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The Interface Between Patents and Plant Variety Rights
Brussels, June 24, 2015



The European and the Unitary Patent System

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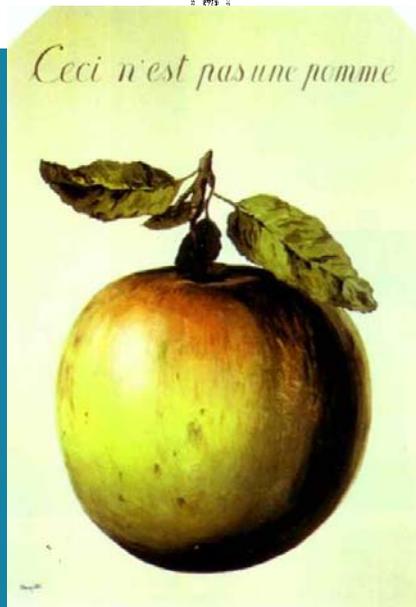
University of Leuven, Centre for Law and Innovation, Belgium
University of Tilburg, Tilburg Institute Law Technology Society, the Netherlands

Member Economic and Scientific Advisory Board (ESAB), EPO
Vice-President European Policy for Intellectual Policy (EPIP) Research Association
Previous member CPVO Board of Appeal



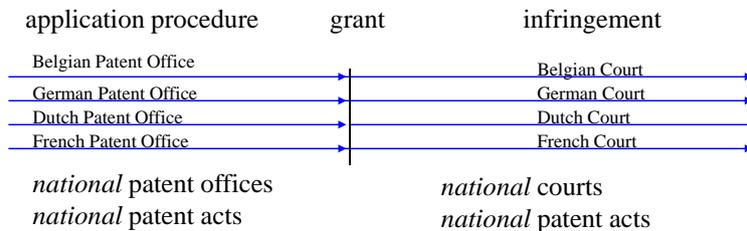
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Ceci n'est pas une pomme

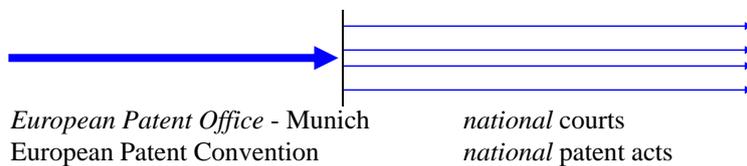


European patent framework (1)

- various national patents



- European patent



European patent framework (2)



EPO member states: 28 + 10
[Norway, Switzerland, etc.]



EU member states: 28

European patent framework (3)

- various national patents

application procedure grant infringement

Belgian Patent Office
 German Patent Office
 Dutch Patent Office
 French Patent Office

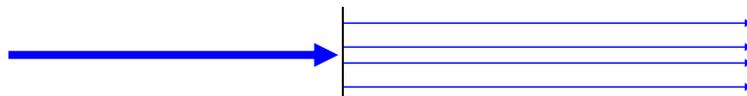
national patent offices
national patent acts

Belgian Court

Advantages and shortcomings

- ✓ Uniform legislation patentable subject matter
- ✓ Uniform interpretation patentability requirements
- ✓ Centralised granting procedure
- ✓ First filing
- ✓ Enlarged scope of protection
- Differing rulings on validity national courts

- European patent



European Patent Office - Munich
 European Patent Convention

national courts
national patent acts

Unitary patent framework (1)

European patent



European Patent Office - Munich
 European Patent Convention

national courts
national patent acts

European patent with unitary effect

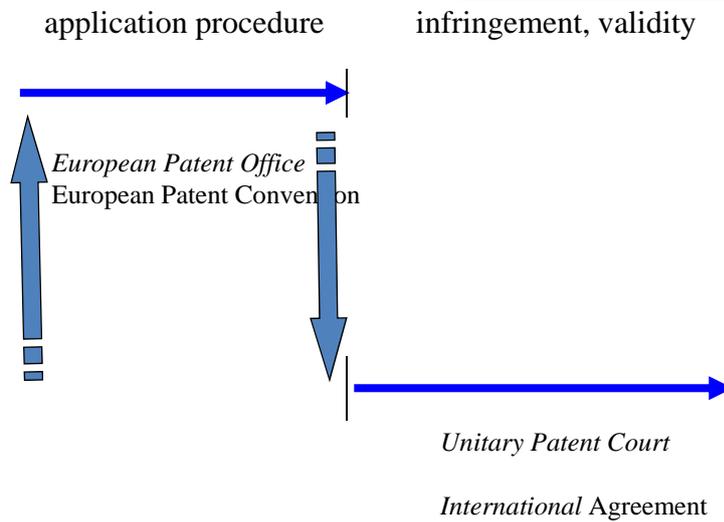


European Union - Brussels

Unitary patent court

Unitary patent framework (2)

