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The European Patent System

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THE EUROPEAN PATENT SYSTEM

*Friedrich - Karl Beier**

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I. INTRODUCTION

One of the classic objectives of comparative law research is to reduce or overcome existing dissimilarities in national laws through harmonization or unification. Every comparative lawyer is aware of the great difficulties in departing from long-established, deeply-rooted national solutions and will be pleased if small progress can be noted at the end of all harmonization endeavors. In this context, it may be of interest, even for non-specialized lawyers, to take notice of the unification process in the

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area of European patent law, which recently has led to the creation of a new patent law system in Europe.¹

II. THE HISTORY OF PATENT LAW UNIFICATION IN EUROPE

The idea of developing a harmonized or unified patent system in Europe originated as early as 1949 with the Council of Europe.² The underlying rationale was the general wish to contribute to harmonizing national law, to better understanding and improved relations between the peoples of Europe, as well as the specific understanding that the fragmented national approach to protect technical inventions was contrary to good sense and rational economic behavior. It seemed unreasonable that the inventor, in order to get protection for the same invention in several countries, had to file separate applications in each country and that these patent applications had to be examined by different patent offices under different standards using different procedures.

The first plans discussed by the Council of Europe sought to end or at least reduce this multiple workload for inventors and patent offices, but were ahead of their time. These plans set in motion the European idea in patent law and created a healthy climate of understanding between patent specialists, but led to only modest results. Two conventions were adopted, one harmonizing certain patent application formalities and the other creating an international classification system. More far-reaching proposals for cooperation did not come forward. The experts realized that any proposal for a harmonized or uniform granting procedure would have no chance without a common understanding of certain basic concepts of substantive patent law, in particular, the

1. On European patent law, see generally the bibliographies compiled by the Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, in: 1974 *GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT, INTERNATIONALER TEIL* [hereinafter cited as *GRUR INT.*] 103; and in 1976, *GRUR INT.* 251.

2. For details on preparatory works, see, e.g., K. HAERTEL, *EUROPÄISCHES PATENTÜBEREINKOMMEN, TEXTAUSABE MIT EINFÜHRUNG UND SACHREGISTER 1* (1974); E. REIMER, *EUROPÄISIERUNG DES PATENTRECHTS* (1955); BEIER, *DIE VEREINHEITLICHUNG DES PATENTRECHTS IN EUROPA, 1972 ÖSTERREICHISCHE BLÄTTER FÜR GEWERBLICHEN RECHTSSCHUTZ UND URHEBERRECHT 1*; Reimer, *Die europäische Idee im Patentrecht*, 1955 *GRUR INT.* 473, reprinted in 1955 *PROPRIÉTÉ INDUSTRIELLE* 194; ULMER, *Europäisches Patentrecht im Werden*, 1962 *GRUR INT.* 537; van Benthem, *Munich Convention of October 5, 1973: The European Patent*, 13 *INDUS. PROP.* 43 (1974).

conditions for patentability. The difficult task of developing such a common understanding was undertaken by the Expert Committee for Patents of the Council of Europe in the late 1950s. On the basis of comparative law studies, the experts attempted to reconcile the various national concepts of patentable subject matter, novelty, obviousness, technical progress, industrial applicability, and the widely dissimilar concepts on interpretation of patents. After more than eight years, these endeavours were finished successfully with the adoption of the Strasbourg Convention of 1963 on the Unification of Certain Points of Substantive Law on Patents for Invention.³

This important step forward would not have been taken so quickly, however, if the patent unification process had not received an important push in the meantime. The previously missing impetus was provided by the creation of the European Economic Community (EEC) in 1957. Soon after the Treaty of Rome took effect, it became clear that the existence of six national patent systems was inconsistent with the main objective of the treaty, the establishment of a common market. The territorial nature of national industrial property rights was an obstacle to the free flow of goods within the Common Market, and a solution had to be found to overcome these undesired consequences. Since harmonization or complete unification of the national patent laws of the member states would not affect the territorial nature of national industrial property rights and their potential divisive effects in the market, the idea of creating a uniform European patent system was reborn and determined all further considerations.

