Multinational Patent Enforcement: What the Parochial United States Can Learn from Past and Present European Initiatives

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Multinational Patent Enforcement: What the "Parochial" United States Can Learn from Past and Present European Initiatives

Kerry J. Begley†

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Introduction

Patents, as "discrete, national instruments," are of increasingly limited value in a contemporary global economy that transcends national borders. Patent law, like all intellectual property law, has historically been based on national laws and the principle of territoriality. Individual national governments grant patents to inventors, and the territorial limits of sovereignty preclude a nation from giving extraterritorial effect to its patent laws. Therefore, the rights, privileges, and obligations that accompany a patent "begin and end with the country that issues it." A U.S. patent, for example, provides no protection against infringing activity in any country other than the United States.

The ease of the international flow of goods, services, and information in today's global society often makes patent rights in a single country insufficient to protect new technology, forcing innovators to procure patents internationally on a nation-by-nation basis. Although international agreements, including the Paris Convention, the Patent Cooperation

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2. Id. at 278.
3. A patent is a statutory right that a national government grants "to an inventor or the inventor's assignee . . . to exclude other people from practicing the invention disclosed and claimed in the patent specification . . . for a fixed period of years." Gretchen Ann Bender, Clash of the Titans: The Territoriality of Patent Law vs. the European Union, 40 IDEA 49, 51 (2000). The patent owner generally has "the exclusive right to exclude others from making, using, or selling the patented invention." Id. The most important part of a patent is the claims, which set forth the metes and bounds of the patentee's right to exclude. DONALD S. CHISUM ET AL., PRINCIPLES OF PATENT LAW 90 (3d ed. 2004).
4. Bender, supra note 3, at 49, 52.
5. Id.
6. Id. (quoting Aluminum Co. of Am. v. Sperry Prod., Inc., 285 F.2d 911, 925 (6th Cir. 1960)).
7. Id.
9. The International Convention for the Protection of Industrial Property, also known as the Paris Convention, is the foundational patent harmonization treaty. Bender, supra note 3, at 53. Prior to 1884, when the Paris Convention became effective, inventors had to submit patent applications simultaneously in every country in which they desired protection; failure to do so could preclude patent protection in every country except that in which the inventor first filed the application. Id. The Paris Convention established the fundamental principle of "right of priority," which entitles a patent applicant of a member country to a twelve-month period after the initial patent application to apply for patents in other member countries. Id. at 54-55. This provides a great practical advantage to applicants who desire multinational patent protection because it allows the applicant time to evaluate the economic viability of the invention before deciding on specific countries in which to seek patent protection. Id. at 55. The United States is a party to the Paris Convention. Voda, 476 F.3d at 898.
Treaty (PCT), and the European Patent Convention (EPC), have helped streamline the acquisition of foreign patents, the "national nature of patents means that enforcement remains local." Thus, although foreign patents increasingly resemble each other, the continued legal independence and territorial limitations of patents force patent holders to litigate simultaneously in several different countries. Such piecemeal international litigation leads to delay, contradictory results, and expense for both national court systems and the parties to the litigation and, thus, uncertainty, delay, and frustration. The burdens on both patentees and national court sys-

10. The Washington Treaty of 1970, commonly referred to as the Patent Cooperation Treaty (PCT), simplifies the international patent application process by providing a mechanism for filing one patent application that can have effect in many countries. Bender, supra note 3, at 56. To begin, an applicant first files a PCT application in a designated national patent office. Id. The international search authority conducts a novelty examination and completes an international search report, which "expresses no opinion as to the patentability of the invention but does include the classification of the claimed invention, the technical fields searched and citations to the prior art." Id. Next, in the national stage, the applicant submits the PCT application to national patent offices where patent examiners examine the application based on their own national patent laws. Id. Thus, although the PCT facilitates the task of obtaining patents in multiple countries, it does not alter member states' substantive requirements of patentability. Id. at 56-57. The United States became a party to the PCT on January 24, 1978. See Voda, 476 F.3d at 899.

