

THE EUROPEAN PATENT: AN OLD AND VEXING PROBLEM

Abstract In December 2012, the European Parliament supported the creation of a European patent with unitary effect. For the next year at least, the international patent community will be on the edge of its proverbial seat, waiting to see whether the proposal becomes a reality. If it does, it will be a significant event in both the long and rich history of patent law, and in the equally rich and understudied history of attempts to create a European patent system. In this article I consider the three post-war European patent initiatives of the most direct and enduring relevance in that regard with a view to answering the following questions. First, what drove them? Second, what issues confronted them? And third, how were those issues resolved and with what ultimate effect? In the concluding section I relate the discussion back to the present by offering some remarks on the current European patent proposal in light of the same.

Keywords: Europe, harmonization, history, patents, unification.

I. INTRODUCTION

In December 2012, the European Parliament endorsed a decision by the European Council to authorize the establishment of enhanced cooperation in the area of the creation of a patent with unitary effect.¹ Since then, the international patent community has been on the edge of its proverbial seat, waiting to see whether the proposal becomes a reality.² If it does, it will be a significant event in both the long and rich history of patent law, and in the equally rich and understudied history of attempts to create a system for unitary European patent protection.³

¹ See Regulation (EU) 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection; Regulation (EU) 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements; Agreement on a Unified Patent Court, EU doc 16351/12 (11 January 2013) (UPC Agreement). On the proposal and its background see H Ullrich, 'Harmonizing Patent Law: The Untamable Union Patent' in M-C Janssens and G v Overwalle (eds), *Harmonisation of European IP Law: From European Rules to Belgian Law and Practice; Contributions in Honour of Frank Gotzen* (Bruylant/Larcier 2012) 243–94; S Peers, 'The Constitutional Implications of the EU Patent' (2011) 7 *EuConst* 229–66.

² The unitary patent system will apply 'from 1 January 2014 or the date of entry into force of the [UPC Agreement], whichever is the later': Regulation (EU) 1257/2012 art 18(2).

³ Recent studies include E Kranakis, 'Patents and Power: European Patent-System Integration in the Context of Globalisation' (2007) 48 *Technology & Culture* 689–728; C Wadlow, 'Strasbourg, the Forgotten Patent Convention, and the Origins of the European Patents Jurisdiction'

Indeed, it is remarkable to consider that more than 50 years ago, in 1959, the creation of such a system was already considered an ‘old and vexing problem’.⁴ It is a problem that was reportedly first tackled in revolutionary France,⁵ though confining ourselves to more peaceful times,⁶ its origins can be said to lie in two initiatives from the 1940s: those of the Benelux countries and France to create the International Patent Institute in The Hague, and those of Denmark, Finland, Norway and Sweden to create a Nordic patent. Nonetheless, and despite the importance of those efforts, the focus in this article will be on three other post-war European patent initiatives of more direct and enduring relevance. The first is of the Council of Europe, beginning in 1949 and ending with the Strasbourg Patent Convention of 1963 (SPC).⁷ The second is of the EEC States, beginning in 1959 and ending with the Community Patent Convention of 1975 (CPC) and Luxembourg Agreement of 1989.⁸ And the third is of the EPC intergovernmental conferences, beginning in 1969 and ending with the European Patent Convention of 1973 (EPC).⁹ In considering these initiatives my aim will be to answer three main questions. First, what drove them? Second, what issues ‘vexed’ them? And third, how were those issues resolved and with what ultimate effect? The aim of doing so is to fill a gap in the European patent literature, as well as contribute to current European patent debates by considering variants of the ‘three classic’ harmonization issues recently posed by Jan Smits and William Bull¹⁰ in respect of the current unitary patent proposal for its immediate precursors: the reasons for legal convergence; the form such convergence ought to take; and the extent to which specific harmonizing measures can be expected to promote such convergence and otherwise satisfy the reasons for pursuing it. The concluding section will relate this discussion to the current unitary patent package.

(2010) 2 IIC 123–48. Earlier studies include R Spencer, ‘A European Patent: An Old and Vexing Problem’ (1959) 45 ABAJ 1157–9; R Spencer, ‘A European Patent: A New Solution to an Old and Vexing Problem’ (1962) 48 ABAJ 747–51; F Neumeyer, ‘Unification of European Patent Legislation on the Common Market’ (1961) 24 MLR 725–37; ‘The Proposed European Patent Law: A Summary Analysis’ (1963) 45 JPOS 153–81; P von Holstein, ‘International Cooperation in the Field of Patent Law with Special Reference to the Activities of the Council of Europe’ (1967) 16 ICLQ 191–206; IC Baillie, ‘Where Goes Europe? The European Patent’ (1976) 58 JPOS 153–85; RC Newman, ‘Progress Toward a European Patent’ (1972) NYUJIntL&Pol 449–84.

⁴ R. Spencer, ‘A European Patent: An Old and Vexing Problem’ (1959) 45 ABAJ 1157–9.

⁵ With a view to unifying the systems of patent protection in the countries we today call Belgium, the Netherlands, and parts of Italy; see Neumeyer (n 3) 725–6.

⁶ As a result of this parameter, German proposals for a European patent published in the early 1940s are also excluded.

⁷ Convention on the Unification of Certain Points of Substantive Law on Patents for Inventions (Strasbourg, 27 November 1963) ETS 47.

⁸ Convention for the European Patent for the Common Market 76/76/EEC (Luxembourg, 15 December 1975); Agreement relating to Community patents 89/695/EEC (Luxembourg, 15 December 1989) OJ L 401/1 (30 December 1989). By article 1(4) of the 1989 Agreement, it was to replace the 1975 Convention upon taking effect.

⁹ Convention on the Grant of European Patents (Munich, 5 October 1973) 13 ILM 268.

¹⁰ See J Smits and W Bull, ‘The Europeanisation of Patent Law: Towards a Competitive Model’ in A Ohly and J Pila (eds), *The Europeanisation of Intellectual Property Law: Towards a European Legal Methodology* (OUP 2013) ch 3.

II. DRIVERS OF POST-WAR EUROPEAN PATENT INITIATIVES

Identifying the subjective motivations of lawmakers is always a difficult task, not least because of the unreliability of their own statements in that regard. Nonetheless, a study of post-war patent initiatives reveals them to have had four principal and closely related drivers.

The first was the cost and inefficiency of maintaining national patent systems, particularly in the aftermath of the Second World War and in the relatively confined geographical area of the Common Market. For European states, national patent systems required the duplication of patent office expertise and infrastructure at a time when patent applications were becoming increasingly numerous and complex in nature; and for inventors and patentees they required the navigation of substantively different systems, laws and languages to secure protection even within the same confined geographical space. As Guillaume Finnis, President of the International Patent Institute and one of the principal architects of the European patent system, remarked in 1964,

[i]t is out of the question, once it becomes possible for everyone to go from one State to the other end of another member of the Common Market, perhaps in less than an hour, to maintain the need for 6 patents in order to obtain protection in 6 countries, one of whose territories is as small as that of Luxembourg.¹¹

The second motivation was the impediment which national patents posed to trade and competition—and therefore, it was said, to European business and innovation—by virtue of their ability to be used to impede the free movement of goods and services across territorial borders, and the establishment of cross-border networks of distribution and mass production.¹² In combination with the increasingly international nature of economic life, this lent a sense of inevitability to the European patent project in the late 1950s and early 1960s.¹³ According to Finnis, for example, so ‘closely linked with international economic life’ were industrial property rights that it was ‘impossible to imagine even for a moment’, in the early 1960s, ‘that they could be governed, in the relations between nations, other than by [international] agreements’.¹⁴

The third motivation was the intellectual and academic interest in supranational patent systems which existed after the War,¹⁵ and the challenge of using industrial

¹¹ See G Finnis, ‘Will National Industrial Property Rights Disappear?’ (1961) *Industrial Property* 148–65, 161. The problem was more pronounced at the international level; see MJ Harbers, ‘Recent Developments: International Patent Cooperation’ (1968) 20 *StanLRev* 1000–29, 1004.

¹² See H von der Groeben, *Competition in the Common Market: Speech made by M von der Groeben during the debate on the draft regulation pursuant to arts 85 and 86 of the EEC Treaty in the European Parliament—19 October 1961* (EEC Commission 1961) 8; also JA Diener, ‘Patents and Nationalism: A Patent Lawyer Looks at the Problem of European Recovery’ (1950) 32 *JPOS* 615–28; DL McLachlan and D Swan, ‘Competition Policy in the Common Market’ (1963) 73 *The Economic Journal* 54–79, 54–6.

¹³ And not only within Europe; see, eg, Diener *ibid*; KE Laude, ‘A Step Toward a European Patent: The Common Market Patent’ (1960) 42 *JPOS* 698–701; cf SP Ladas, ‘Common Market Patent and Trademark Treaties Open or Closed’ (1961) 51 *Trademark Reporter* 1203–8.

¹⁴ Finnis (n 11) 154.

