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Europe's Bold Experiment: Lessons Learned from America's Patent Law Experience

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CEIPI Centre d'Études Internationales de la Propriété Intellectuelle

EIPIN European Intellectual Property Institutes Network

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Section 101:
Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Section 103:
A patent for a claimed invention may not be obtained … if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious … to a person having ordinary skill in the art to which the claimed invention pertains

- A significant portion of U.S. patent law, including some of the most important and controversial patent law doctrines, is either built upon judicial interpretation of elliptical statutory phrases (e.g., subject matter or obviousness), or is devoid of any statutory basis whatsoever. For example:

(1) non-literal infringement,

(2) claim interpretation,

While Congress and the courts each have a hand in constructing the latticework of patent law, judges – not the authors of lex scripta – are the principal architects.

Comparative Sources of Law in Patent Adjudication

- U.S Code Title 35
  - Five Parts; 390 Sections
  - Most substantive law found in:
    - Sections 101-103, 112, 154, 271
- Common Law
  - Just about everything else

- UPC Agreement
  - Five Parts; 89 Articles
- UPC Article 24
  - EU Law
  - UPC Agreement
    - Articles 25-30 (substantive)
  - EPC
  - International Agreements
  - National Law

EPC Article 69(1) states:

“The extent of the protection conferred by a European patent or a European patent application shall be determined by the claims. Nevertheless, the description and drawings shall be used to interpret the claims.”

Article 2 of Protocol on Interpretation of Art 69 reads:

Section 271(a) of United States patent code, states:

“Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.”

Legislative Ambiguity is Judicial Opportunity

- 1. There are inherent limitations to language, particularly in the context of regulating the unforeseeable and unpredictable nature of technological innovation;
- 2. Courts have a comparative advantage to evolve patent policy in a manner more consistent with the norms of the various technological communities, many having divergent views of the patent system;
- 3. The complexity, frequency, and pace of change within a creative community far outstrips a legislator's capacity to predict and act

One Size Does Not Fit All

- "[L]aw and its social environment stand in a relation of reciprocal influence; any given form of law will not only act upon, but be influenced and shaped by, the established forms of interaction that constitute its social milieu. This means that for a given social context one form of law may be more appropriate than another, and that the attempt to form law upon a social environment uncongenial to it may miscarry with damaging results."

-Lon Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 1, 27 (1969)

Thank you and Questions