Work was resumed in 1959 by a small EEC working group under the chairmanship of Dr. Haertel, who was President of the German Patent Office at that time. Supported by fresh European *élan*, the working group produced a Preliminary Draft of an Agreement on a European Patent Law in November 1962.⁴ This draft contained complete provisions for a new supranational patent system for the six EEC countries. It was designed to be an additional system of protection coexisting with the national patent systems of the member states. The main purpose of the new system was the grant of European patents having effect in all

3. 1964 GRUR INT. 259; for details, see Pfanner, *Vereinheitlichung des materiellen Patentrechts im Rahmen des Europarats*, 1964 GRUR INT. 247.

4. 1962 GRUR INT. 561. See also Froschmaier, *Grundzüge des Konventionsewurfes über ein europäisches Patentrecht*, 1962 GRUR INT. 433.

member states through a common granting authority, the European Patent Office, under European rules and standards of patentability.

Although the experts agreed on nearly all of the patent law solutions in the 1962 draft, the governments of the EEC countries were unable to agree on certain political issues. The Common Market patent was a victim of the general crisis in the Common Market in the mid 1960s. The work came to a complete standstill in 1965 and was not resumed until 1970.⁵ Surprisingly, the initiative for resumption came from the French Government, which urged the speedy establishment of an European patent system not restricted to Common Market boundaries. Under these new auspices, the deliberations started again and were successfully brought to an end within a very short period.

III. THE NEW EUROPEAN PATENT SYSTEM

The new European system of patent protection consists of three main elements or subsystems:

- (1) The *European patent system* created by the European Patent Convention, adopted at Munich in 1973;⁶
- (2) the *Common Market patent system* created by the Community Patent Convention, adopted at Luxembourg in 1975;⁷ and
- (3) the *harmonization of national patent systems* in Europe.

The first and most important element is the Convention on the Grant of European Patents, which provides for a uniform patent granting procedure.⁸ This procedure begins with the filing of an

5. For details, see Beier, *supra* note 2, at 2.

6. Convention on the Grant of European patents (European Patent Convention), also known as the Munich Patent Convention, adopted in Munich Oct. 5, 1973, entered into force Oct. 7, 1977 (published in German, English, and French in CONVENTION ON THE GRANT OF EUROPEAN PATENTS (European Patent Office ed. 1979)).

7. 1976 GRUR INT. 231 (in German), reprinted in 7 INT'L REV. INDUS. PROP. & COPYRIGHT L. 1976 (in English).

8. For details on the Munich Diplomatic Conference, see MATHÉLY, *LE DROIT EUROPÉEN DE BREVET D'INVENTION* 12 (1978); VAN EMPÉL, *THE GRANTING OF EUROPEAN PATENTS* 21 (1975); Braendli, *Munich Diplomatic Conference for the Setting Up of a European System for the Grant of Patents: Report on the Discussions and Decisions of Main Committee I*, 4 INT'L REV. INDUS. PROP. & COPYRIGHT L. 402 (1973); Haertel, *The Munich Diplomatic Conference on European Patent Law*, 4 INT'L REV. INDUS. PROP. & COPYRIGHT L. 271 (1973); *Report of the German Delegation*, 1974 GRUR INT. 47.

European patent application and ends, after novelty research and examination, with the granting of an European patent through a common administrative authority, the European Patent Office in Munich. This European patent does not, however, provide uniform legal protection in all contracting states. It leads, rather, to a bundle of a national patents with effects and rights having their substantive legal basis in the national laws of the individual contracting states.

The Munich Convention embraces not only the nine European Community countries, but also tends to include all other European countries which are interested in the introduction of a modern search and examination system for their territories. Over twenty European countries took part in the Munich Diplomatic Conference, including a socialist country, Yugoslavia. The Munich Convention was signed by sixteen countries, the nine EEC states and seven other West European countries.

After completion of the ratification procedure and the necessary preparations for the opening of the European Patent Office, the Munich Patent Convention entered into force on October 7, 1977. It presently includes the following eleven contracting states: seven of the nine EEC countries, Belgium, the Federal Republic of Germany, France, the United Kingdom, Italy, Luxembourg, and the Netherlands and four non-EEC countries, Austria, Sweden, Switzerland, and Liechtenstein. The European Patent Office started its work on November 1, 1977, with its main office in Munich and a branch office, which conducts formal examination and search, in the Hague. On June 1, 1978, the first European patent applications were filed and during the first eighteen months of its activity, a total of 16,500 applications were received. The system now provides for substantial examination in all fields of technology, and the first European patents were granted in January 1980.