¹⁵ See JB Gambrell, ‘Patents and Antitrust: An Integrated Approach in the European Economic Community’ (1965) 6 *Boston College Law Review* 541–60, 543.

property rights as a means of pursuing a 'United Europe'.¹⁶ That European political integration might be furthered by administrative arrangements such as sharing patent office resources was very much in keeping with the thinking of the time; the establishment of the European Organisation for Nuclear Research (CERN) and EURATOM being two examples of the use of scientific and technical cooperation by European states in the 1950s as a catalyst for post-War 'functional federation'.¹⁷ It also had a precursor in German history, by which Finnis himself was clearly influenced. Hence his description of post-war European patent initiatives as focused on 'the possibility of providing . . . federal level . . . industrial property title-deeds' similar to those which had been created in the Zollverein, with positive effects for German federalism.¹⁸

And finally, the fourth motivation was the existence of competing patent initiatives, and the fear they created within and among European states of being left behind politically, technologically and economically, 'like the less gifted child', as Swedish patent official Frederik Neumeyer expressed it to the European Free Trade Association (EFTA) States in 1961.¹⁹

Hence it is suggested that post-war European patent initiatives were driven by a combination of economic, political, intellectual and psychological motivations, including some—such as the promotion of political federation—unrelated to patent law itself. For the original EEC Six, it was the first three of the motives above which drove their early work from 1959, with a particular emphasis on Single Market policies.²⁰ After 1964, however, when disagreements caused their work to be suspended, it was the fear on the part of France in particular of becoming dependent on US patent examining authorities under the Patent Cooperation Treaty (PCT),²¹ and dominated by foreign (including German) patents and industry, which led to the EEC Six taking up their project again, and implementing the plan which ultimately led to

¹⁶ See Finnis (n 11) 164; McLachlan and Swan (n 12) 55; LA Manson, 'The EEC Patent Union and Political Integration' (1973) 12 *ColumbJTransnatlL* 342–58; also LJ Robbins, 'The Proposed New European Patent' (1961–62) 5 *PTC J Res & Ed* 217–32, 220.

¹⁷ See TJ Misa and J Schot, 'Inventing Europe: Technology and the Hidden Integration of Europe' (2005) 21 *History & Technology* 1–19, 13; also JF Tuttle, 'Patent Policies of the European Atomic Energy Community' (1968–69) 30 *UPittLRev* 331–69; F Froschmaier [General Directorate of Competition of the European Commission], 'The Draft Convention on Patents in the Common Market' (1962) *ICLQ Supp* 4, 50–59, 59; GW Keeton, 'The Zollverein and the Common Market' (1963) *CLP* 1–16, 16. On the concept of 'functional federalism' itself see G Schwarzenberger, 'Federalism and Supranationalism in the European Communities' (1963) *CLP* 17–33.

¹⁸ See Finnis (n 11) 156–9; GF Westerman, 'A Common Patent in the Common Market' (1962) 44 *JPOS* 444–61, 446–7; PJ Federico, 'The European Patent Concept' (1974) 16 *PTC J Res & Ed* 33–43, 43. On the Zollverein and the Common Market generally see L Kohr, 'The History of the Common Market' (1960) 20 *JEH* 441–54; Keeton *ibid*; EN Roussakis, 'The Common Market and the Zollverein: Experiences in Integration' (1969) 35 *Louvain Economic Review* 201–8; WO Henderson, 'The German Zollverein and the European Economic Community' (1981) *J Institutional & Theoretical Economics (Economic Reconstruction in Europe: The Reintegration of Western Germany: A Symposium (September 1981))* 491–507.

¹⁹ See Neumeyer (n 3) 729.

²⁰ See F Froschmaier, 'Some Aspects of the Draft Convention Relating to a European Patent Law' (1963) 12 *ICLQ* 886–97, 888. That patent territoriality would need to be abolished in order to realize the Single Market was a widely held belief in the 1960s, including outside the EEC; see, eg, D Thompson, 'Restrictive Practices, Patents and Trade Marks in the Common Market' (1962) 11 *ICLQ* 594–6, 595; Gambrell (n 15).

²¹ (Washington, 19 June 1970) 28 *UST* 7645.

both the European and Community Patent Conventions. So too for the Council of Europe and non-EEC EPC States, a central driver of whose work—at least, in its latter stages—was their fear of being sidelined by the EEC States' pursuit of a Common Market patent.

III. THE CENTRAL VEXATIONS OF POST-WAR PATENT INITIATIVES AND HOW THEY WERE ADDRESSED

Post-war European patent initiatives were vexed by a wide range of issues: substantive, procedural, institutional, political, and constitutional in nature. They included, for example: how to proceed given the substantive variations in national laws, procedures and traditions which existed at the time;²² what substantive law to support in the context of those differences and a growing volume and complexity of technical information ('prior art');²³ by what procedural and institutional means to support a supranational patent system, including what role and location to assign supranational courts and offices, and what official languages and translation requirements to adopt; how open to make the supranational system to non-founding states; and, for the EEC Six specifically, how far to integrate it within the European Economic Community.

A. The Council of Europe and the Strasbourg Patent Convention (SPC) Initiative

The question of how to proceed occupied the first decade of work undertaken by the Council of Europe from 1949 on a European patent system. During that period, the Council's Committee of Experts on Patents considered variants on three main proposals.²⁴ The first was for a unitary patent coexisting with national patents.²⁵ The second was for a system for granting 'bundles' of national patents, supported by a central (European) patent authority.²⁶ And the third was for a convention requiring the voluntary unification of substantive aspects of national patent law. Thus, the only models not considered seriously during this period were ones aimed at replacing national laws; it having early been accepted that differences in national legal techniques and traditions would make that approach infeasible.

It was, of course, the third of the above models which the Council ultimately decided to pursue in 1959, and realized four years later with the Strasbourg Patent Convention of

²² The differences between the substantive patent laws of European states were extensive, and included the substantive criteria for a patent grant, the range of subject matter excluded from protection, the definition and standard of novelty required, the procedure for obtaining a patent, the method of determining the scope of protection, the scope of protection for product patents, the content of the patent rights and the period for which they existed, the allocation of rights in respect of employee inventions, and the limits on the rights of patentees to exploit their patent grants.

²³ See J Vojacek, 'The Changing Face of Patent Law' (1948) 30 JPOS 407–14, 408 (noting that 'technical literature [in Europe] has been increasing at such an alarming rate—at least 300,000 new printed patent specifications every year, apart from thousands of technical reviews and books', increasing the difficulty of conducting patent examinations and ensuring their reliability).

²⁴ cf MN Meller, 'Toward a Multinational Patent System' (1962) 44 JPOS 227–71, 233.

²⁵ This model was first proposed by M Longchambon in 1949 adopting the French model of a registration patent, and by Professor Reimer in 1953 adopting the German model of a post-examination grant. On the Reimer plan see Wadlow (n 3).

²⁶ This model was first proposed by Dr de Haan (Netherlands) in response to Dr Reimer's proposals in 1954. For a discussion see Wadlow (n 3).

1963 (SPC). Open only to Council of Europe members invited to join by its Committee of Ministers,²⁷ the SPC committed Member States to unifying their laws on patentability and the role of patent claims. Politically and legally it was an impressive achievement. It was the product of extensive comparative and analytical work over a 14-year period and avoided those aspects of substantive law which its drafters considered to be based in the economic and political fabric of states, focusing instead on aspects the unification of which would support the establishment of a European procedure for granting national, if not European, patents.²⁸ Spurred on by the EEC Six's announcement in 1959 of their goal of achieving an autonomous European patent system and unitary patent—something which it had at that point failed to achieve after ten years of intensive discussion—over the next three years the Council of Europe completed its convention quickly and, in doing so, established the substantive basis for all subsequent European patent initiatives. Of especial importance were its rigorous novelty standard for patentable inventions,²⁹ its expansive conception of protectable subject matter (which included chemical, medicinal and other products traditionally excluded from patentability by European states),³⁰ and its entrenchment of a central role for formal statements by patentees regarding their invention ('patent claims') in determining the scope of patent monopolies.³¹

Through these provisions, the SPC represented a first concrete step on the path to a European patent system, taken by an institution which, while still relatively young, had already acquired considerable political credibility and law-making experience, including in the patent field.³² Nonetheless, its Convention left several significant gaps, including the procedure for obtaining patents, the content, ownership and duration of patents, and the appropriate restrictions on their exploitation. As the Council of Europe had itself recognized, these were all matters on which European states disagreed, and the unification of which was likely to cause substantial controversy.

²⁷ The original members of the Council of Europe were Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, the UK, Greece, Turkey, Iceland, Germany and Austria. Iceland and Germany joined in 1950, and Austria in 1956. By 1963 (when the SPC was signed) Cyprus (1961) and Switzerland (1963) had also joined.

²⁸ The Council of Europe's approach has been fairly presented as both measured and respectful of national sovereignty; see GJ Weiser and JN Behrman, 'The Convention for European Industrial Property Rights' (1961–2) 5 PTC J Res & Ed 233–49.

²⁹ See SPC art 4.

³⁰ See SPC arts 1 and 2. The SPC's expansive conception of protectable subject matter was especially contentious, and was the reason for its boycott by Austria.

³¹ See SPC art 8 ('1. The patent application shall contain a description of the invention with the necessary drawings referred to therein and one or more claims defining the protection applied for. 2. The description must disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. 3. The extent of the protection conferred by the patent shall be determined by the terms of the claims. Nevertheless, the description and drawings shall be used to interpret the claims.')

³² This experience derived from the Council's earlier conclusion of two patent conventions: the European Convention Relating to the Formalities Required for Patent Applications (Paris, 11 December 1953) ETS 16, and the European Convention on the International Classification of Patents for Inventions (Paris, 19 December 1954) ETS 17. For a discussion see S Delvalle Goldsmith and M Burnside, 'Harmonization of European Patent Laws' (1964) 46 JPOS 48–61. For early accounts of the Council of Europe's role and work generally see GL Powell, 'The Council of Europe: The Latest Development in the Trend toward Closer Co-operation among the Western European States' (1950) 3 ICLQ 164–96; AH Robertson, 'The Legal Work of the Council of Europe' (1961) 10 ICLQ 143–66.

