



BUNDESRECHTSANWALTSKAMMER

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International Patent Law Harmonization – Draft Objectives and Principles

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Position

The German Federal Bar has already filed its comments on the critical issues “grace period”, “18 months publication”, “conflicting applications” and “prior use rights” with its submission no. 32/2014 of July 2014. We refer to this statement.

The Draft Objectives and Principles submitted by the chairman of the B+-Subgroup give cause for the following comments:

Besides the question to what extent a harmonization of patent law with respect to the four issues mentioned above can be achieved, it is important to note that the Draft Objectives and Principles are referring to the “Objectives of the Global Patent System”. It is important to understand that the Global Patent System does not only consist of the totality of the respective national patent laws – hopefully to be harmonized to a reasonable extent – but also includes court decisions, i.e. case law of the national courts. This relates to court decisions in nullity proceedings and infringement proceedings.

Therefore, the attempt to harmonize the various national patent laws with respect to these specific issues mentioned in the Draft Objectives and Principles is helpful and an important first step – however, it appears to be of at least the same importance to try to harmonize basic principles in the jurisdiction dealing not only with the four issues mentioned above, but with very fundamental elements of the Global Patent System, as for example the granting of injunctions in case of patent infringement. In this respect it appears that at an international level the application of the law, already harmonized to a very large extent, leads to substantially different solutions: Whereas for example in Europe, the grant of an injunction generally is the normal, if not automatic consequence of patent infringement, the grant of an injunction under the US legal regime is subject to an equity evaluation. This leads to the conclusion that for various reasons US courts are granting injunctions in around 30 to 40 per cent of all patent infringement cases only. Furthermore, it appears that in China the grant of an injunction appears to be an exceptional remedy, whereas the main remedy in case of patent infringement is the obligation to pay damages and/or to try to get a licence from the patent owner.

It would be very valuable in the context of harmonizing the international structures for a Global Patent System to at least consider these substantial differences in the national patent systems. With respect to the injunction this applies all the more since the injunction is to be considered as the essential right of a patent owner in order to prevent the infringer from continuing infringing the patent.

It would be very helpful to initiate a broader discussion about these differences in order to consider whether the differences identified would require a harmonization of the national patent law with respect to these issues as well.