaty<sup>7</sup> required an appropriate amendment of the national rules defining the rights attached to any IP right.

14. During the seventies the Commission became aware that the absolute denial to the Community of any competence to adopt secondary legislation in IP matters was simply wrong and that there was space for Community legislative initiatives. It was obviously correct that the Community did not possess any exclusive internal competence in this field, but IP rights had a strong impact on the functioning of the

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<sup>5</sup> See Decision of 13 July 1995 on the case C-350/92 *Spain v. Council*.

<sup>6</sup> Art. 85-86 EEC Treaty, later Art. 81-82 EC Treaty, now Art. 101-102 TFEU

<sup>7</sup> Art. 30 and 36 EEC Treaty, later Art. 28 and 30 EC Treaty, now Art. 34 and 36 TFEU

common (later internal) market. This market is one of the shared competences of the EU (Art. 4 TFEU). The EEC was entitled, under Art. 100 EEC Treaty, to “*issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market*”. National IP legislation undoubtedly falls under this definition. It was therefore possible, by making use of Art. 100 EEC Treaty as a legal basis, to adopt Directives approximating the IP legislations of the Member States when the differences were sufficiently important to represent an obstacle for the smooth functioning of the internal market.

15. Art. 100 EEC Treaty<sup>8</sup> required unanimity in Council; the European Parliament was only consulted and the only accepted measure was the Directive. In 1986 the Single European Act introduced an Art. 100A EEC Treaty<sup>9</sup>, which recognised the Community competence under basically the same conditions as Art. 100 EEC Treaty, but the measure only required a qualified majority in Council, was subject to the cooperation procedure with the European Parliament and could differ from a Directive. The Maastricht Treaty, signed in 1992, further amended the procedure under Art. 100A EC Treaty by making the adoption of the measure subject to the co-decision procedure with the European Parliament.

Since the Maastricht Treaty this legal basis is generally accepted and regularly used. Only the numbering of the article has been changed: Art. 95 EC Treaty after the Amsterdam Treaty, Art. 114 TFEU after the Lisbon Treaty. It has given origin to a corpus of measures, mainly Directives, which have strongly influenced all aspects of the national IP legislations and conditioned their evolution. The principle of national territoriality of IP rights is preserved but the autonomy of the national legislator in establishing the applicable rules is now seriously limited.

16. The need to avoid that the functioning of the internal market be hampered and to establish fair conditions for competition between undertakings has been a sufficiently convincing argument to justify a complete and systematic approximation, at substantive level, of the national rules governing trademark<sup>10</sup> and design<sup>11</sup> and, at procedural level, of the national rules concerning civil, administrative and judiciary measures ensuring the enforcement of IP rights<sup>12</sup>. The same argument has justified measures approximating on specific points the rules governing copyright, with as main example the term of duration of copyright<sup>13</sup>.

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<sup>8</sup> Later Art. 94 EC Treaty, now Art. 115 TFEU

<sup>9</sup> Later Art. 95 EC Treaty, now Art. 114 TFEU.

<sup>10</sup> Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks.

<sup>11</sup> Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs.

<sup>12</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

<sup>13</sup> Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version).

But this legal basis did in particular allow, every time the technological or cultural development required new IP instruments or adaptation of the existing instruments, to realise this progress in a uniform manner, by introducing on specific issues unified rules in the national legislations, thus avoiding the risk of divergent developments. The Directive on topographies of semiconductor products<sup>14</sup> was not only a typical example of this type of measures, but also the first Directive on IP rights in absolute to be adopted by Council in 1986. Many other Directives of this type followed, most of them adapting the instrument of copyright to its new technological functions. Let's just mention the Directives on software<sup>15</sup>, on data bases<sup>16</sup>, on satellite broadcasting and cable retransmission<sup>17</sup> and on the information society<sup>18</sup>. In the field of patents the Directive on biotechnology<sup>19</sup> also belongs to this category of measures.

17. Art. 100A EEC Treaty had opened to the Community a large perspective for legislative action, but the very nature of the measures adopted, applicable to national IP rights, could not affect the territorial limitation of each right to the Member State having granted it. The negotiations on the Community Patent had made the Commission aware how important it was for large companies, but also for active medium and small companies, to dispose of unitary IP rights covering the whole territory of the Community.

Alas, even perusing attentively the Treaty, no provision could be found giving explicitly a competence to institute such unitary rights. A provision was however found which could be interpreted as giving implicitly such a competence, Art. 235 EEC Treaty, later Art. 308 EC Treaty. *“If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.”*

18. In 1973 the Commission started preparation of two instruments: a Directive approximating the substantial rules of the legislation governing the national trademarks and a Regulation instituting a Community Trademark, in order to test the two legal basis identified above, Art. 100 and 235 EEC Treaty. The two proposals were presented as a whole. The basic consideration was that national trademarks would continue to play an important role even in an integrated market, but a unitary

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<sup>14</sup> Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products

<sup>15</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version)

<sup>16</sup> Directive 96/9/EC of the European Parliament and the Council of 11 March 1996 on the legal protection of databases

<sup>17</sup> Council Directive 98/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

<sup>18</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>19</sup> European Parliament and Council Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions.

right covering the whole of the Community could usefully supplement such national rights. This unitary right, the Community Trademark, would coexist with the national trademarks and be created in the Community legal order, whose existence as an independent order separate from the national orders, but also from the international legal order, had been recognised by the Court of Justice. It would be registered and managed by a Community agency to be created under the same legal basis.