B. The EEC States' Community Patent Convention (CPC) Initiative: prior to 1959

Less intimidated by national disagreement over patent matters than the Council of Europe were the EEC Six,³³ whose comparative homogeneity and commitment to realizing the goals of the Treaty of Rome all but ensured a more ambitious agenda than that of the Council.³⁴ Following a proposal from the European Commission in 1959,³⁵ the sights of the EEC Six were, from the outset, set on an autonomous supranational patent system, including supranational administrative and judicial institutions and unitary patent grants.³⁶

Nonetheless, it is important not to overstate the ambitiousness of the EEC Six's project, nor the extent of their legal and political alignment. For example, in 1959 they continued to grant different types of patents: in all but Germany and the Netherlands registration of patents was all that was required, without novelty or patentability examination, and applications were not subject to opposition proceedings.³⁷ In addition, even the EEC Six recognized that any supranational system would need to co-exist with national systems, for a transitional period at least, notwithstanding the range of difficulties which such co-existence would create.³⁸ Finally, the EEC Six never intended their system to be truly autonomous, but rather anticipated from the outset that there would be an important, if not exclusive, role for national law and courts concerning such matters of conflict as entitlement, infringement and compulsory licensing.³⁹

³³ Belgium, the Netherlands, Luxembourg, France, Germany and Italy.

³⁴ See in this regard GJ Weiser, 'Patent and Antitrust Developments in the European Economic Community—A Sequel' (1966–67) 10 PTC J Res & Ed 1–9, 5 (reporting the view among EEC and national officials that 'countries like Britain, Ireland, Austria, Sweden, Switzerland, and Norway cannot contribute to the fundamental decisions involved in establishing the [CPC] and to the functioning of the system itself since they lack the basic economic and political community of interest that brought and keeps the six members of the EEC together', and that 'these countries are really not politically ready or willing to surrender enough national sovereignty to the supra-national institutions that would be required for participation in the [CPC].')

³⁵ The trigger for the EEC patent initiative was the so-called Groeben plan of 1959 concerning industrial property rights prepared by European Commissioner Hans von der Groeben. For a discussion see Neumeyer (n 3) 728.

³⁶ See, eg, the 1960 report of Germany Ministry of Justice official Kurt Haertel, commissioned by von der Groeben (and discussed in Robbins (n 16) 221–4). That the EEC patent would need to be supported by a system of courts exercising federal jurisdiction was widely assumed from the outset; see, eg, Froschmaier (n 20) 895–6; the comments of GW Tookey as reported in 'Current Developments in Industrial Property Rights in Great Britain' (1962–63) 6 PTC J Res & Ed 453–76, 461.

³⁷ cf AR Tracy, 'A Visit to the British, French, and German Patent Offices' (1936) 18 JPOS 208–14; Harbers (n 11) 1002–4. On the origins of examination in German patent law see J Pohlmann, 'The Inventor's Right in Early German Law: Material of the Time from 1531 to 1700' (1961) 43 JPOS 121–37. The French system was reformed in the 1960s; see M Hiance and Y Plasseraud, 'The New French Patent Law' (1968) 50 JPOS 209–13.

³⁸ This view had already been taken in the Haertel report; see also Westerman (n 18) 457; Finniss (n 11) 162. One issue which co-existing systems gave rise to was the simultaneous protection of inventions by national and Community patents, which remained a difficulty until the end; see General Secretariat of the Council of the European Communities, *Records of the Luxembourg Conference on the Community Patent 1975* (Office for Official Publications of the European Communities 1982) (CPC travaux) paras 248–50.

³⁹ See Finniss (n 11) 162. This was also the view taken in the Haertel report. Indeed, even the proposals published in Germany in the early 1940s envisaged states retaining responsibility for the issuance of compulsory licences, and perhaps also the nullification of patent grants, in order to protect national economies, and as envisaged by art 5(2) of the Paris Convention for the Protection

Each of these issues was enormously controversial for reasons that went to the heart of the CPC project.⁴⁰ For example, the distinction between registration and examination systems was based in different ‘natural rights’ and ‘public interest’ patent philosophies.⁴¹ Similarly, the issues of entitlement and licensing raised questions of property, employment and contract law, all of which were strongly associated with national sovereignty, and regarded as lying outside the patent field.⁴² They also raised issues of access to the future CPC, including whether nationals of non-EEC states would be entitled to apply for and own a unitary patent and, if they were to be so entitled, whether importation of a patented product into the Common Market would satisfy unitary patent working requirements.

Closely related to access and working was the question of the CPC’s membership, and the community and values which the Convention would seek to represent. That question arose because of the absence of any clear mandate for the creation of a unitary patent in the Treaty of Rome, and the acceptance of the Commission and EEC States that it would therefore require a special agreement under Article 15 of the Paris Convention.⁴³ Hence the possibility of a system that would serve a wider international community than the EEC, and have a correspondingly open membership policy.⁴⁴ Hence also the importance of the normative question of what the CPC’s purpose ought to be: to support European integration, whether economic, political or administrative, or to facilitate global patent standards and the abolition of patent territoriality? The answer would affect all aspects of the EEC Six’s

of Industrial Property (Paris, 20 March 1883, 13 UST 1) (Paris Convention). Early on in its work, the Council of Europe had also recognized compulsory licensing as a primary means by which states could (and would want to) offset the effects of a harmonized system on their national economies. See further n 58.

⁴⁰ For an overview see RG Lloyd, ‘The Protection of Industrial Property and the Common Market’ (1963) CLP 123–37, 130–7.

⁴¹ For example, France supported a ‘natural rights’ view of patent monopolies which required that they be made available as of right, and not subject to denial or limitation by the executive or an administrative official. See Kranakis (n 3) 703; N Greenblum and A Netter, ‘The French Patent and the European System’ (1977) 59 JPOS 573–99, 575. For a comparison of the US and European patent philosophies see Diener (n 12); H Kronstein and I Till, ‘A Reevaluation of the International Patent Convention’ (1947) 12 Law & Contemporary Problems 765–81. On other differences between the post-war patent systems of US and Europe see T Ostfeld, ‘Problems of European Patent Protection’ (1952) 34 JPOS 739–55; also LJ Harris, ‘The First Modern Common Market: A Reinterpretation of the [British] Commonwealth Experience in Industrial Property’ (1962–63) 6 PTC J Res & Ed 199–223.

⁴² For example, in the early 1960s the International Labour Organization was reportedly considering the issue of employee inventions (see Lloyd (n 40) 131). Compare the early ambivalence regarding the boundaries of patent and competition law, discussed below.

⁴³ The provisions in the Treaty of Rome concerning industrial property, in conjunction with its provisions on freedom of movement and competition, created an ambiguity regarding EC competence in patent law; cf, eg, arts 36 and 222 (envisaging national regulation of industrial property and territorial restrictions on patent exploitation) with arts 85 and 86 (providing the basis for a competition regime effective within the Common Market). That ambiguity can be read as underpinning a philosophical ambivalence at the heart of the early European project itself, on which see further below; Baillie (n 3) 153; M Klotz, ‘A Great Opportunity Lost? The New Draft Relating to a European Patent Law’ (1963) 45 JPOS 416–19, 417; but cf n 20. For a discussion of some of the European and US constitutional issues created by the EEC project see Meller (n 24).

⁴⁴ cf Froschmaier (n 20) 892.

initiative, from how to pursue their goal (and whom to involve in its pursuit⁴⁵), to what substantive law to support, and what degree of integration to seek with the EEC.⁴⁶

As noted above, the issue of membership was closely related to that of access to the CPC patent for nationals of non-EEC states.⁴⁷ Both were matters of especial controversy within and outside the Common Market, particularly following de Gaulle's veto of the UK's bid for Community membership in 1963.⁴⁸ They were also the focus of much US criticism of the EEC initiative following reports that the Convention would be open to all Paris Union states on a full or partial association basis, but that nationals of non-member states might be denied access to the CPC so as not to discourage applications for membership, nor permit European industry to be dominated by foreign patentees.⁴⁹ The news that US nationals might be barred from obtaining the unitary patent provoked a flurry of disgruntled commentary in the early 1960s, politicizing the EEC Six's project internationally. Many argued that to deny access to foreign applicants would infringe the national treatment provision of the Paris Convention and, by requiring the indefinite retention of national EEC patent systems, defeat the project's economic and other objectives.⁵⁰

⁴⁵ As remarked by the Chairman of the Board of Trade Advisory Group on the proposals of Common Market countries regarding a European patent system, GW Tookey, the EEC initiative was in its early years 'a private party', and like many such parties was surrounded in secrecy. See 'Current Developments in Industrial Property Rights in Great Britain' (n 36) 460.

⁴⁶ See generally GJ Weiser, 'Patent and Antitrust Development and Prospects of the European Economic Community' (1964–65) 8 PTC J Res & Ed 1–20 (reporting on interviews with officials involved in the EEC patent initiative); Weiser (n 34).

⁴⁷ For a general discussion see Meller (n 24); Froschmaier (n 20).

⁴⁸ See, eg, Weiser (n 34) 5 (noting the desire of the Netherlands to wait for UK participation in the EEC project so as 'to correct the balance of industrial and political powers which often leaves that country isolated from the Franco-German industrial group').

⁴⁹ See generally Meller (n 24); Froschmaier (n 20). That European industry might be dominated by foreign patentees was contested by some commentators; see, eg, HG Maier, 'A New Look at the European Patent: Limited Availability' (1966) 19 VandLRev 257–83, 278–82 (arguing that of the three reasons for seeking patent protection in foreign countries—to protect patented products exported into the country; to protect products manufactured in the country by a branch or subsidiary of the applicant; and to serve as the basis for a licence allowing a national to make or exploit the product—only the first would be relevant in the case of the unitary patent, and it was insufficient to support the exclusion of foreign nationals). On the threat of domination and small and medium-sized European enterprises particularly see LJ Robbins, 'The European Patent Convention: Some Present Viewpoints of the European Patent Profession' (1963) 45 JPOS 295–307, 303–4. The impact of the CPC on small and medium-sized enterprises was of especial concern, particularly given the expectation that national patent systems would become less efficient as a result of 'a swing . . . to the federal system' among EEC countries. See 'Current Developments in Industrial Property Rights in Great Britain' (n 36) 461.