11. The Munich Convention on the Grant of European Patents, also known as the European Patent Convention (EPC), which was signed on October 5, 1973 and became effective on October 7, 1977, is an agreement between European states that established a common European patent granting system with a common patent office, the European Patent Office (EPO). Vincenzo Di Cataldo, From the European Patent to a Community Patent, 8 COLUM. J. EUR. L. 19, 19 (2002); Jean-Luc Piotraut, European National IP Laws Under the EU Umbrella: From National to European Community IP Law, 2 LOY. U. CHI. Int'l L. Rev. 61, 63 (2005). The patent applicant submits a single application to the EPO and if accepted, the EPO grants a European patent, which is actually a bundle of multiple national patents for the nations designated in the patent application. Bender, supra note 3, at 58; Di Cataldo, supra, at 20.

12. Professors' Brief, supra note 8, at 1.

13. Id.; Michael C. Elmer & Alejandro I. Garcia, Are U.S. Courts Going Global on Voda v. Cordis?, INTELL. PROP. L. NEWSL. (ABA Section of Intellectual Property Law, Chicago, Ill.), Spring 2006, at 4, 4. The 1994 Trade-Related Aspects of Intellectual Property (TRIPS) agreement, to which the United States is a party, provides that member states must provide for effective enforcement of intellectual property rights within their own state, but the agreement does not require member states to provide for consolidation of patent claims arising out of connected instances of infringement, to enforce the judgments of other members, or to exercise claim or issue preclusion based on trials in other member states. See Rochelle Cooper Dreyfuss, An Alert to the Intellectual Property Bar: The Hague Judgments Convention, 2001 U. Ill. L. Rev. 421, 423-24 (2001).

14. Professors' Brief, supra note 8, at 1; Thomas, supra note 1, at 278; Elmer & Garcia, supra note 13, at 4; see Judge Randall Rader, United States Court of Appeals for the Federal Circuit, Keynote Address at the High Technology Protection Summit at the University of Washington School of Law: Do you Want Your Foreign Patent Enforced in a U.S. Court? 3-4 (July 21, 2000), available at http://www.law.washington.edu/CASRIP/Symposium/Number6/Rader.pdf (explaining, through example, the difficulties facing inventors currently attempting to enforce patents internationally).

tems have led to a desire for multinational patent enforcement, which entails consolidating suits regarding patent rights from different countries in a single forum.  

The potential for U.S. courts to exercise jurisdiction over foreign patent claims initially appears attractive as a means to prevent the debilitating expense and delay of piecemeal patent litigation in individual national courts. As a result, the conservative approach of U.S. courts to multinational patent enforcement has been highly criticized, especially given the willingness of many European courts to adjudicate foreign patent claims. In Voda v. Cordis Corp., Judge Leonard of the Western District of Oklahoma, defying the traditional reluctance of U.S. courts to exercise jurisdiction over foreign patent claims, permitted Dr. Jan K. Voda, a U.S. cardiologist, to allege infringement of his five Canadian and European patents in addition to his three U.S. patents already in suit against Cordis Corporation, a U.S. company. Because of the significance of the issue and the likelihood of substantial difference in opinion on the minimal relevant case law, the U.S. Court of Appeals for the Federal Circuit granted a rare interlocutory appeal. In the long-awaited decision handed down on February 1, 2007, the Federal Circuit found that the Oklahoma district court abused its discretion in assuming jurisdiction over Dr. Voda's foreign patent infringement claims, reasserting the traditional hesitance of U.S. courts to assume jurisdiction over foreign patent claims. With a particular emphasis on comity concerns, the decision all but eliminates the potential for U.S. courts to exercise supplemental jurisdiction over foreign patent claims.

