

# Political Aspects of Accessibility to the European Patent

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## I

**T**RYPING TO UNDERSTAND OUR FRIENDS' REASONS and attempting to explain our own feeling must be our purpose, our task, as humans, each time a misunderstanding occurs on a difficult problem.

In this respect, I think it useful for maintaining friendly—one could even say cordial—relations between Americans and French to apprise the members of this Foundation of the reasons the Convention creating the European Patent should not include a clause providing for full free access to the European patent of nationals of all countries of the Paris Convention. Also marked advantage would ensue if a sensible solution is found to avoid the refusal of free access to the European Patent.

At first sight this seems quite a difficult task, so obvious it is that any applicant or any inventor who wishes for convenience and financial reasons should be able to obtain patent coverage territorially as large as possible with one single patent.

In this regard, I understand very well our American friends' feeling, in that it would seem normal to them to be granted the same facilities as those granted to nationals of the European countries who are members of the Convention, were it only to respect the cardinal principle of equality of treatment between member and non-member countries' nationals.

But is this the right way to ask the question at issue?

Let us first observe that, in this case, it is not the equality of treatment between Europeans (members of a Europe politically united) and Americans which is at stake. As long as these Europeans do not build Europe as one country economically and politically, they will remain the nationals of different independent states and they will be subjected to the laws of these respective countries. Perhaps, at most, there will be the possibility of acquiring a European title coexisting

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with their own national title, and strictly limited to the field of Industrial Property by virtue of some Arrangements. The equality of treatment regarding respective national laws would be within the terms of Article 2 of the Paris Convention. In this respect, the contemplated European Convention is nothing but an arrangement taken in the spirit of Article 15 of said Convention even though if, going further than the Madrid, The Hague, the Lisbon or the Panamerican Trade-mark Conventions, such an arrangement creates a new industrial property title of a scope determined by an ad hoc supra-national Patent Office.

And from the moment the requirements for adherence to the contemplated Convention are amended, so as to harmonize the material rights on patents filed in each respective member country with those secured by a European title, there is no longer any difference between the nature of such rights.

But the point at stake does not reside there. The matter is rather to determine if the advantage of the United States, as well as of the European countries which are to sign the contemplated Convention, is not—in view of the present comparative state of the strength and political structures in Europe—to give nationals of third countries (among which are today the United States and Japan, and tomorrow USSR if the latter becomes a member of the Paris Union) the right to obtain European patents without having first elected a domicile in the territory of a member country through an establishment or the setting up of a subsidiary.

The answer to this must, for the present, be negative.

As a matter of fact, how can occidental countries best establish their influence and attract hesitating countries? Is it through an eager competition between industrial countries, each one struggling to snatch some markets from the other? Is it by satellitizing occidental countries around the more powerful of them through economic and financial domination? Or is it by a concerted distribution of tasks conducive to harmonious and well-balanced economic and social development, based on equal access for all European countries to scientific progress?

The approach to this limited but important problem differs according to the answers given to the above questions. In fact, the two first questions make only one. An eager competition leading to a steady weakening of the less powerful or less economically advanced countries would end by their removal into the lot of those miserable states matured for other economic structures, or by the loss of their economic sovereignty.

Could we, in the circumstances, speak of "association" between the different countries involved and, yet more, of "partnership" between nations or group of nations equally responsible for common decisions?

On the contrary, the concerted policy the allied forces enjoyed when their respective manufacturing programs were first submitted to the freely accepted discipline of the War Production Board, led to a correct distribution of production and trade for the common advantage of all the parties, in avoiding redundances, excessive investment in some sectors and insufficient investment in others. A similar policy would ensure optimum employment of manpower and capital while at the same time it would raise peoples' standards and would reduce existing differences between rich industrialized countries and less developed or unfortunate countries.

Undoubtedly, this policy would allow an escape from the "brazen law" of unlimited competition, but is not this already so in our Western countries where the part of industrial activity corresponding to orders placed by the State, and in keeping with governmental scientific research programs, increases by year to year.

The first assumption—full competition policy in the Western world—implies free access by every one to all and any means of industrial development; hence, it implies the protection of inventions insofar as they are patentable and novel. In this light, and leaving aside juridical arguments authorizing arrangements between Member States of the Paris Convention, the access of third countries to the European patent may be understood.

The policy outlined in the second assumption would result in the equilibrium of production and research strength between the large economic areas constituting what we call "the industrialized nations of the free world." This equilibrium would be offset if one partner country can, through a unilateral policy, crystallize for its own benefit full sectors of activity, thanks to the technical advance secured by tremendous research investments. Official statistics show that the comparison between investments for industry and research work, provided by both the public and private sectors, in the United States for one part and in the European Community for the other part is of one to several.

The statistics furnished by Mr. Federico illustrate the consequences of this difference in terms of quantity of patents filed, if one keeps in mind that four-fifths of the foreign patents filed by Europeans are filed in the Six countries of the European Community, plus Great Britain, and about nine-tenths of the foreign patents are filed by American nationals in Europe.

A new facility—insofar as the grant of a European patent is not subjected to a very complicated prosecution—would allow third countries, already endowed with more important research funds than any other European countries taken separately (and separate allotments are a necessity as long as a European political Federation is not a reality), to increase still further the existing differences to the detriment of equilibrium between economic and political areas of equally full partners of the Atlantic community.

The only possible limitation of such risk is therefore to grant the benefit of the European patent only to Member countries of the Convention and to persons considered as such under the terms of the Paris Convention.

