

WHAT'S OLD IS NEW AGAIN

As the European Union expands eastward, IP questions arise.

By Peter K. Yu

In the past decade, the European Union has devoted substantial efforts to harmonizing its intellectual property laws and practices. Its copyright directives have dealt with term extension and the protection of computer programs and databases. Its Community Trademark system provides a convenient way to protect trademarks throughout the entire region under a single registration. And its recent proposal to establish a Community Patent system underscores the need for multinational patent acquisition and efficient protection throughout the European Community.

Next year, as the Community expands to include countries from Eastern and Central Europe and the Mediterranean, the E.U. harmonization project will face some serious challenges. Last December, the E.U. extended invitations to ten countries (Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia) to join the E.U. by 2004. If all of them agree, E.U. membership will increase to 25.

On the surface, the expansion will improve the E.U.'s bargaining power, making harmonization an even more attractive and important project. It will bring about 100 million more consumers into the European Community. It also will build an economy of more than \$9 trillion, rivaling that of the United States. With a cheap labor force, a wide diversity of agricultural produce, and some of the hottest technology markets in the world, the New Europe will no doubt have more leverage in negotiating IP issues on the international bargaining table.

However, the expansion might create unprecedented challenges that slow down, or even halt, the current harmonization process. With the increase of E.U. languages and national filings and the potential initial confusion of nationals and IP offices in the new member countries, delays and complications are bound to happen. IP rights holders who intend to invest in the New Europe will face some major business dilemmas.

Today, Eastern and Central Europe are two of the most rapidly growing technology markets in the world. Because of their Communist past, many countries in the region have poorly developed communications networks and either outdated computer systems or no systems at all. These countries are eager to adopt the latest communications technologies.

Though growing quickly, these markets remain troubled by endemic corruption, Soviet-style bureaucracy, and inadequate infrastructure. The lack of judicial expertise, enforcement mechanisms, and competent lawyers also make IP protection difficult. The new member countries might have 80,000 pages of E.U. laws and regulations on paper, but there is no guarantee that they will enforce these laws to the extent that would allow businesses to recuperate their investment—at least in the short term.

Since the E.U. was founded, IP rights holders have lobbied aggressively in Brussels to enhance protection of their products. However, with the current expansion, lobbyists might have to rethink their strategy. IP rights are territorial by nature. A nation's laws are often colored by the

country's level of wealth, economic structure, technological capability, political system, and cultural traditions. Because the new members have distinctively different political, social, economic, and cultural systems, they might prefer an IP system that is different from what exists in their Western neighbor states.

For example, all the new members from Eastern and Central Europe were recently Communist countries and are making the difficult transition to a market economy. Access to science textbooks and educational products is crucial to the countries' development and the improvement of living standards. It would not be surprising if these countries prefer a copyright regime that allows for expansive fair use, broad translation rights, and flexible compulsory licenses.

If the content industries do not lobby carefully, their efforts might eventually backfire, creating disagreements, or even deadlocks, within the E.U. Today, the E.U. is powerful because it allows member countries to negotiate collectively with their trading partners. The E.U. will remain powerful only if its members agree to stay together. If they do not, lobbying in Brussels might be ineffective, and the industries might be better off spending their resources in the leading member countries instead.

Even worse, disagreements over IP issues might spill over to the larger accession debate. They might further exacerbate the tension that already exists between the old and new members. Because of harsh entry requirements, tensions emerged when the ten new member countries negotiated entry into the E.U. They were concerned that their accession packages would relegate them to a second-class status within the E.U.

Intellectual property protection is not the only objective of the E.U. harmonization project. There are other competing interests that call for limits to IP protection. Consider, for example, pharmaceutical products, which implicate both IP protection and public health. To make drugs affordable and widely accessible, some new members might emphasize the public health issue in an effort to limit patent protection for pharmaceutical products under the E.U. regime.

Some pharmaceutical companies have considered discounting their products in the new member countries. Unfortunately, these discounted drugs could compete directly against the original higher-priced products if they were imported back into the existing member's market without the authorization of the IP holder.

Other issues are bound to arise. Each time the European Community expands, it faces new challenges. This time around, the Community is taking on countries that are undergoing significant and unique transitions. Given the experimental nature of the E.U.'s eastward expansion, cautious optimism is the best advice an attorney can give to those who are pondering investment plans in the New Europe.

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