While the immediate future of multinational patent litigation in U.S. courts was pending in the Federal Circuit, the European Court of Justice...
(ECJ) largely crushed the European multinational patent enforcement trend\textsuperscript{26} with two July 13, 2006 decisions in Roche Nederland v. Primus\textsuperscript{27} and Gesellschaft fur Antriebstechnik mbH & Co. KG v. Lamellen und Kupplungsbau Beteiligungs KG (GAT).\textsuperscript{28} As a result, Europe immediately began a "concerted push" for both the Community Patent and the European Patent Litigation Agreement (EPLA), two initiatives to improve the European patent litigation system that have been in negotiations for years.\textsuperscript{29} These recent European developments suggest the wisdom of U.S. courts' general refusal to assert jurisdiction over foreign patent claims. The ECJ decisions illustrate the lingering territoriality of patent law\textsuperscript{30} despite the cooperative legal environment fostered by the European Union (EU)\textsuperscript{31} and the concomitant success in harmonizing European national patent laws.\textsuperscript{32} In addition to the two decisions,\textsuperscript{33} the proposed judicial systems in the Community Patent initiative and the EPLA demonstrate European nations' continued hesitance to allow foreign national courts to adjudicate patents effective in their territory.\textsuperscript{34} Furthermore, the unavoidable inefficiencies evident in previous multinational patent enforcement efforts in European national courts,\textsuperscript{35} despite being better suited for multinational patent enforcement than U.S. courts,\textsuperscript{36} establish that national courts are not an ideal venue for patent enforcement on an international level. As such, the recent impetus for both the Community Patent and the EPLA suggests that Europe has realized that multinational agreements establishing a common patent judicial system are the appropriate means to ensure effective multinational patent litigation.\textsuperscript{37} Although multinational patent enforcement is a praiseworthy goal, the lessons from Europe illustrate that it is a goal that the United States generally should not pursue on its own.\textsuperscript{38}

will in hindsight be seen as either the most significant trial court order for the globalization of patent rights in some time or the forerunner for later judicial, treaty, or legislative action that will confirm District Judge Tim Leonard's bold globalization of patent law.


30. See Shaw, supra note 26, at 1.

31. See Bender, supra note 3, at 49.

32. See id.; Di Cataldo, supra note 11, at 19.

33. See Shaw, supra note 26, at 1.

34. See generally EUROPEAN PATENT OFFICE, supra note 15, at 5 (describing the proposed judicial system in the draft EPLA); Di Cataldo, supra note 11, at 27 (explaining the difficulties in negotiating a judicial system for the proposed Community Patent).


37. See Next Steps, supra note 29.

38. See Voda v. Cordis Corp., 476 F.3d 887, 900 (Fed. Cir. 2007) ("[W]e as the U.S. judiciary should not unilaterally decide either for our government or for other foreign
After explaining general concepts of jurisdiction in U.S. courts applicable to foreign patent claims (Part I.A.1), this Note examines U.S. courts' traditional hesitance to exercise such jurisdiction (Part I.A.2) and then introduces the controversial Federal Circuit decision in *Voda v. Cordis Corp.*, which perpetuates this conservative approach to multinational patent enforcement (Part I.B). For comparison, the Note turns to a discussion of recent European developments in multinational patent litigation, specifically Dutch courts' progressive use of multinational patent injunctions (Part II.A), followed by the ECJ's decisions in *Roche* and *GAT*, which severely limit the potential for such consolidated suits (Part II.B). Next, the Note describes specific initiatives to harmonize the European patent litigation system, the Community Patent (Part II.C) and the EPLA (Part II.D), along with European leaders' current plan for the implementation of both initiatives (Part II.E).

Finally, the Note explores the lessons that Europe's example provides the United States. The Note argues that, despite progress in unifying the European patent system, European nations remain hesitant to accept a foreign national court's patent invalidity determinations, which the ECJ decisions in *Roche* and *GAT*, as well as the proposed judicial systems in the Community Patent and the EPLA, evidence. This hesitance reinforces comity concerns, which have been the main barrier to the exercise of jurisdiction over foreign patent claims in U.S. courts (Part III.A). Further, the rare availability of multinational patent enforcement, combined with the inherent difficulties of its use, confirm that national courts are not an ideal venue for the global enforcement of patent rights (Part III.B). As such, the Note concludes that Europe's initiatives demonstrate that agreements specifically designed to implement a common patent judicial system, although difficult to establish, are the best means to effectuate multinational patent enforcement (Part III.C).

I. The United States

A. The Conservative Attitude of U.S. Courts Toward Multinational Patent Enforcement

1. Concepts of Jurisdiction in U.S. Courts Relevant to Foreign Patent Claims

In order for a U.S. court to exercise jurisdiction over foreign patent claims, the court must consider: (1) whether the court has jurisdiction over the claims, and (2) whether the court, in its discretion, should decline to exercise jurisdiction over the claims.39 Under the first prong of the jurisdiction analysis, for a U.S. court to assume jurisdiction over a foreign patent claim, the court must have both personal jurisdiction and subject

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matter jurisdiction. In the patent context, the requirements for personal jurisdiction, the judicial power to bind the parties, usually do not present much of a barrier and are ordinarily met if the defendant purposefully conducts activity in the forum.