⁵⁰ For typical responses see Ladas (n 13); Weiser and Behrman (n 28) 245–7; GM Frayne, 'The EEC (Common Market) Patent and the National Treatment Principles' (1962) 52 Trademark Reporter 248–59; RE Bucknam, 'Access to the European Patent System' (1963–64) 7 PTC J Res & Ed 427–30; GJ Weiser, 'The European Common Market Patent Convention: The Right to Apply for a Common Market Patent' (1962–63) 6 PTC J Res & Ed 317–26; Maier *ibid.* US attention to this issue was partly a matter of timing; the EEC Six's work coinciding with a demand for greater US participation in the international industrial property scene (see DL Ladd, 'The Patent Plans of the Common Market Countries' (1962) 44 JPOS 583–91, 590).

C. The EEC's Community Patent Convention (CPC) and European Patent Convention (EPC) Initiatives: from 1969

In 1964, disagreement among the EEC Six on the issues of controversy described above caused work on the CPC to cease. When that work was recommenced in 1969, following a call by French foreign minister Michel Debré in 1968, it was in a very different legal and political climate.⁵¹ Above all, the impasse over access had been resolved by the PCT initiative⁵² and a decision, originating with the EFTA States, to pursue two European Conventions instead of one: an inclusive system for granting bundles of national patents in a wide collection of European countries, ie, the system later established by the EPC, and a unitary patent for the exclusive benefit of EEC States to begin (for those States) where the EPC left off.⁵³ Spurred on by progress on the PCT, and by the French fear of becoming marginalized in an emerging international patent community which favoured examination systems and overwhelmed by patent applications from US nationals,⁵⁴ work on the EPC commenced alongside the resumption of work on the CPC as an initiative of 17 European States: the EEC Six, the EFTA Seven, Greece, Ireland, Spain and Turkey.

1. The European Patent Convention (EPC) initiative: 1969 to 1973

We have seen that the Strasbourg Convention established the substantive basis of a European patent system in its provision for unified laws on patentability and the role of patent claims. Of the issues that remained, those of greatest relevance for the EPC patent-granting project were ownership, the patent grant, and the procedure for obtaining bundles of (European) national patents.

By 1969, when the first EPC intergovernmental conference took place, a consensus on the last of these issues was already emerging among European states. Reflecting on the one hand the international community's portrayal of registration patents as 'worthless' products of 'less developed' countries which lacked the resources and technical expertise required for novelty searching and patent examination, and on the other hand the enormous and increasing burden which rigorous examination of all patent applications represented,⁵⁵ that consensus was for a system of deferred examination. In substance, deferred examination represented a compromise between the registration and examination systems of EEC States which would also have the further and important practical advantage of relieving the burden of the European Patent Office (EPO) in its early life, and variants of which had then recently been tested, with positive result, in the two important European patent jurisdictions of Germany and the Netherlands.⁵⁶

⁵¹ Among other things, the period from 1964 to 1969 saw important developments in principles of EC competition law, including *C-24/67 Parke, Davis & Co v Probel* [1968] ECR 55 (deciding that while patents are not per se abusive of EC competition principles, their use may be, and must therefore be scrutinized for compliance with the same).

⁵² For a discussion see Newman (n 3) 479–80. On the background to the PCT initiative see S Ladas, *Patents, Trademarks, and Related Rights* (Harvard University Press 1975) 563–4.

⁵³ See Ladas *ibid* 633.

⁵⁴ See Kranakis (n 3) 706–7; Ladas (n 52) 634.

⁵⁵ See Kranakis (n 3) 703.

⁵⁶ cf Froschmaier (n 17) 58. The introduction of 'deferred examination' was widely foreseen (see, eg, Laude (n 13)), and was proposed by a US commentator in the mid-1960s as a model for

The issues of entitlement and the patent grant were more difficult. The Council of Europe had already established a general principle of strong patent grants, and the EEC States were committed to building on that principle in order to ensure that European patents would be good currency in the arena of international trade. The EPC States followed their lead by defining patentability expansively, and adopting the so-called ‘maximal approach’ to harmonization, whereby the validity of the European patent in each designated state would be governed by the Convention rather than national law.⁵⁷ An important reason why there was support for this approach—as for the Council of Europe’s support for expansive patentability previously—was the freedom which European states were expected to have to offset its effects by means of national provisions on post-grant matters, including infringement and compulsory licensing.⁵⁸ Among other things, this explains the EPC States’ early consideration of whether Article 8(3) of the SPC—that ‘[t]he extent of the protection conferred by the patent shall be determined by the terms of the claims’ (interpreted having regard to the description and drawings)—ought to be omitted from the EPC, given that ‘the general aims of the Convention’ were unconcerned with patents after grant. The Working Party decided that the provision ought to be included, ‘since an applicant can only draw up his claims for a European patent application if he knows exactly what the principles for their interpretation are’.⁵⁹ The result was EPC Article 69, mirroring SPC Article 8, supplemented by the Protocol, which was included by the EPC as ‘a declaration of intent’ that national courts interpret European patents by means of an approach falling ‘somewhere between the “liberal” concept formulated by the German courts and the “restrictive” concept applied in the United Kingdom’.⁶⁰

The EPC States also considered harmonizing patent entitlement under the EPC, but decided against doing so for two reasons. The first was their view that it would be ‘impossible to standardise the laws on ownership of inventions for all the European States which may become Contracting parties to the Convention,’ and equally impossible for the EPO ‘to determine which national laws would be applicable in each case’ and ‘apply twenty or so different national laws according to each individual case’.⁶¹ And the second, reflecting their circumscribed view of the boundaries of substantive patent law, was that it would be inappropriate, as a matter of principle, to have ‘disputes traditionally falling within the sphere of property law . . . dealt with by

modernizing the US patent system (see JR Duncan, ‘The European Patent Convention as a Guide to Modernizing Our Patent Examining System’ (1964–65) 8 PTC J Res & Ed 405–42).

⁵⁷ See art 2(2) (regarding the effect of a European patent), art 138 (regarding the grounds for revocation of a European patent), art 167 (regarding the reservations permitted to the EPC standards). On the ‘maximal’ approach generally see J Pila, ‘Article 53(b) EPC: A Challenge to the *Novartis* Theory of European Patent History’ (2009) 72 MLR 412–62, 446.

⁵⁸ This was felt to be particularly important given the envisaged support for product patents. See, eg, Weiser (n 34) 2; also A Deringer, ‘Towards European and EEC Patents’ (1971) 16 *Antitrust Bulletin* 151–63.

⁵⁹ Inter-Governmental Conference for the Setting up of a European System for the Grant of Patents doc BR/7/69 (29 July 1969) 20.

⁶⁰ Inter-Governmental Conference for the Setting up of a European System for the Grant of Patents doc BR/177/72 (13 April 1972) 14.

⁶¹ Inter-Governmental Conference for the Setting up of a European System for the Grant of Patents doc BR/144/71 (16 December 1971) 18–19.

authorities other than national civil courts'.⁶² Entitlement was consequently left for determination by national courts applying national law.⁶³

2. *The EEC States' Community Patent Convention (CPC) Initiative: 1969 to 1975*

With the Council of Europe and EPC states having resolved the issues of patentability standards, validity/revocability, entitlement, and the process for obtaining a European patent, the role of patent claims in defining patent scope, and the method of interpreting claims, there remained a few gaps to be filled by the EEC States after 1973. Those of primary importance concerned infringement, including the rights conferred by the patent and the so-called economic provisions—the restrictions on the permissible exploitation of patents—and the relationship between the CPC and the EEC itself.

(a) Infringement

With respect to infringement, the EPC had provided that the rights conferred by a European patent should be the same as those conferred by national law in respect of national patents, consistent with the nature of European patents as bundles of national patents, and that infringement should 'be dealt with by national law'.⁶⁴ An exception concerned European patents for processes, which the Convention provided would protect the products directly obtained by the process, in addition to the process itself.⁶⁵ This provision was inserted following a Swiss proposal of 1973⁶⁶ reflecting the provisions of the then draft CPC. It was explained at the time with reference to the inability to define certain chemical products independently of the process for their manufacture. According to the proposal, if the protection for such products was to be effective notwithstanding this, it would need to extend beyond the manufacturing process itself to 'the products directly obtained' from that process, and to be supported by a reversal of the burden of proving infringement in the case of new materials, in respect of every designated State. In the event, only the first part of this argument was accepted by the drafters; the second constituting 'too great an inroad into the national law of the Contracting States'.⁶⁷ It continued to be supported by the EEC States, however, and is therefore reflected in the CPC, subject to a further provision that 'in the adduction of proof to the contrary, the legitimate interests of the defendant in protecting his manufacturing and business secrets shall be taken into account'.⁶⁸

Infringement having been left to national law under the EPC, the EEC States confined themselves to defining the rights comprised in the Community patent,⁶⁹ and otherwise followed the EPC's approach by leaving infringement to the 'national law relating to infringement of a national patent in the Contracting State where the court hearing the

⁶² *ibid.*

⁶³ See EPC art 60(1); CPC art 69(4).

⁶⁴ EPC art 64(1), (3).

⁶⁵ EPC art 64(2).