19. The two proposals were the object of thorough preparation by the Commission. Most of the techniques of the intergovernmental patent negotiations had been taken over: close cooperation with the best national experts, consultation of the interested circles, discussion of successive versions of the draft proposals during public hearings. Eventually the two proposals were submitted officially to Council in 1980. The proposals were initially received with mistrust concerning the legal basis by the Working Party in Council, but progressively, during the eighties, the validity of the Commission's approach was recognised. Any doubt concerning the admissibility of this legal basis has been dispelled by the Court of Justice in its Opinion 1/94<sup>20</sup>

It took 13 years for the Council to adopt, in 1993, the Regulation instituting the Community Trademark<sup>21</sup>. The negotiations concerning the substantive aspects of trademark law were completed in 1988 when the Directive approximating the national legislations on trademarks was adopted, because of the fundamental unity of the system governing national and Community rights. Five years were needed to find solutions to political issues like the seat of the OHIM and its linguistic and financial regime. Only the intervention of the European Council permitted to reach an agreement.

As soon as the road toward the creation of unitary rights was opened two new initiatives were successfully launched by the Commission: the unitary rights on plant varieties and on designs. The EU right on plant varieties was adopted in 1994<sup>22</sup> and is granted and managed by a special EU agency having its seat in Angers, the EU design was adopted in 2001<sup>23</sup> and is registered and managed by the OHIM in Alicante.

20. An initiative was undertaken in 2000 by the Commission to institute an EU unitary patent using the same legal basis, Art. 308 EC Treaty. The proposal took over the unsuccessful results of the two 1975 and 1989 Conventions on the Community Patent, but it adapted them to the clear institutional framework created by choosing the instrument of an EU Regulation. The proposal was inspired by the precedent of the Trademark Regulation, but it contained at least two interesting features which constituted innovative elements from an institutional point of view. First of all the EU did not aim at setting up a new Patent Office operating as an EU agency, as it

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<sup>20</sup> S. par.55-71 of the Opinion 1/94 of 15 November 1994

<sup>21</sup> Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version)

<sup>22</sup> Council Regulation (EC) n 2100/94, of 27 July 1994 on Community plant variety rights

<sup>23</sup> Council Regulation (EC) n. 6/2002 of 12 December 2001 on Community designs



did with the OHIM. In the case of patents it was reasonable, not to say inescapable, to make use of the existing structure of the EPO. The EU patent has therefore been conceived as a European Patent designating the EU, granted by the EPO under the EPC procedure. To obtain this result the EU would have acceded to the EPC of its own right, next to its Member States, following a revision of that Convention. The second element differentiating this proposal from the trademark solution concerned the litigation regime. The litigation concerning EU trademarks was reserved to the national courts both for infringement actions and invalidity counterclaims, only the direct actions on invalidity being brought directly before the OHIM first and the EU General Court and Court of Justice for judicial control. The proposal for a EU patent, making use of Art. 225A and 229A EC Treaty, two new provisions introduced by the Nice Treaty, suggested to concentrate the whole of the litigation concerning the EU patent, infringement and invalidity actions, before a special Court to be institute in the framework of the EU Court of Justice.

21. Intense negotiations went on on this proposal before Council from 2000 until the end of 2009. Several times the proposal came for consideration before the Council at ministerial level, but every time the unanimity required by Art. 308 EC could not be reached on the issue of the linguistic regime of the EU patent (the EU official languages have now reached, since the last accessions, the number of 23).

An entirely new development in terms of legal basis resulted from the entry into force of the Lisbon Treaty on 1 December 2009. A new Treaty provision, Art. 118 TFEU, explicitly recognises an EU competence to institute unitary IP rights “*in the context of the establishment and functioning of the internal market*”. The procedure does no longer require unanimity in Council, but only the qualified majority, and the European Parliament is now fully involved under the “*ordinary legislative procedure*”, the new terminology for “*co-decision*”. There is however a limitation: the language arrangements for the EU unitary rights continue to be established by the Council alone acting unanimously on proposal by the Commission and after consulting the European Parliament.