The basis for the second element of the overall European patent protection system is the Convention on the European Patent for the Common Market, also referred to as the Community Patent Convention or the Luxembourg Convention, which was adopted at Luxembourg on December 15, 1975.⁹ That instrument is a supplemental convention for the nine EEC countries, and its

9. See note 7 *supra*. See also, *Report of the German Delegation, 1976 GRUR INT. 187*; Savignón, *Luxembourg Conference on the Community Patent: General Report*, 7 *INT'L REV. INDUS. PROP. & COPYRIGHT L.* 91 (1976).

territorial effect is limited to the Common Market. The rules of the Luxembourg Convention take over where the rules of the Munich Convention leave off, after the grant of the European patent. Its objective is to prevent the dismemberment of the European bundle patent granted in Munich for the Common Market. Accordingly, it transforms a part of that bundle into a unitary, so-called Community patent for the EEC countries. This patent enjoys uniform protection in all EEC countries and cannot be used to split up the Common Market. It can only be filed, granted, transferred, and cancelled for the whole territory of all the member states of the Common Market. Unfortunately, the coming-into-effect of the Luxembourg Convention has been delayed due to constitutional difficulties in Denmark and Ireland. As a consequence, the second element of the overall European patent system, the Common Market patent, which may be called the hard-core of the European patent, is still missing.

The final element of the European patent system consists of a far-reaching harmonization of national patent laws. The original concept was that the establishment of the new European patent system should leave the national patent systems of the contracting states totally unaffected. In adopting the new system, no member state was obliged to abandon its own system of protection, to close its national patent office, or to change its national patent law. This realistic approach, coexistence between the unchanged national patent systems and a new, modern system for European patents,¹⁰ greatly facilitated agreement between experts coming from different countries. Trying to find modern legal solutions for the European patent, they were ready to adopt notions that departed from their own traditional legal concepts. But, after having agreed to these new solutions for the European patent system, each contracting state realized that it would be unwise to leave the national patent laws unchanged. This understanding caused a complete departure from the original idea and has led to a far-reaching harmonization of the national patent laws in Europe during the last five years. In adhering to the Munich Patent Convention, each contracting state has simultaneously adapted its national patent legislation to the main rules of the Munich Patent Convention and, also, to a large extent, to the rules of the

10. See Haertel, *Studie über die grundsätzlichen Probleme der Schaffung eines europäischen Patents, das neben die nationalen Patent tritt* 3, 120 (1960) (unpublished study in Bonn).

Luxembourg Patent Convention, which are not yet in effect. In many instances, the provisions of these international conventions have been adopted word-for-word in the implementing laws enacted during the last five years in the Federal Republic of Germany, France, the Netherlands, the United Kingdom, Switzerland, Sweden, and others, and this has been done without any legal obligation to harmonize national legislation.¹¹

The persuasive power of the European patent system has, therefore, brought forward a degree of unification of patent law in Western Europe which no one envisioned ten years ago. Even the conservative English have, without much hesitation, discarded many sacred principles of their national patent law dating back to the famous Statute of Monopolies of 1623. They have adopted a new patent law, which, in its form and content, is no longer a true British statute since it incorporates many continental-European concepts and solutions.¹² This quasi-automatic harmonizing effect, emanating from a convincing international text not originally intended to harmonize national laws, is an astonishing phenomenon. It should also find attention in other fields of law in which the unification process is hindered by widely differing national concepts. It is almost a miracle that such far-reaching harmonization of law could have been attained in the field of patent protection, an area which was always and is still regarded as an instrument of national economic policy.

IV. THE MUNICH PATENT CONVENTION

Let me now give some further comments on the first and most important element of the overall European patent system, the European Patent Convention of 1973.