⁶⁶ See Munich Diplomatic Conference for the Setting up of a European System for the Grant of Patents doc M/67/1 (11 September 1973).

⁶⁷ Munich Diplomatic Conference for the Setting up of a European System for the Grant of Patents doc M/148/G (1 October 1973) 7.

⁶⁸ CPC art 75(2).

⁶⁹ See CPC arts 29 and 30 (prohibition of direct and indirect use of the invention) and art 31 (limitation of the effects of the Community patent).

action is located, in so far as the private international law of that state does not require application of the national law of another contracting state',⁷⁰ with detailed provisions for determining the jurisdiction of national courts.⁷¹ The CPC also clarified that 'national courts dealing with actions relating to patents had no jurisdiction to decide whether or not a patent was valid',⁷² and were consequently required, when dealing with a Community patent, to treat it as such.⁷³ Finally, the Convention provided for a stay of proceedings by a national court where its decision depended upon a Community patent's validity and an opposition, limitation or revocation action was on foot before the EPO;⁷⁴ further requiring that in any case in which such a stay had been ordered by a court with jurisdiction to determine the extent of a Community patent's protection, the EPO should 'express an opinion' on that issue of patent scope in the event of it deciding to maintain the patent.⁷⁵ Such an opinion could also be sought by the national court on its own motion or at the request of one of the parties in an infringement action.⁷⁶ Through these and other provisions, the CPC was integrated with both national and EPC law by means of a system which involved the vertical and horizontal bifurcation of validity and infringement (law and proceedings), and a non-binding preliminary referral procedure between national courts and the EPO.⁷⁷

(b) Economic provisions

On the economic provisions, the EEC States' original acceptance that licensing ought not to be regulated by European patent law persisted, with four important competition-based exceptions. The first was to provide for licences of right with respect to Community patents.⁷⁸ The second was to confirm the permissibility of exclusive or non-exclusive licences covering the whole or part of the territories in which the Community patent was effective, albeit on the understanding that they would be subject to 'national or Community cartel law'.⁷⁹ The third was with respect to exhaustion: territorial licenses within the Common Market would not be binding on third parties, such that a licensor's sale of a patented product would exhaust the patent in respect of that product for the entire Community 'unless there are grounds which, under Community law, would justify the extension to such acts of the rights conferred by the patent'.⁸⁰ And the fourth concerned compulsory licences. According to the EEC States, compulsory licences—including 'official licences and any right to use patented inventions in the public interest'⁸¹—would be a matter for national law, but their effect confined to the granting state's territory.⁸²

⁷⁰ See CPC art 36.

⁷¹ *ibid.* Jurisdiction lay with the courts of the contracting state in which (a) the defendant had his residence or an establishment, the plaintiff had his residence or an establishment, or failing that, with the courts of Germany; and (b) the act of infringement was committed. In the case of (a) jurisdiction extended to acts committed within the territory of any of the contracting states, whereas in the case of (b) it was confined to acts committed within the territory of that state.

⁷² CPC travaux para 456. ⁷³ CPC art 76. ⁷⁴ CPC art 77(2).

⁷⁵ CPC art 78(1). ⁷⁶ CPC art 78(2). ⁷⁷ CPC art 78(3). ⁷⁸ See CPC art 44.

⁷⁹ CPC art 43(1); CPC travaux para 63; see also CPC art 43(2) and CPC travaux paras 68–9.

⁸⁰ CPC arts 32 (Community patents) and 81(1) (national patents). See also CPC arts 81(2) and 81(3), through which the States sought to achieve a degree of legal certainty while also limiting the risk of 'adopting a provision which might be declared incompatible with the EEC Treaty': CPC travaux para 390.

⁸¹ CPC art 46(4). At the 1975 CPC Conference the Chairman noted, at the request of the UK delegation, the Committee of the Whole's agreement that the 'right to use patented invention in the

In addition, and without prejudice to compulsory licences granted ‘in the public interest’, the mere failure to work a Community or national patent locally would not be a valid basis for a compulsory licence. This was in contrast to a failure to work the patent within the Common Market more generally, and to produce the product covered by the patent in sufficient quantity to satisfy the needs of the State in which it was manufactured, which (it was accepted) would justify such a grant.⁸³ The extension of this provision to national patents was especially controversial, raising as it did the relationship between the socio-economic needs of EEC States on the one hand and the free movement and other values of the EEC on the other.⁸⁴ Hence the following concern expressed by the Italian delegation in 1975:⁸⁵

The Italian delegation stated that whereas Italy had always sought in industrial property matters to maintain a balance between the three aspects of production, public interest and rewarding the inventor, the Community Patent Convention seemed primarily concerned with the interests of the inventor and with problems of competition, to the extent of ignoring the production aspect. Thus Article 79 [Article 82] in combination with Article 47 took account of the market aspects of the problem but not of the production aspect nor of the social problems involved for Italy. For these reasons the Italian delegation continued to advocate the deletion of Article 79 [Article 82].

The tension reflected here between Community and state interests runs through both the economic provisions of the CPC, and their discussion at the Conference at which the Convention was eventually signed. Historically understood as a mechanism for supporting local industry by encouraging the innovation or importation of new technologies, in the Community context in which ‘local’ meant ‘within the Community’, the territorial nature and effect of national patent rights needed to be balanced against the requirements of the Single Market.⁸⁶ That task was left by the Treaties to the Court of Justice, which responded in the 1960s and 1970s by defining Community competence with respect to patent and other intellectual property rights by drawing a distinction between the existence of such rights, over which the Community was said to lack jurisdiction, and the exercise of such rights, for which it was regarded as responsible. According to the Court applying this distinction, derogations from the fundamental freedoms for the purpose of protecting industrial and commercial property needed to be interpreted restrictively, and thus to be confined to such derogations as the Court decided were ‘justified for the purpose of safeguarding rights which constitute the specific subject matter of such property’.⁸⁷ Its reasoning begged the question, however, what was the specific subject matter of a patent the safeguarding of which would justify derogations from the fundamental freedoms of the Community? According to the Court, in a feat of circuitous reasoning which conflated patent and competition law, and

public interest’ included the right of a government to use a patented invention or to approve such use; with the French delegation also recording its broad understanding of the provision (see below).

⁸² CPC art 46.

⁸³ See CPC arts 47 and 82. On their background see Deringer (n 58) 161–2.

⁸⁴ For an early critique of the emphasis placed on competition by von der Groeben and the Commission generally, including its implications for monopolies, see AG van Meerhaeghe, ‘The Purpose of Competition Policy: A Critical Essay on the EEC’s Views’ (1967) 27 *Journal of Economics* 425–38.

⁸⁵ CPC travaux para 207.

⁸⁶ See n 43.

⁸⁷ C-78/70 *Deutsche Grammophon v Metro* [1971] ECR 487, [11].

drawing inspiration from the then draft CPC, it was not the exclusive right to prevent third parties from doing the acts reserved to the patent owner in respect of the patented invention by the patent law of the granting state within the territory of that state, as logic might have suggested. Instead, the specific subject matter of a patent was the exclusive right to prevent third parties from the 'use [of] an invention with a view to manufacturing industrial products and putting them into circulation for the first time, either directly or by the grant of licences to third parties'.⁸⁸ In this way, the subject matter of a patent was redefined to achieve a compromise between the rights of patentees under national patent law, and the rights of competitors under the Treaties;⁸⁹ in much the same way as the CJEU did (and has done recently) in other intellectual property fields.⁹⁰ Given that redefinition, the opposition of the Italian delegation to the restriction of states' rights regarding local working requirements as prioritizing competition to the detriment of national industry was unlikely to attract widespread support.

Nonetheless, the EEC States' rejection of the Italian concerns regarding the compulsory licensing provisions of the CPC ought not to be taken as indicating that there was a more general resolution of the tension between Community and state interests. For one, the restrictions on the permissible grant of compulsory licences for lack or insufficiency of exploitation did not apply to licences granted 'in the public interest';⁹¹ a phrase which the French delegation understood broadly, 'as including licences issued in the interests of public health, in the interests of the economy or in the interests of national defence'.⁹² In addition, the CPC permitted States to exclude the operation of the compulsory licensing provisions for a maximum period of 15 years.⁹³ On the other hand, the CPC provided for 'common rules on the granting of compulsory licences in respect of Community patents',⁹⁴ which the Commission was adamant would not prejudice the free movement of goods.⁹⁵ And so, too, while the CPC guaranteed a patentee's right to enforce a territorial restriction on a patent licence, the reason (as explained by the UK and German delegations) 'was only . . . to clarify the consequences as regards patent law . . . in accordance with [Article 43(1)]';⁹⁶ the implication being that competition law might still undermine the restriction's legality.

(c) Exploitation

Having dealt with exploitation in the manner described above, there remained to be considered the institutional and procedural relationship between the Community patent

⁸⁸ C-15/74 *Centrafarm v Sterling Drug* [1974] ECR 1147, [10]–[11].

⁸⁹ cf FG Jacobs, 'Industrial Property and the EEC Treaty: A Reply' (1975) 24 ICLQ 643–58, 657–8.

⁹⁰ See C-128/11 *UsedSoft GmbH v Oracle International Corp* [2012] 3 CMLR 44 (deciding that the exhaustion doctrine applies to all 'transfers of ownership' for payment, including transfers of ownership effected by the provision of a digital copy of copyright-protected software).

⁹¹ See CPC arts 47, 82.

⁹² CPC travaux para 82.

⁹³ CPC art 89.

⁹⁴ See the Resolution of this name in Resolutions, Declarations and Decision Annexed to the Final Act of the CPC.