To this conclusion, it may of course be answered that the rights conferred by national patents in Europe involve also the same risk for each European State and that it would suffice to establish European subsidiaries or trustee Companies to fulfill the obligation of nationality.

But two arguments may be opposed to this answer:

First of all, experience has proved that non-European nationals very seldom seek patent protection in every and all European countries; some areas stay uncovered either because patent expenses would be too high or because the different patent prosecution regulations are too difficult or because only a few of the European markets justify the expense.

Secondly, the European subsidiaries or trustee Companies are authorized by their parent Company to file patents in their own names only if the authority is in the parent company management, which presupposes an unquestionable financial control. Only big foreign business can afford to own European subsidiaries or branches they fully control; this factor substantially reduces the number of patents of foreign origin in the adhering countries.

Moreover, if one thinks it over more thoroughly, it appears only fair that the benefit of a supranational title should apply only to those who admit its consequences and obligations in their home country. As a matter of fact, it would prove discriminatory to nationals of countries signatory to the Convention, if they were the only ones to be subjected to the regulations of the European patent in their home country, while third parties claiming the same benefit in the same European countries would not admit to the same regulations on their territory—regulations which would be the only return to Europeans for the facilities thus offered to outsiders.

## II

I very much wish my American friends would give some further thought to the above remarks, which stem from the political aspect of the relations between Europe and the United States.

It is true that the Germans have officially taken a position opposite to the one I expressed above. Are the reasons for such an attitude so strictly political? In this respect the German policy is to keep in line with American desires in order to be assured of their full assistance in their relations with the East. The German patriotism is such that they prefer the risk of a certain economic subordination—while at the same time expecting to escape it thanks to their industrial dynamism—to the risk of being left alone in the event of negotiations with the USSR.

The French, who have just gone through the difficult period of “decolonization”—as the consequences of Algerian access to independence have proved—do not wish to be subjected to the ruling of richer industrial territories because French economic power has been diluted over a vast free trade area, far different from the principle of the European Treaties.

Hence, a European patent which would not engender a cohesive force for European industry and be beneficial to said industry, would be contrary to the French concept of Europe.

It would be unrealistic to ignore this situation.

In contrast, it would be unfriendly and unfair to ignore the feelings of our American friends.

A great effort should be made to avoid final and non-appealable conclusions which would endanger every one's interest, and make it impossible to reach a sensible solution.

Around which concepts can a solution be found?

The first one is that the greatest number of countries should adhere to the Convention. Nothing could be more pleasing to the French than to see the United States become a member of the Convention, all the more so if the adherence requirements are simplified and if the right to membership is admitted for all countries requesting it, after having harmonized their internal rights in patent matters with that of the European patent.

Unfortunately, it seems doubtful that the United States would accept a delegation—as limited in scope as it may be—of their sovereignty to the benefit of a supranational authority.

The second one is that Article 5 of the Convention should provide that all and any national of Member countries of the Paris Union shall

be entitled to obtain a European patent provided *it is based on a national patent, first in date*, i. e., a patent first filed in one of the adhering States, as the terms of the Union Convention state.

This solution would have the advantage to increase the number of inventions originating—from a juridical point of view—in Europe.

The third solution would consist in a formula of association providing that the European patent would enjoy the same value as the national patent in territories of associated countries possessing a full staff of examiners, provided that, in return, the measures applicable to Europeans, with a view to obtaining a European patent, are likewise applicable to nationals of associated countries. Also, that a close cooperation is established between the examination services in order that existing prior art may be exhaustively opposed to all applicants. A tax would have to be paid by holders of European patents for extension of the patent protection to the associated country, save when the applicant is a national of this country or has already acquired protection therein by a national filing.

In this way, nationals of an associated country would be on the same level as applicants of a member country, considering the double obligation they would have to file both a national and a European patent to obtain patent coverage in Europe. Europeans would have, on their side, to pay an additional tax to obtain extension to the United States territory of the European patent coverage.

The request for extension of protection to associated territories would first require transforming the provisional European application into a final application. The rejection of the final European application would abolish the right for protection in associated states.

Thus, the equality of opportunity for Europeans and Americans would derive from the reciprocal protection afforded by such association; the preeminence of the European patent being quite obvious to Europeans.

The last solution would consist in postponing the access to the European patent—agreement on its principle having first been reached—until such date as the adhering countries have unanimously accepted to put it into practice, or until they have established a united economic and political Federation with one common policy in all fields. Thus, they will have reached the stage where their industrial structure and capacity is comparable to that of the United States, thanks to the pooling together of all European industrial potentialities.

It is around these concepts, and others, that a friendly and trustworthy discussion should take place to achieve a well-balanced and co-prosperous Atlantic Community.

## III

In any case, it would be an error of judgment to believe that a rapid access to the European patent is practically feasible, even for the Europeans themselves, unless a most rapid merger of all existing examination services (The Hague and International Institute in Munich) is realized.

This merger seems, at first, not to the liking of Germany, who does not mean to renounce the benefit of a national examination. Many years would consequently lapse before the setting up of a common and competent examination Office, possessing a staff of Examiners as technically efficient as good polyglots.

Under the best circumstances, a satisfactory European Patent Office is not to be expected before 1970. Until then, the number of European patents that might be filed will be very limited, and national patents will, in the meantime, and as provided for in the transitory period, keep all their interest.

This preliminary period should permit diverging positions to come closer and the laying down of solutions acceptable by third parties, under the express condition, however, that nothing be done to endanger the free development of European techniques, whose independence and strength are indispensable to the political equilibrium of the Atlantic Community.