A. *General Remarks—The European Patent Organization*

The Munich Patent Convention is an impressive document

11. See Armitage, *The New British Legislation*, 9 INT'L REV. INDUS. PROP. & COPYRIGHT L. 207 (1978); Braendli, *Das neue schweizerische Patentrecht*, 1979 GRUR INT. 1; Frustner, *The New Dutch Patent Legislation*, 19 INDUS. PROP. 31 (1980); Lewin, *Introductory Remarks Concerning the Swedish Patents Act Following the 1978 Revision*, 18 INDUS. PROP. 22 (1979); Österborg, *Recent Changes in Danish Patent Law—Harmonization with the International Patent Systems*, 10 INT'L REV. INDUS. PROP. & COPYRIGHT L. 314 (1979); Vianes, *The Reform of French Patent Legislation*, 18 INDUS. PROP. 222 (1979).

12. Cf. Armitage, *supra* note 11, at 208.

with 178 carefully drafted and systematically arranged articles. Complemented by several protocols and implementing regulations, which consist of 106 explanatory rules, it contains a complete set of rules dealing with the establishment and working of the European patent organization and the granting procedure of the European Patent Office without reference to national law.

The Convention establishes an European patent organization which has its seat in Munich and consists of the European Patent Office (EPO) and the Administrative Council. The EPO is an international administrative agency with a staff whose members come from all of the contracting states. It is led by a president and several vice-presidents. It is competent to examine and grant European patents, and its activities are supervised by the Administrative Council. The Council consists of representatives of the contracting states and, in addition to its budgetary and control functions, it has legislative competence to amend some of the provisions of the Convention and the Implementing Regulations.

B. *Conditions of Patentability*

Part II of the Munich Convention¹³ contains the provisions of substantive patent law of which the chapter on patentability¹⁴ is the most important one. Under article 52(1), European patents shall be granted for inventions which are new, involve an inventive step, and are susceptible of industrial applications. Since the basic provisions on patentability mention only these four criteria, namely: invention, novelty, inventive step or nonobviousness, and industrial applicability, and are to be understood as containing an exhaustive enumeration, no other criteria of patentability can be applied to European patent applications, in particular the requirement that the invention achieve technical progress¹⁵ as was required in the Federal Republic of Germany and is still required in many other countries. At first glance, it seems contrary to the basic philosophy of patent protection to abandon the very requirement of technical progress whose promotion is the main purpose of the patent system. We must admit, however, that the re-

13. *Supra* note 6, at arts. 52-74.

14. *Id.* at arts. 52-57.

15. *See also*, SINGER, *DAS NEUE EUROPÄISCHE PATENT—SYSTEM* 32 (1979); ULLRICH, *STANDARDS OF PATENTABILITY FOR EUROPEAN INVENTIONS: SHOULD AN INVENTIVE STEP ADVANCE THE ART?* (1977); Singer, *Das Materielle europäische Patentrecht*, 1974 GRUR INT. 61, 63.

quirement of technical progress as a separate object of examination, in addition to novelty and non-obviousness, is of minor importance in practice and that its proof in some fields leads to practical difficulties. It is, therefore, no great loss if European patent law relinquishes the requirement of technical progress as an independent examination criterion and proceeds from the general presumption that an invention which is susceptible of industrial application and which is not obvious to the average man skilled in the art constitutes an enrichment of technology and thus contributes to technical progress, without the applicant's having to prove in each case that the invention is more advantageous than all other known technical solutions. This does not mean, however, that we should totally forget that patents are granted to advance the art, stimulating not only technical but also economic and social progress. If, therefore, the invention actually achieves such progress, it should be taken into consideration as a positive criterion for patentability, be it as a general rule derived from the main objective of patent protection or as the most important indicia in proving an inventive step.¹⁶

The Munich Convention avoids the questionable attempt to give a positive definition to the term "invention." Article 52(2) gives only a negative, non-exhaustive enumeration of subjects which should not be considered inventions. Excluded are discoveries, scientific theories, mathematical methods, aesthetic creations, presentations of information, and, in particular, non-technical mental processes, including computer programs.¹⁷ With that provision, the contracting states have, under the motto of "no experiments," adopted a very conservative concept of patentable inventions which leaves little room for the future adaptation of the European patent system to new scientific and technical developments.¹⁸ This is, in my opinion, a short-sighted view which can

16. For more details on this problem, see SINGER, *DAS NEUE EUROPÄISCHE PATENT—SYSTEM*, *supra* note 15, at 50; Pagenberg, *The Evaluation of the "Inventive Step" in the European Patent System—More Objective Standards Needed*, 9 INT'L REV. INDUS. PROP. & COPYRIGHT L. 1, 121 (1978).