⁹⁵ CPC travaux para 289. Whether the grant of a compulsory licence in respect of a national patent would be regarded as exhausting the patent for the entire Community was considered and answered in the negative, consistent with the later decision of the Court of Justice in C-19/84 *Pharmon v Hoechst* [1985] ECR 2281.

⁹⁶ CPC travaux para 68.

system and the EEC, including the location of its supporting institutions and its official languages and translation requirements.

The EPC had required the establishment of a European patent office for the purpose of granting its European (bundles of national) patents, with Munich and The Hague as its chosen locations: Munich on account of the German Patent Office's examination experience and facilities, and The Hague as the home of the International Patent Institute—which, it was agreed, ought to be subsumed as a branch of the EPO. As a patent-granting system,⁹⁷ the EPC had not required a European patent court,⁹⁸ and as a system intended to benefit a wider collection of states than those within the EEC, its independence of the Common Market was a given, as was its need for different language and translation provisions.⁹⁹ Thus—and in contrast to the CPC—the EPC did not require that claims be translated into an official language of each Contracting State,¹⁰⁰ but did permit a Contracting State to require that a specification or application be translated, and to accept as authentic a translation which was more restrictive than the official (German, English and French language) versions.¹⁰¹

In contrast to the EPC, and notwithstanding its conclusion outside the Treaty of Rome, the CPC was intimately connected to the European Economic Community. The main evidence of this connection, aside from its history, was its membership, its provision for preliminary references to the Court of Justice,¹⁰² and its economic clauses entrenching the EEC's competition policies.¹⁰³ However, and notwithstanding this, the drafters of the CPC were also concerned to integrate their system fully into the EPC system so as to make use of the European patent institutions and infrastructure which already existed, and to strengthen the currency of the European patent system in the globalizing economy. Thus, Community patents were to begin life as European (EPC) patents granted on the basis of the EPC, and to be administered by offices within the EPO.

D. Conclusion

The central challenge for European patent reformers after 1949 was to create a supranational patent system without harming local interests and industry.¹⁰⁴ For the Council of Europe the answer lay in a convention requiring the voluntary unification of aspects of substantive patent law. For the EPC framers it lay in a harmonized system for

⁹⁷ As expressed in its Preamble, the EPC sought 'to strengthen co-operation between the States of Europe in respect of the protection of inventions'.

⁹⁸ In contrast to Boards (with technically and legally qualified members) to hear appeals from the EPO's examining, opposition and other administrative offices, including an Enlarged Board to decide or give opinions on questions of law referred by the Boards or EPO President, and decide on petitions for review of a decision by a Board (see EPC arts 21 and 22).

⁹⁹ The CPC was from the outset proposed to operate on a trilingual (German, French and English) basis; the inclusion of English presumably on the basis of its envisaged access by non-EEC states. According to Robbins (n 49) 305–6, the exclusion of Dutch and Italian was regarded by some as problematic.

¹⁰⁰ CPC arts 14(8) and (9).

¹⁰⁰ CPC art 33(1).

¹⁰² CPC art 177.

¹⁰³ See A Krieger, 'The Luxembourg Convention on the Community Patent: A Challenge and a Duty' (1988) 19 IIC 143–57, 145.

¹⁰⁴ See PO Langballe, 'International Patent Systems: Aims, Principles, Means' (1970–71) 14 PTC J Res & Ed 139–44, 141 ('[I]t cannot—and should not—be concealed that strong national interests are closely associated with the means envisaged for the operation of the proposed system.')

granting bundles of national patents requiring neither substantive legal reform nor a European patent litigation system. And for the EEC States it lay in a federal patent system: a system which would co-exist with national patent systems, and otherwise preserve national interests via the retention of domestic infringement and exploitation law and jurisdiction, territorial licensing, and the right to grant state-based compulsory licences.

In retrospect, it seems too easy to say that the Council of Europe and EPC States proceeded more sensibly than the EEC States; both the SPC and EPC having come into force and surpassed reasonable expectations, in contrast to the CPC, which has languished by the wayside. But the question remains, why exactly did the CPC fail?

One answer of course is that it required ratification by each of the EEC States, of which in 1975 there were nine, including some for which ratification required a national referendum or overwhelming parliamentary majority.¹⁰⁵ A second answer, however, may be that it was not perceived to offer enough of substance beyond that which the SPC and EPC already offered to justify the fragmentation and uncertainty which its adoption would have entailed. To be precise, and as summarized by Iain Baillie at the time,¹⁰⁶ the CPC offered a single patent for the EEC countries, a single renewal fee and revocation proceeding, a uniform definition of the rights conferred by Community patent law and uniform economic provisions for national and Community patents. Against these benefits had to be weighed its risks and likely costs to industry, including: (a) increased expense to patentees, regardless of the degree of protection required for their inventions; (b) indivisible patent grants; (c) all or nothing patent protection—patents being revocable throughout the Community by a single opposition or nullity procedure, but potentially requiring separate litigation in each EEC State to prevent infringement; and (d) a ‘Wagnerian complexity’ to negotiate, as a result of the system’s integration into national, EPC and EEC legal systems.¹⁰⁷ Put differently, and in terms of the four motivations of post-war European patent initiatives identified above, it was not clear that the CPC *would* reduce the costs and inefficiencies of existing patent systems, particularly given the existence of the PCT and EPC, nor, once the principle of exhaustion had been recognized for national patent systems especially, that it would facilitate integration beyond the level of those systems, the Treaties and the SPC.¹⁰⁸ Absent assured economic and political benefits, there remained only the intellectual and psychological motivations to spur the EEC States into giving effect to the CPC.

¹⁰⁵ The SPC, EPC and CPC were all pursued as special agreements under the Paris Convention. The SPC required eight ratifications to enter into force which—as ratifications required substantial amendment of national laws—took 17 years to secure. The EPC required ratification by six states which had among them 180,000 patent applications filed in 1970, which took four years. On the constitutional difficulties faced by Ireland in particular regarding the CPC see CPC travaux paras 483–6; Krieger (n 103) 145–6.

¹⁰⁶ See Baillie (n 3) 170.

¹⁰⁷ See *ibid* 177. The description of the system as ‘Wagnerian’ is from Federico (n 18) 43.

¹⁰⁸ On the likely economic impact of the European patent conventions see Manson (n 18); cf Newman (n 3) 481–3. On their importance as tools of integration cf Newman (n 3) 483; Maier (n 49) 277–8 (discussing the inadequacy of the Koch-Froschmaier principles of exhaustion (on which see N Koch and F Froschmaier, ‘The Doctrine of Territoriality in Patent Law and the European Common Market’ (1965–66) 9 PTC J Res & Ed 343–60) as a solution to the European patent problem). To some extent the disagreement over the latter issue reflects a disagreement over whether European integration requires the removal of obstacles to cross-border activities on the one hand or the creation of unified systems and institutions on the other; a disagreement which is itself informed by the type of integration sought. See Smits and Bull (n 10) 6.

Neither proved sufficient. On the contrary, fear of being marginalized or left behind in the supranational patent race gave way to an ambivalence regarding the effects which the CPC might have on local economies, particularly for those EEC States without strong export industries.¹⁰⁹ As one commentator reporting on European patent professionals' views had remarked in the early 1960s, while the CPC would support 'the free flow principle' within the Common Market, 'the flow would not be uniform in origin.'¹¹⁰ Among other things, this raised the possibility that the CPC might harm rather than promote political integration by exacerbating existing disparities in the technological development of EEC States, and encouraging divisive industrial and regulatory practices, such as establishing business subsidiaries and granting compulsory licenses in respect of patents originating in other parts of the Community.¹¹¹

A third and closely related reason that the CPC can be said to have failed were the concerns regarding its litigation arrangements. Principal among those concerns were the scope which the CPC left for forum shopping between national courts, and its bifurcation of infringement and validity proceedings. These issues were the reason for the CPC Resolution on the litigation of Community patents,¹¹² which committed the EEC States, even before the Convention had been ratified, to commencing 'the necessary work to provide a solution to the [problems] of dealing effectively with actions relating to Community patents [and] arising from a separation of jurisdiction in respect of infringement and validity of Community patents'.¹¹³ According to the Protocol, such work 'should be concluded before any litigation on Community patents takes place and at the latest within 10 years from the date of signing of the Convention'. For Denmark, the UK and Ireland, fulfilling the Protocol was a precondition of ratifying the CPC. That fulfilment came with the conclusion of the 1989 Agreement and its system of Community patent courts, under which validity and infringement could be heard together by any national court having the status of a Community court, with appeals to a Common Appeal Court and thereafter to the European Court of Justice.¹¹⁴

By the time of the Luxembourg Agreement, the political context of the European patent problem had altered significantly as a result (among other things) of the adoption of the Single European Act in 1985. As is well known, that Act set 31 December 1992 as the final date for completing the internal market by means of more than 300 specific measures, including the entry into force of the CPC for a majority, if not all, EC Member States. In fact, it had already been suggested that ratification by a majority of States ought to be accepted as sufficient to bring the CPC into effect, primarily on account of the constitutional obstacles which Ireland and Denmark in particular faced.¹¹⁵ Thus it was that 12 ratifications by EEC Members (being also EPC Contracting States) were required for the 1989 Agreement to enter into force.¹¹⁶ Even this set the bar too high, however, with the result that the Agreement shared the fate of the 1975 Convention in never being implemented; the reason this time being less the constitutional obstacles of ratifying states than the continued ambivalence regarding its

¹⁰⁹ This ambivalence existed from the initiative's earliest days; see, eg, Robbins (n 49) 301–3.

¹¹⁰ Robbins (n 49) 303. ¹¹¹ See Robbins (n 49). ¹¹² See n 94.