Symbiosis

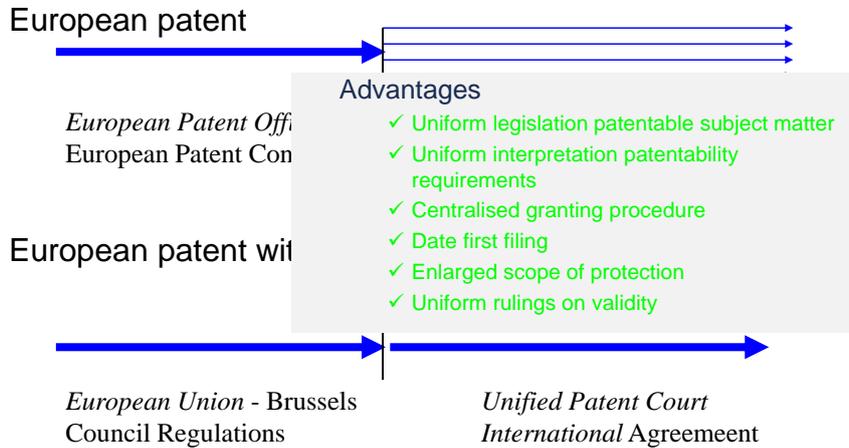


Unitary patent framework (3)

Coexistence and Cumulation

National patent	Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Great Britain, Greece, Hungary, Italy, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden	Albania, Iceland, Liechtenstein, (Former Yugoslav Republic of)Macedonia, Monaco, Norway, Serbia, San Marino, Switzerland, Turkey	Andorra, Ukraine, Moldova
European patent	Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Great Britain, Greece, Hungary, Italy, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden	Albania, Iceland, Liechtenstein, (Former Yugoslav Republic of)Macedonia, Monaco, Norway, Serbia, San Marino, Switzerland, Turkey	
European patent with unitary effect	Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Great Britain, Greece, Hungary, Italy, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden		

Unitary patent framework (4)



Unitary patent legislation (1)

Unitary Patent Package [UPP]

Scope

– Council Regulations

- 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 agreements

European patent with unitary effect → **Unitary patent [26 states]**

– Agreement on a Unified Patent Court, Brussels, 11 January 2013 (Council of the European Union)

Unified Patent Court → **Unitary patent [26 states]**
 → **EPC patent [38 states]**



Unitary patent legislation (3)

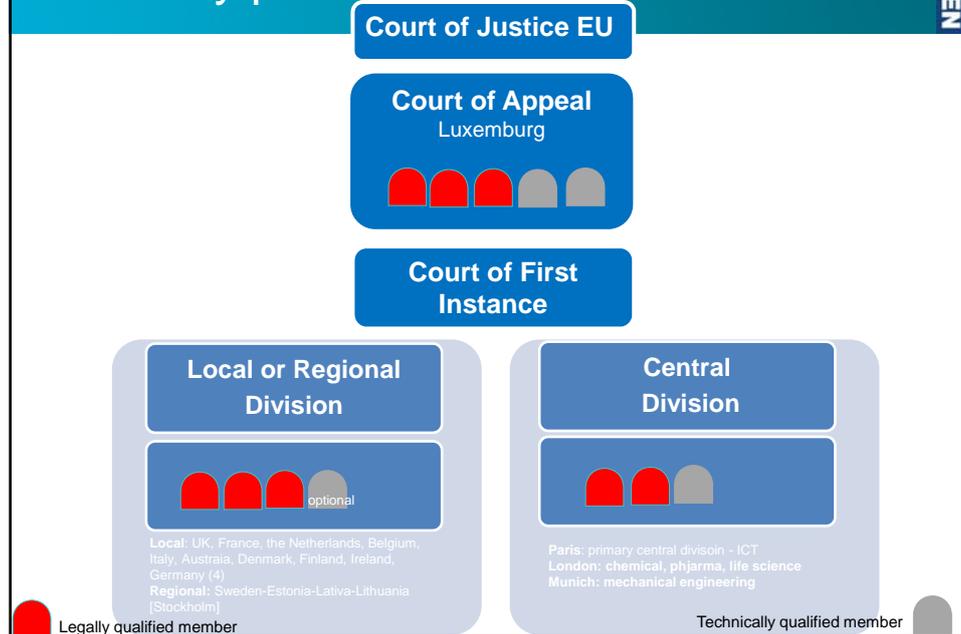
Material scope

Regulation 1257 Agreement

- Patentability [subject matter]
- Conditions
- Rights
 - Art. 5. Effect of unitary patent
 - Art. 7. Object of property
 - Art. 8. Licenses of right
- Limitations
 - Art. 27. Limitations
 - (a) private and non commercial use
 - (b) experimental purposes
 - (c) breeding; developing
 - Art. 28. Prior use
 - Art. 29. Exhaustion
- Other
 - Recital 10. Compulsory license [member states]