17. Cf. Kolle, *Die patenfähige Erfindung im europäischen Patent-Erteilungsübereinkommen*, in *GEWERBLICHER RECHTSSCHUTZ, URHEBERRECHT, WIRTSCHAFTSRECHT, MITARBEITERFESTSCHRIFT ZUM 70. GEBURTSTAG VON EUGEN ULMER* 207, (1973).

18. For more details on this subject, see Beier, *Future Problems of Patent Law*, 3 INT'L REV. INDUS. PROP. & COPYRIGHT L. 423, 427-28 (1972); Beier, *Scientific Research, Patent Protection, & Innovation*, 6 INT'L REV. INDUS. PROP. &

only be explained, not justified, by the administrative consideration that the newly-created EPO should not be burdened with additional and difficult problems of substantive patent law and search.

Much more forward looking is article 53, containing the other exceptions to patentability. The catalogue is, fortunately, very small. Only inventions whose publication or exploitation would be contrary to the *ordre public* or morality and inventions in the area of plant cultivation and animal breeding are excluded. The latter exclusion does not, however, apply to microbiological processes and the products thereof. Thus, the patentability of microbiological inventions, which play an important role in the field of antibiotics, is expressly acknowledged. Rule 28 of the Implementing Regulations contains specific provisions concerning the disclosure of such inventions and regulating the details of microorganism deposit, culture collection, and the release of samples to the public. Although the content of rule 28 was improved during the Munich Diplomatic Conference, the pharmaceutical industry was not completely satisfied.¹⁹ It therefore urged a further amendment, which, after an interesting discussion,²⁰ was recently adopted by the Administrative Council.²¹

The most important feature of article 53, however, is that it does not exclude or restrict patent protection for chemical and pharmaceutical inventions, foods, or agricultural products. This is a complete deviation from the existing national law of many contracting states, which, for reasons of economic, health, or agricultural policy, have restricted patent protection in these fields to the manufacturing process only or even, for pharmaceutical inventions, have granted no protection at all, as in Italy.²² In all

COPYRIGHT L. 367 (1975).

19. See Huni, *The Disclosure in Patent Applications for Microbiological Inventions*, 8 INT'L REV. INDUS. PROP. & COPYRIGHT L. 499 (1977).

20. Cf. VON PECHMANN, HINTERLEGUNG UND FREIGABE NEUER MIKRO-ORGANISMEN, MITTEILUNGEN DER DEUTSCHEN PATENTANWÄLTE 41 (1977); Teschemacher, *Ein Sonderrecht für mikrobiologische Erfindungen? Zur geplanten Änderung der Regel 28 AOEPÜ*, 1979 GRUR INT. 444.

21. 1980 GRUR INT. 152.

22. See the decision of the Italian constitutional court (Corte Costituzionale) of Mar. 9, 1978, in 10 INT'L REV. INDUS. PROP. & COPYRIGHT L. 246 (1979) (German version in 1978 GRUR INT. 355, with comments by Franceschelli). See also Samperi, *Patentability of Pharmaceutical Products in Italy — Background and Recent Developments*, 18 INDUS. PROP. 128 (1979).

these fields, full patent protection will be available at the end of a transition period. Exceptions may be claimed by the contracting states by way of reservation. Up to now, only Austria has used that possibility to maintain provisionally its existing restrictions for chemical products, medicines, and foods.

With respect to novelty, the basic patentability criterion, the French law concept of absolute novelty has been adopted. According to article 54, an invention is considered new if it does not belong to the state of the art. The state of the art comprises everything made available to the public before the priority date through written or oral description, use, or any other method. All substantive, temporal, and territorial limitations of the novelty concept, which are known from various national patent laws,²³ have become obsolete. The European novelty examination is based on the strictest world wide novelty standard.