¹¹³ *ibid.* See also the recitals to the 1989 Agreement.

¹¹⁴ For a discussion see WL Haardt, 'The Setting up of a Court of Appeal for Community Patents' (1985) 3 IIC 332–40.

¹¹⁵ All nine original signatories to the CPC supported that, including Ireland and Denmark. See A Krieger, 'When Will the European Community Patent Finally Arrive?' (1998) IIC 855–76.

¹¹⁶ See 1989 Agreement art 10.

benefits. For example, industry remained unenthusiastic about the prospect of indivisible protection within the Community and, having experienced a decade under the EPC, unconvinced of the desirability of further harmonization initiatives. Added to this was a new concern over the prospect of national courts revoking patents for the entire Community, and of the ever growing costs to inventors and patentees of complying with the CPC's translation requirements.¹¹⁷

IV. CONCLUDING REMARKS: THE UNITARY EUROPEAN PATENT INITIATIVE IN THE LIGHT OF
POST-WAR EUROPEAN PATENT INITIATIVES

Attempting to draw lessons from history for legal reformers can be a hazardous task. Nonetheless, the history of patent law harmonization initiatives is sufficiently rich and understudied to require it, particularly given recent developments in the European patent field. As noted in the Introduction, 50 years after the signing of the SPC the pursuit of a unitary European patent persists, with the European Parliament in December 2012 having endorsed a decision by the European Council to authorize the establishment of enhanced cooperation in the area of the creation of unitary patent protection for a 'coalition of willing' EU Member States.¹¹⁸ Against this background two immediate questions arise. The first is what lessons can be derived from post-war European patent initiatives for current patent law reformers? And the second is what can be said, in the light of those lessons and initiatives more generally, of the current unitary patent package?

A. Lessons Suggested by Post-War European Patent Initiatives

Perhaps the most obvious lesson suggested by post-war patent initiatives is that any system which requires ratification at national level will depend for its success on the extent to which it is perceived to promote the interests of its ratifying states, whatever integrationist and other European motivations its creators may have had. A second is that supranational law-making in the patent field is an invariably incremental process; the reason being the commitment of European reformers to building on what exists, notwithstanding the risks of inefficiency, complexity and path dependence which this method creates. And finally, in addition to being a legal and political exercise, such law-making is also a matter of formal competence; a point underlined by the following remarks of Finniss in the early 1960s.

This work [on a Community Patent Convention] has no formal basis in the text of the Treaty of Rome. Its future prospects and present status rest therefore on considerations of fact and depend on the development of the Economic Community, the failure or stagnation of which gives it a purely academic character. If, on the other hand, the Community grows and expands, as it seems it must do, the day will come, without doubt,

¹¹⁷ See Krieger (n 115); J Cruz, 'The Community Patent Convention: What Sort of Future?' (1998) *J World Intellectual Property* 819–26.

¹¹⁸ The States in question are all 27 EU Member States excluding Spain and Italy. At the time of writing, all EU Member States excluding Poland and Spain have signed the UPC Agreement, including Italy. See <http://ec.europa.eu/internal_market/indprop/patent/ratification/index_en.htm>.

when the objectives will appear, in spite of their breadth, excessively modest. Only the future will tell.¹¹⁹

We have long passed the days of seeking a solution to the European patent problem entirely by means of international agreements, and the EU could hardly be said to have failed or stagnated. Indeed, not only does the creation of a European patent now have a formal basis in the text of the EU Treaties, it would seem to be required by that text.¹²⁰ But, 50 years after the commencement of their project, can the EEC Six's aims be described as excessively modest? A comparison of the current unitary European patent package with the CPC and 1989 Agreement suggests that they cannot.

B. The Unitary Patent Initiative from an Historical Perspective

If it takes effect, the unitary European patent system will establish the necessary legal framework for the creation and enforcement of unitary patent protection in the territories of participating EU States. In particular, it will permit the voluntary conversion of European (EPC) patents into unitary patents having 'equal effect' and providing 'uniform protection' throughout the territories of those States,¹²¹ and establish (for the same subset of EU territories) a Unified Patent Court with local, regional and central divisions, having exclusive jurisdiction in respect of all European (including EPC) patent rights.¹²²

According to Regulation (EU) 1257/2012, this framework will reduce the cost and inefficiency of requiring separate national patents within the EU, foster innovation and the competitiveness of European business overseas, and support the establishment and functioning of the internal market.¹²³ It will do so by creating for Europe (and the EU) a third type of patent to supplement domestic and European (EPC) patents,¹²⁴ and giving effect to the central features of the CPC and 1989 Agreement, including their definition of patent rights and exceptions,¹²⁵ their provisions on exhaustion and licensing,¹²⁶ their accommodation of bifurcation,¹²⁷ their preservation of EU competition principles¹²⁸ and national jurisprudence on patent infringement,¹²⁹ and

¹¹⁹ G Finniss, 'Industrial Property and the Common Market' (1962) ICLQ Supp 4, 47–9, 48–9.

¹²⁰ See Consolidated Version of the Treaty on the Functioning of the European Union OJ C 83/01 (30 March 2010) (TFEU) art 118 (providing that the European Parliament and Council 'shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralized Union-wide authorization, coordination and supervision arrangements', and the Council 'shall by means of regulations establish language arrangements for the European intellectual property rights' (emphasis added)).

¹²¹ See Regulation 1257/2012 art 3(2).

¹²² See UPC Agreement art 32 (giving the Unified Patent Court exclusive competence in respect of all European (EPC and unitary) patents and Supplementary Protection Certificates).

¹²³ See Regulation (EU) 1257/2012 recitals (1), (4) and (19).

¹²⁴ cf CPC art 2(1) (making the conversion of EPC patents into Community patents automatic).

¹²⁵ See UPC Agreement arts 25 to 28; cf 1989 Agreement arts 25 to 27.

¹²⁶ See Regulation (EU) 1257/2012 art 6 (exhaustion), art 3(2) (territorial licences) and art 8 (licences of right); cf 1989 Agreement arts 28, 42, 43.

¹²⁷ See UPC Agreement art 32(3); cf 1989 Agreement art 73(2).

¹²⁸ See Regulation (EU) 1257/2012 art 15 (competition and unfair competition law); cf 1989 Agreement art 2(1).

¹²⁹ Aside from preserving national patents, the UPC Agreement art 24(1)(e) lists national law among the UPC's sources of law.

their incorporation of the CJEU preliminary referral mechanism.¹³⁰ On the other hand, it will limit the role and jurisdiction of the CJEU in accordance with that referral mechanism,¹³¹ create a new ‘European’ patent community different from both the EU and EPC patent communities and, further increasing the system’s complexity, limit the effect of each unitary patent to those participating states which had ratified the UPC Agreement at the time the patent was registered.¹³² In addition, and explaining these latter features and the system’s constitutional basis in the enhanced cooperation provisions of the EU Treaties,¹³³ it will entrench English, French and German as its three official languages, following the lead of the EPC and CPC, while also (and in contrast to those Conventions) relieving patentees of any obligation to furnish additional translations of patents other than at the request of a defendant in patent infringement proceedings.¹³⁴

What is to be made of this in light of the history above? Above all, that the form of legal convergence which the current unitary patent proposal envisages remains largely that of the CPC, and is purportedly driven by some, but not all, of the same objectives.¹³⁵ Nor are we at the point of being able to rely exclusively on EU instruments to create a unitary patent; individual state ratification of the UPC Agreement being necessary. The result is a reminder of how little legal and political progress has been made in this field in the last 50 years notwithstanding the EU’s formal competence in intellectual property under TFEU Article 118,¹³⁶ and of the continued importance of state interests for the current initiative.

The latter in particular requires engagement with the net benefits of the system for EU Member States. If its benefits seem uncertain, there are likely four central and related reasons. The first is the complexity of the system, created by its constitutional basis,¹³⁷ European patent reformers’ continued commitment to building on (and retaining) what exists, and the widespread concern in patent and political spheres to limit the substantive provisions of the Regulations so as to constrain the CJEU’s substantive jurisdiction in the patent field.¹³⁸ The second is the omission of any role for national courts, which, even noting the widespread dissatisfaction over divergent national decision-making

¹³⁰ See UPC Agreement art 21; cf 1989 Agreement art 2(2) and (3).

¹³¹ In particular, there will be no general right of appeal from the Unified Patent Court to the CJEU, and, in the absence of a general EU patent law, no general jurisdiction for the CJEU in respect of substantive patent law.

¹³² Regulation (EU) 1257/2012 art 18(2).

¹³³ See Consolidated Version of the Treaty on European Union, OJ C 83/13 (30 March 2010) (TEU) art 20, TFEU arts 326 to 334.

¹³⁴ See Regulation 1260/2012 arts 3(1), 4; also UPC Agreement arts 49 to 51. It was Spain and Italy’s rejection of these arrangements which triggered its original refusal to cooperate in the system and application for annulment of the 2011 Decision of the Council authorizing enhanced cooperation. See Joined Cases C–274/11 and C–295/11 *Kingdom of Spain v Council of the European Union and Italian Republic v Council of the European Union* (16 April 2013) (deciding, among other things, that the language arrangements ‘may not be described as prejudicial to the competences, rights or obligations’ of either State). Spain has two further actions against the Regulations themselves pending before the Court; Joined Cases C–146/13 and C–147/13.

¹³⁵ Absent from the statement of those objections in Regulation 1257/2012 are the interest in using the creation of a supranational industrial property system as a means of pursuing political federation, and the fear of being left behind politically (contra technologically and economically) as a result of competing patent initiatives.

¹³⁶ See n 120.

¹³⁷ See n 133.