The Commission transformed in July 2010 its original proposal on the linguistic regime of the EU patent into a new proposal based on this new provision. The discussion was pursued on this basis in Council during the last semester, but the extensive efforts of the Belgian Presidency did not succeed. The Council reached the conclusion in December 2010 that “it was impossible to reach on this issue a decision requiring unanimity at present and in the foreseeable future”. Under these circumstances several delegations requested the Commission to take an initiative in order to create a unitary patent protection in the framework of a procedure of “enhanced cooperation”, as foreseen by the Lisbon Treaty. The Commission has positively reacted to this request and a proposal for a Council decision authorising enhanced cooperation in the area of the creation of a unitary patent protection has been submitted in December 2010. According to recent information the Member

States wishing to participate in this enhanced cooperation are 25, only Italy and Spain maintaining an objection to this procedure.

22. The development of the EU legislative activity on IP rights had also an impact on the status and activity of the EU in the international WIPO and WTO framework. In the seventies and eighties, before the EU Member States recognised the internal EU competence, a practice had been progressively developed to present coordinated positions in the WIPO meetings. These were prepared in coordination meetings with the participation of the Commission, but in the absence of any voting rule they were useful only to the extent that the Commission and the delegation holding the Presidency in Council succeeded in obtaining a consensus on some compromise. This practice had however the advantage that the third countries were getting used to the idea that they should expect the group of EU countries to operate as a unit.
23. The development of the EU internal competence entailed the recognition of the existence of a double external competence:
  - an exclusive competence for the trade related aspects of IP rights, contained in the EU exclusive competence for the common commercial policy,
  - an implicit external competence based on the doctrine of “implied powers”, resulting from the internal EU legislation.
24. The fight against the international commerce of counterfeit and pirated goods had led the Community in the eighties to adopt unilateral internal measures authorising the custom authorities to take measures under a suspensive procedure for goods imported within the EU suspected of being infringing IP rights. These measures were compatible with the obligations under the GATT and belonged to the field of common commercial policy. This action has been developed in the following years and it covers today, under Council Regulation (EC) No 1383/2003 of 22 July 2003<sup>24</sup> the whole spectrum of IP rights, including patents.

The negotiations concerning the TRIPs Agreement led to the full recognition of the external competence of the EU in this field. The accent put on the trade related aspects of IP rights gave the EU the right to be recognised as a future party to this Treaty and to sign it. During the ratification procedure the question arose of the extent of this competence. The Commission traditionally maintained the argument that any negotiations with third countries concerning IP rights belonged to the common commercial policy and therefore the EU had an exclusive competence. This argument had never been accepted by the Council. The ratification procedure of the Treaty instituting WTO gave the Commission the opportunity of testing its argument: the Commission took the view that the TRIPs should be ratified exclusively by the EU and not by its Member States. The Council asked the opinion of the Court of Justice

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<sup>24</sup> Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights

on this issue by making use of Art. 300 (6) EC Treaty. The Court took a clear position in its Opinion 1/94: the EU competence is limited to matters concerning the fight against international counterfeit and pirated goods, but does not extend to provisions of substantive or procedural law concerning IP rights. Here the external competence is in principle reserved to the Member States, except when the EU has adopted internally common rules and the exercise of the competence by the Member States would be likely to affect them or to alter their scope<sup>25</sup>

Now Art. 207 TFEU concerning the common commercial policy expressly mentions the commercial aspects of intellectual property as object of this policy.

25. The implicit external competence of the Community to conclude agreements with third countries or international organisations even when this was not expressly foreseen by the Treaty has been recognised by the Court of Justice since 1971 in the famous decision AETR<sup>26</sup>. The doctrine of “implied powers” represents a cornerstone of the system of external competences of the EU.

**This doctrine has found naturally application to the area of intellectual property. To the extent that approximation Directives had been adopted, Member States were no longer allowed, either individually or collectively, to negotiate agreements with third countries which could affect the obligations resulting from those Directives.** The unitary EU rights instituted by Regulation were also quick affected by negotiations with third countries. In this case the EU external competence was exclusive, but subject to an important restraint: as the Regulations adopted internally were based on Art. 308 EC Treaty, requiring unanimity, the same voting rule was required for the various stages of the negotiations procedure affecting these rights. This has not prevented the successful conclusion of two international instruments, the 1989 Protocol Relating to the Madrid Agreement on trademarks<sup>27</sup> and the 1999 Geneva Act of the Hague Agreement on Industrial Design<sup>28</sup> to both of which the EU has become a party. The rule of unanimity has changed since the entry into force of the Lisbon Treaty. Art. 118 TFEU provides as basic voting rule the qualified majority, with the consequence that the

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<sup>25</sup> S. Art. 216 (1) TFEU

<sup>26</sup> Case 22/70 “AETR” (Commission/Council) Decision of 31.3.1971 *“In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form they may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules or alter their scope.”*

<sup>27</sup> Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, adopted at Madrid on June 27, 1989

<sup>28</sup> Geneva Act of the Hague Agreement on Industrial Design Concerning the International Registration of Industrial Designs Adopted by the Diplomatic Conference on July 2, 1999

procedure for negotiations affecting EU unitary rights will be based on the same voting rule. An exception remains with regard to negotiations affecting the linguistic regime of such IP rights that are still to be decided by unanimity.

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