According to article 54(3), the content of prior applications, which on the priority date of a later publication have not yet been published, will also belong to the state of the art. Such a rule was necessary in order to prevent double patenting. But how this objective was to be accomplished has been extraordinarily controversial in the last twenty years.²⁴ After a long discussion of the advantages and disadvantages of the traditional prior claim approach, its modern counterpart, the so-called whole contents approach, and many intermediate solutions, the contracting states adopted the whole contents approach to avoid a separate identity test by the simple inclusion of the prior application in the normal novelty test. Therefore, not only the claims, but the entire disclosure contained in the prior application, will hinder the grant of a subsequently filed patent application. These prior applications, however, are considered only as a bar to novelty; they will not be considered in deciding whether the later application involves an inventive step.²⁵ To be patented, a subsequent application, in other words, can therefore be obvious in view of the contents of

23. *E.g.*, limitations on printed matter or on domestic use, the British concept of "insular novelty," and the like.

24. *Cf.* Bardehle, *Das ältere Recht im Europa-Patent*, 74 GRUR 211 (1972); Blumenberg, *Die ältere Anmeldung im künftigen europäischen Patentrecht*, 1972 GRUR INT. 261; Kolle, *Der Stand der Technik als einheitlicher Rechtsbegriff*, 1971 GRUR INT. 63; Moser von Filseck, *Zur Frage der Abgranzung einer jüngeren gegenüber einer prioritätsälteren europäischen Patentanmeldung*, 1970 GRUR INT. 156.

25. Munich Convention, *supra* note 6, at art. 56(2).

an earlier, not yet published application; it must not be fully anticipated. This solution constitutes a reasonable compromise which facilitates the granting procedure and meets the demands of patent practice.

Unfortunately, the same cannot be said with respect to article 55 dealing with non-prejudicial disclosures.²⁶ In contrast to the German, Japanese, and United States patent laws, which provide a grace period of six or twelve months during which the inventor or his legal successor is protected against the anticipatory effects of his own disclosures, article 55 restricts that protection to disclosures by third parties which may be considered as evident abuse. This very narrowly defined exception, together with the introduction of the absolute novelty concept and the requirement of nonobviousness, will certainly lead to great disadvantages for independent inventors, scientists, and small and medium-sized enterprises which are used to test, exhibit, or give other information on their inventions before filing a patent application. The grace period accorded them sufficient time to evaluate the technical and economic value of the invention, and, if necessary, to improve the invention without fear of losing patent protection. If these possibilities no longer exist, serious disadvantages for many inventors will be the consequence. A more liberal solution which should preferably be an international, worldwide solution would be highly desirable.²⁷

My final comments on patentability concern the concept of nonobviousness,²⁸ for which the Munich Convention utilizes the somewhat unfortunate expressions "inventive step," "*activité inventive*," and "*erfinderische Tätigkeit*" adopted by the Stras-

26. See Bossung, *Der Stand der Technik und eigene Vorverlautbarung im internationalen, europäischen und nationalen Patentrecht*, 1978 GRUR INT. 381, 384-87; von Pechmann, *Ist der Fortfall der Neuheitsschonfrist des § 2 Satz 2 PatG noch zeitgemäss?* 82 GRUR (1980)(Special Issue in honor of W. Oppenhoff).

27. This problem is now also under consideration as Question 75 (Prior Disclosure and Prior Use by the Inventor or his Successor in Title) within the framework of the Working Program of the International Association for Industrial Property.

28. See J. PAGENBERG, *DIE BEDEUTUNG DER ERFINDUNGSHOHE IM AMERIKANISCHEN UND DEUTSCHEN RECHT* (1975); Pagenberg, *Der Begriff der erfinderischen Tätigkeit im europäischen Patentübereinkommen*, in *GEWERBLICHER RECHTSSCHUTZ, URHEBERRECHT, WIRTSCHAFTSRECHT*, *supra* note 17, at 223; Pagenberg, *supra* note 16.