¹³⁸ This is why the definition of the uniform protection conferred by the unitary patent was relocated from Regulation 1257/2012 to the UPC Agreement. See UPC Agreement arts 25 to 28;

under the EPC, the provision for local divisions of the Unified Patent Court, and the retention of national jurisprudence regarding patent infringement, may make the package too ambitious for some countries.¹³⁹ The third is the scepticism which exists regarding the quality of EU law-making in intellectual property generally, and the uncertainty regarding the CJEU's future role under the Regulations and UPC Agreement.¹⁴⁰ And the fourth is the concern regarding its economic benefits, and the continued tendency of EU Member States to put their own interests above those of the 'Community'. That concern and tendency are well captured by the following remarks of Lord Justice Kitchin, one of England's most senior patent judges, in 2012:

[In the UK] we now have a system which serves businesses and disputes of all sizes. It has specialist judges and gives businesses what they want: a relatively quick decision – indeed generally quicker than any other EU jurisdiction. It also generates a huge amount of business for the UK. The Rolls Building has been opened with a fanfare of publicity promoting London as a world leading centre for state of the art international dispute resolution. Patent litigation is an integral part of the work done there. It has been estimated that the annual spend on patent litigation and advisory services in the UK is at least £100m. I think this is very conservative and the true figure is probably an order of magnitude greater. So I strongly believe this is not a system we should be rushing to dismantle unless we are confident we are replacing it with something better.¹⁴¹

Perhaps the final conclusion to be drawn is that even if the unitary patent system *could* be said to satisfy the economic motivations of post-war patent reformers—a proposition the truth of which is far from clear¹⁴²—a persistent ambivalence and suspicion regarding their political ideals might nonetheless prevent their aims from becoming a reality.¹⁴³ The suggestion returns us to the objectives of the system, and their connection to the aims of legal integration more generally.

Perhaps unsurprisingly, Regulation 1257/2012 makes no reference to either the goal of European federation or a fear on the part of EU lawmakers of being sidelined by competing patent initiatives (such as, most recently, the European Patent Organisation's proposed European Patent Litigation Agreement). And yet three things make it difficult to dismiss such motivations entirely. The first is the wider economic and political climate in which the project has been pursued, including the recent economic crisis in Europe, throughout which the legitimacy and viability of the EU has been repeatedly

Regulation 1257/2012 art 5; also C Wadlow, "Hamlet without the Prince": Can the Unitary Patent Regulation strut its stuff without Articles 6–8? (2013) 8 *JIPLP* 207–12.

¹³⁹ For a critique of the exclusivity of the UPC's jurisdiction see Smits and Bull (n 10) (arguing for a 'competitive model of patent law').

¹⁴⁰ On the former see, eg, D Kitchin, 'Congress dinner—October 2012: The Rt Hon Lord Justice Kitchin' <<http://www.cipa.org.uk/pages/Congres-Dinner-2012-Lord-Justice-Kitchin>> (expressing the view that any system which results in references to the CJEU will be undesirable because, among other reasons, "the CJEU has no real patent expertise and its track record in IP cases does not inspire confidence"). The scepticism is long-standing; see, eg, Jacobs (n 89) 645.

¹⁴¹ Kitchin *ibid*.

¹⁴² See, eg, Max Planck Institute for Intellectual Property and Competition Law, 'The Unitary Patent Package: Twelve Reasons for Concern' (17 October 2012) <http://www.ip.mpg.de/en/pub/publications/opinions/unitary_patent_package.cfm>; Kitchin (n 138); B van Pottelsberghe, 'The Unitary Patent: Challenges Still Ahead' (17 December 2012) <http://www.bruegel.org/nc/blog/detail/article/969-the-unitary-patent-challenges-still-ahead/#_UR4EHBx1M3U>.

¹⁴³ One is reminded of the views reported by Weiser in the mid-1960s; see n 34.

questioned. The second is the reference made by EU lawmakers in seeking support for other recent initiatives to the prospect of it being sidelined in the European patent field.¹⁴⁴ And the third are the allegations of misinformation, secrecy, and bad faith within the EU over the unitary patent project and its objectives respectively.¹⁴⁵ In combination, these considerations might support an impression of the system as a means for the EU to defend and strengthen its interests in the increasingly competitive European and international patent fields. They also connect to three of the most common and trenchant criticisms of EU law-making generally. The first focuses on its expansionist tendencies, including in areas of fundamental rights and private law,¹⁴⁶ and often following decisions of the CJEU.¹⁴⁷ The second focuses on the perceived non-transparency of its law-making procedures and—as expressed by Joseph Weiler with characteristic force—its ‘democratic deficit’, evidenced by its pursuit of an ambitious constitutional and legal agenda, and its failure ‘to defend and protect the values it professes to hold most dear’.¹⁴⁸ And the third focuses on its perceived political Messianism, viz., its reliance on the vision of European integration to justify its actions and means.¹⁴⁹ These are strong criticisms which strike at the heart of the EU’s formal and normative legitimacy,¹⁵⁰ and go some way to explaining the open hostility which is frequently expressed towards greater EU involvement in intellectual property, including—and as seen in recent debates on the unitary patent proposal—from senior members of government¹⁵¹ and the judiciary.¹⁵²

¹⁴⁴ See, eg, J Pila, ‘Dispute over the Meaning of ‘Invention’ in Art. 52(2) EPC: The Patentability of Computer-Implemented Inventions in Europe’ [2005] IIC 173–91, 189 (quoting the opening remarks of Commissioner Frits Bolkestein in the Plenary Debate on the European Parliament and Council’s Proposal for a Directive on the patentability of computer-implemented inventions COM (2002) 92 final).

¹⁴⁵ See J Pagenberg [former member of the Expert Committee of judges and attorneys engaged by the European Parliament to work on the project], ‘Open Letter to Herman van Rompuy, President of the European Council’ (31 May 2012) <<http://www.eplawpatentblog.com/2012/June/Mail%20to%20Herman%20Van%20Rompuy%5B1%5D.pdf>>; J Pagenberg, ‘The EU Patent Package: Politics vs. Quality and the New Practice of Secret Legislation in Brussels’ (June 2012) <<http://www.eplawpatentblog.com/2012/June/Pagenberg%20%20EU%20Patent%20Court%5B1%5D.pdf>>. The allegations of secrecy recall the methods of the Council of Europe, EEC Six and EPC States from the 1950s to 1970s, on which see, eg, n 45.

¹⁴⁶ The protection of intellectual property is a fundamental right under the Charter of Fundamental Rights of the European Union, OJ C 364/1 (18 December 2000); see art 18(2).

¹⁴⁷ The CJEU’s use of fundamental rights to expand EU competence in particular has been a well-worn theme for over 20 years. See, eg, J Coppel and A O’Neill, ‘The European Court of Justice: Taking Rights Seriously?’ (1992) *Legal Studies* 227, 227. cf (in defence of the CJEU) I Ward, ‘Making Sense of Integration: A Philosophy of Law for the European Community’ (1993) 12 *J European Integration* 101.

¹⁴⁸ See JHH Weiler, ‘The Political and Legal Culture of European Integration: An Exploratory Essay’ (2011) 9 *I-CON* 678, 681.

¹⁴⁹ *ibid* 682 ff; JHH Weiler, ‘60 Years since the First European Community: Reflections on Messianism’ (2011) 22 *EJIL* 303.

¹⁵⁰ They are not universally supported; see, eg, P Eleftheriadis, ‘The Moral Distinctiveness of the European Union’ (2011) 9 *I-CON* 695; G de Búrca, ‘Europe’s *Raison d’être*’ (2013) NYU School of Law, Public Law & Legal Theory Research Paper Series No 13/09 <<http://ssrn.com/abstract=2224310>>.

¹⁵¹ See, eg, IP Watch blog, ‘European Unitary Patent and Court Becomes Reality’ (11 December 2012) <<http://www.ip-watch.org/2012/12/11/european-unitary-patent-and-court-becomes-reality/>> (reporting the comments of Prime Minister David Cameron).

¹⁵² See, eg, Kitchin (n 140).

In 2013, Gráinne de Búrca offered a defence of the EU against the charge of Messianism specifically with reference to its shifting *raison d'être* over the past 60 years. In the argument she made, that charge overlooks the change in the EU's primary mission from promoting Europe's internal peace and prosperity to enhancing its 'global economic and political influence and role'.¹⁵³ The argument may have especial relevance and credence here for the simple reason that enhancing Europe's external influence and role has long been a driver of the European patent project. In addition, and regardless of whether it does, by calling attention to the 'internal' and 'external' dimensions of legal integration, de Búrca recalls the philosophical ambivalence which has always been at the European patent project's heart.¹⁵⁴ If it seems natural now for the EU to focus increasingly on its own institutional place and strength on the global stage, it is equally natural for Member States to continue to focus on their internal peace and prosperity. What remains to be seen is what response to the latest solution to the old and vexing problem of a European patent such a focus will produce.

JUSTINE PILA*

¹⁵³ See de Búrca (n 150) 1.

¹⁵⁴ See n 43.

* Fellow of St. Catherine's College, University Lecturer in Intellectual Property Law, and Research Fellow of the Institute of European and Comparative Law at the University of Oxford, justine.pila@law.ox.ac.uk. This is the adapted version of a paper presented in Helsinki on 16 November 2012 at a conference organized by the University of Bayreuth Graduate Programme in Intellectual Property and the Public Domain and the IPR University Centre. I am grateful to Ansgar Ohly and Niklas Bruun for their invitation to participate, and to the generous support of the University of Oxford's John Fell OUP Fund for the larger project to which it relates. My thanks also to Christopher Wadlow for his very valuable comments on an earlier draft. The title is from the works by Richard Spencer (n 3).