Implication: Court of Justice EU no competence
UPC: exclusive competence

Unitary patent court ⁽¹⁾



Unitary patent court ⁽²⁾

- Local /regional divisions
 - Competence
 - **Infringement suits**
 - Location: patentee can shop for forum
 - Default rule: local/regional division is competent
 - place of (threat of) **infringement**
 - seat of place of business of **defendant**
 - In case of infringement in three different states
 - defendant can ask for move to Central Division
 - In case infringer comes from outside EU
 - Central division or place infringement
 - Scope: decision of local/regional division is valid
 - On the territory of **all participating** member states

Unitary patent court ⁽³⁾

- Central division
 - Competence
 - **Validity**
 - *Direct* procedures concerning validity;
 - *Counterclaims* – in an infringement suit - on validity can be sent to central division;
 - **Infringement**
 - Infringement procedures where infringement takes place on territory of a member state not having a local/regional division
 - Infringement cases where defendant lives outside EU ,
 - Infringement in territory from more than three member states (on request defendant)
 - Location
 - Paris, London, Munich

Unitary patent court ⁽⁴⁾

- Court of Justice EU
 - Competence
 - **Interpretation EU legislation**
 - EU Biotechnology Directive,
 - EU Enforcement Directive
 - 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 agreements
 - **NO Interpretation substantive patent law**
 - EPC
 - Agreement on a Unified Patent Court, 2013

Interface EPC – UPP – CPVO

European patent [EPC]



Council of Europe/EPO - Munich *national* courts
 European Patent Convention *national* patent acts
 38 member states

Unitary patent [UPP]



European Parliament - Brussels *Unified Patent Court*
 Council Regulations *International Agreement*
 24 EU member states

Community plant variety certificate



European Parliament - Brussels *national* courts: infringement;
 Council Regulation 2100/94 *CPVO*: validity
 28 EU member states *Council* Regulation

Interface EPC – CPVO ⁽¹⁾

European patent [EPC]



Council of Europe/EPO - Munich *national* courts
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Community plant variety certificate



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Interface EPC – CPVO (2)

Current EPO patent practice

- Plants *per se*
 - genetically modified plants (rDNA_t)
e.g. claims to the end product: modified plant cells, plants, seeds;
intermediate products: vectors, plasmids, etc.
 - plants result of conventional plant breeding
- Plant traits
e.g. claims to glyphosate resistance, increased anti-oxidant content
- Plant methods
 - transformation techniques (rDNA_t)
e.g. claims to *Agrobacterium* mediated gene transfer
 - (mix) conventional breeding (and molecular breeding) techniques; “marker assisted selection”
e.g. broccoli patent, tomato patent

Interface EPC – CPVO (3)

European patent [EPC]



Council of Europe/EPO - Munich *national* patent acts

European Patent Convention

38 member states

No Breeder's exemption

No Farmer's privilege^[Be]



Compulsory cross license interdependence

Community plant variety certificate

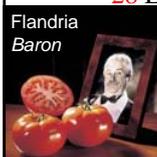


European Parliament - Brussels

Council Regulation 2100/94

28 EU member states

Council Regulation

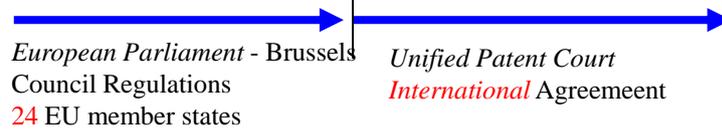


Breeder's exemption

Farmer's privilege

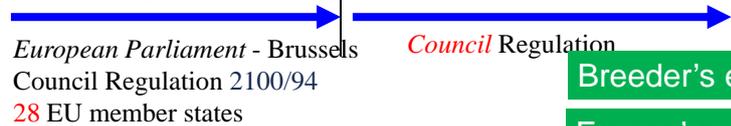
Interface UPP – CPVO ⁽¹⁾

Unitary patent [UPP]