bourg Patent Convention of 1963. These terms, at least the German and French versions, are unfortunate since they mis-state the real meaning of this important criterion of patentability. It is not the activity of inventing which is decisive to the concept, but rather the product of that activity, the invention, and its distance from the state of the art. It is nevertheless a welcome development that this judge-made condition of patentability, whose practical importance is much greater than that of novelty, is now firmly anchored in the European patent law. According to the legal definition in article 56, an invention shall be considered to involve an inventive step if, having regard to the state of the art, it is not obvious to a person skilled in the art. This definition corresponds to the definitions developed by United States and German courts for nonobviousness or *Erfindungshöhe* respectively.²⁹ It is to be hoped that this criterion, upon which the quality of future European patent examination will largely depend, will find reasonable interpretation by the European Patent Office and the national courts. After thorough discussions within interested circles, the European Patent Office recently announced its intention to follow the middle line practiced by the German Patent Office rather than the too liberal English or too strict Dutch standard of evaluating nonobviousness.³⁰

V. THE EUROPEAN GRANTING PROCEDURES

Most of the remaining articles of the Munich Patent Convention deal with the European patent granting procedure.³¹ It is not possible in this article to comment on the details of that procedure. It will be sufficient to say that the European Patent Office will practice one of the most elaborate, modern examination procedures based on the experiences of large, national patent offices and provide all the necessary legal guarantees for the patent applicant as well as for competitors and the general public. This procedure contains the following steps:

- (1) The filing of a European patent application designating the member states for which protection is sought, in one of the three

29. See PAGENBERG, DIE BEDEUTUNG DER ERFINDUNGSHOHE, *supra* note 28, at 108, 167.

30. See Pagenberg, *supra* note 16, at 351, 1978 GRUR INT. at 243. See also van Benthem & Wallace, *The Problem of Assessing Inventive Step in the European Patent Procedure*, 9 INT'L REV. INDUS. PROP. & COPYRIGHT L. 297 (1978).

31. Munich Convention, *supra* note 6, at pts. III-VII.

- official languages, English, French, or German;
- (2) the examination on filing and formal requirements;
 - (3) the drawing up of a search report revealing the relevant state of the art;
 - (4) the publication of the application, together with the search report, eighteen months after the date of priority;
 - (5) the examination of the published patent application as to patentability, dependent on a written request by the applicant which can be filed within six months after publication; otherwise the application will be deemed to be withdrawn;
 - (6) the grant of the European patent or its refusal, with the possibility of appeal; and
 - (7) a post-grant opposition procedure to give third parties the opportunity to raise objections against patentability; if the opposition is successful, the patent will be revoked, with retroactive effect; if the opposition fails or no opposition is raised during the nine month period after publication of the grant, the European patent will be given full effect within the territories of all contracting states for which it has been granted.

VI. CONCLUSION

The formation of the European patent system, which I have presented here only in part and which is still missing one essential element, the Common Market patent, constitutes a milestone in the development of international patent law. No event since the Paris Convention for the Protection of Industrial Property in 1883 has so drastically changed the system of protection of inventions as the European patent system will. I do not except the Patent Cooperation Treaty (PCT) signed in Washington in 1970³² and entered into force over two years ago.³³ It certainly overcomes the territorial approach of the Paris Convention in that it provides for an international patent application and a single novelty search for several countries. But it leaves the substantive law, as well as the patent granting and examination procedure and the final act of granting the monopoly, to the competence of the indi-

32. Published in 1971 GRUR INT. at 119 and in 9 INDUS. PROP. at 259 (1970); see *Die Washingtoner Konferenz über den Patent Cooperation Treaty: Report of the German Delegation*, 1971 GRUR INT. 101. See also Pfanner, *Der Vertrag über die internationale Zusammenarbeit auf dem Gebiet des Patentwesens (PCT) und seine Auswirkungen auf die Industrie*, 1971 GRUR INT. 459.

33. On Jan. 24, 1978. See *PCT Notification no. 14, of Oct. 31, 1977*, 16 INDUS. PROP. 255 (1977).

vidual state for which protection is sought. Notwithstanding the progress attained in international cooperation by the Paris Convention and the PCT, the legal basis of international patent protection is still, as 100 years before, the grant of national patents, through national patent authorities, according to national laws. This territorial or national phase of patent law will be overcome by the European patent system.

We are at the beginning of a new, supranational phase of patent law development. Even though limited in direct effect to Western Europe, the European patent system will certainly provide a model for the establishment of other regional patent systems and will also influence the further development of national patent systems outside of Europe. This seems to me an encouraging perspective which is so urgently needed in our divided world.