Breeder's exemption

Community plant variety certificate



Breeder's exemption

Farmer's privilege

Interface UPP – CPVO ⁽²⁾

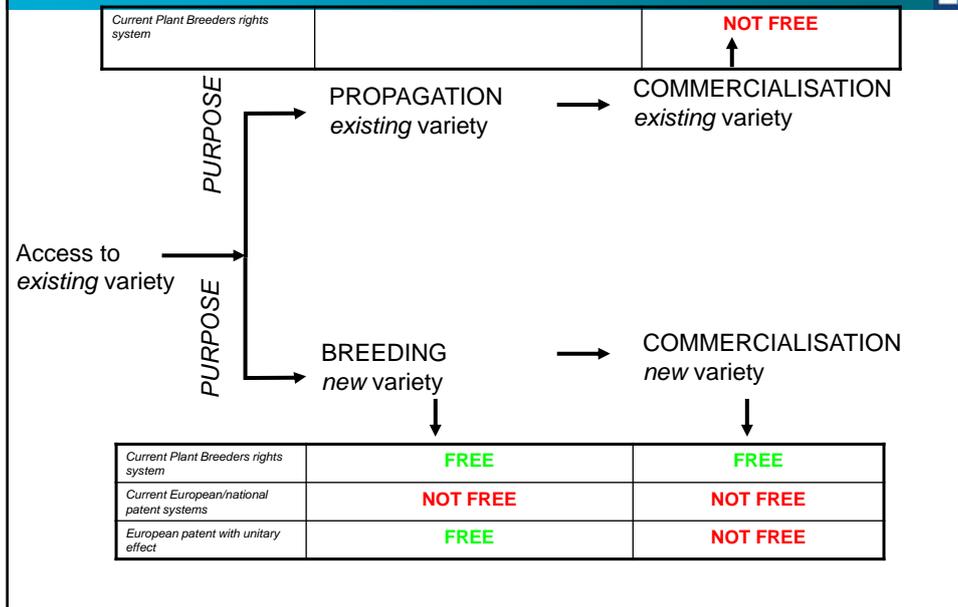
ARTICLE 27

Limitations of the effects of a patent

The rights conferred by a patent shall not extend to any of the following:

- (a) acts done privately and for non-commercial purposes;
- (b) acts done for experimental purposes relating to the subject matter of the patented invention;
- ➔ (c) the use of biological material for the purpose of breeding, or discovering and developing other plant varieties;
- (d) the acts allowed pursuant to Article 13(6) of Directive 2001/82/EC¹ or Article 10(6) of Directive 2001/83/EC² in respect of any patent covering the product within the meaning of either of those Directives;

Interface UPP – CPVO ⁽³⁾



Final conclusion ⁽¹⁾

Two opposing tendencies

More appropriation

- Expansion patentable *subject matter*: plants *per se*, plant varieties
- Expansion patenting *as such*: more patents are applied for and granted

Expansion relating to *coming into existence of rights*

Final conclusion (2)

Two opposing tendencies

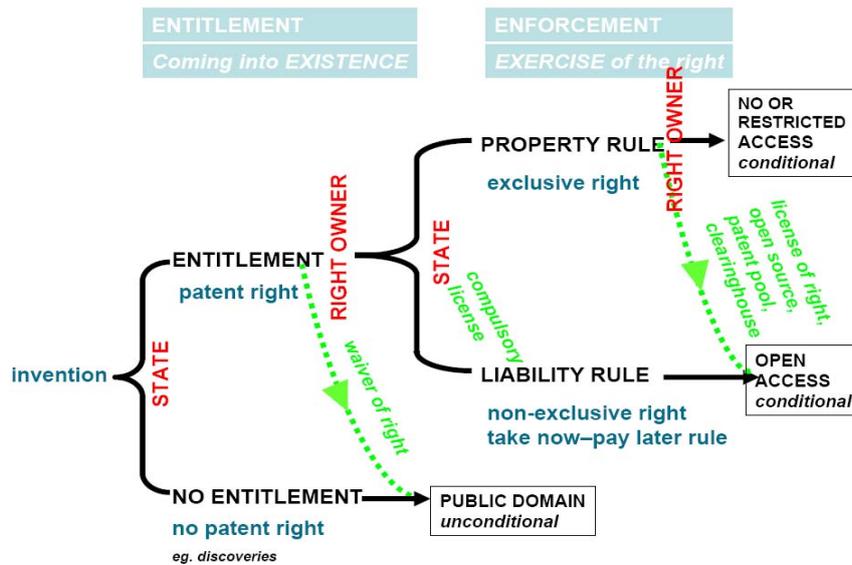
More sharing

- Establishment *formal-legal* mandatory breeder's exemption
- Establishment *formal-contractual* voluntary licensing platform (International Licensing Platform),

These mechanisms turn the right to exclude into right to remuneration

The more appropriation, the more control on *exercise/access* of those rights is necessary

Final conclusion (3)



VAN OVERWALLE, G., 'Exclusive Property versus Open Commons. The Case of Gene Patents', *The WIPO Journal: Analysis and Debate of Intellectual Property Issues*, 4, 2013, 139-158