There are two possible avenues for a U.S. court to assume subject matter jurisdiction over a foreign patent: diversity jurisdiction and supplemental jurisdiction. Diversity jurisdiction exists if the requirements of litigant diversity and amount in controversy (currently $75,000) are met. Although the amount in controversy in most patent infringement cases typically exceeds the $75,000 requirement, satisfying the litigant diversity requirement is more problematic. First, domestic diversity must be complete: the parties must be citizens of different states. Additionally, diversity jurisdiction may fail if aliens litigate on both sides of the proceeding. Nevertheless, a U.S. court will often have jurisdiction over foreign patent claims based on diversity jurisdiction.

Given that 28 U.S.C. § 1338(a) gives federal district courts original jurisdiction over claims involving U.S. patents, federal courts may also rely on supplemental jurisdiction to assume jurisdiction over foreign patent claims that are sufficiently related to U.S. patent claims. The U.S. Supreme Court addressed the fundamental principles of pendent jurisdiction, the predecessor to supplemental jurisdiction, in United Mine Workers of America v. Gibbs. The Court explained that supplemental

40. See Bradley, supra note 18, at 578-79; Thomas, supra note 1, at 312-14.
41. See Bradley, supra note 18, at 578-79 & n.364; Thomas, supra note 1, at 314-15.
43. Elmer & Garcia, supra note 13, at 6. Section 1332(a) provides in relevant part: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between: (1) citizens of different States; ... and (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties ... For the purposes of this section, ... an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.
44. See Brief for the United States as Amicus Curiae in Support of the Appellant at 8, Voda v. Cordis Corp., 476 F.3d 887 (Fed. Cir. 2007) (No. 05-1238) [hereinafter U.S. Brief].
45. See Elmer & Garcia, supra note 13, at 6.
46. See Thomas, supra note 1, at 312; Elmer & Garcia, supra note 13, at 6.
47. Elmer & Garcia, supra note 13, at 6.
49. 28 U.S.C. § 1338(a) (2000) ("The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents ... Such jurisdiction shall be exclusive of the courts of the states in patent ... cases."); see Thomas, supra note 1, at 312.
50. See Bradley, supra note 18, at 579.
51. Thomas, supra note 1, at 318-19.
jurisdiction exists if the non-federal claim arose out of a "common nucleus of operative fact" with a claim within the original jurisdiction of the federal court and, as such, the claims would ordinarily be expected to be tried in one proceeding. In 1990, Congress codified the basic principles articulated in Gibbs regarding the scope and exercise of supplemental jurisdiction in 28 U.S.C. § 1367. Section 1367(a) states in relevant part:

in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

Once a court determines that it has jurisdiction, the second prong of the jurisdiction analysis presents the separate question of whether the court should abstain from exercising jurisdiction. Thus, even if the requirements for personal and subject matter jurisdiction are met, a U.S. court may nonetheless decline to exercise that jurisdiction under certain prudential doctrines, including the doctrine of forum non conveniens, considerations of international comity, and the act of state doctrine. For supplemental jurisdiction suits, § 1367(c) provides specific bases to decline to entertain supplemental claims.

The forum non conveniens doctrine, a likely obstacle to the exercise of jurisdiction over foreign patent claims predicated on either diversity or supplemental jurisdiction, allows a court to decline to exercise jurisdiction if it would be an inconvenient forum and an adequate alternative forum exists. To obtain a forum non conveniens dismissal, the defendant must show that there is an adequate alternative forum and that various private and public interest factors weigh in favor of dismissal. The relevant private interest factors, which relate to the convenience of litigants, include: (1) the relative ease of access to sources of proof, (2) the availability of compulsory process for attendance of the unwilling, (3) the cost of the attendance of the parties and witnesses, (4) if necessary, the possibility of viewing the premises, (5) the enforceability of the judgment, and (6) whether the plaintiff sought to harass the defendant in choosing the

53. Id. at 725; see Mars Inc. v. Kabushiki-Kaisha Nippon Conlux (Mars II), 24 F.3d 1368, 1374 (Fed. Cir. 1994) (quoting Gibbs, 383 U.S. at 725); Thomas, supra note 1, at 312-13.
54. Mars II, 24 F.3d at 1374. Although the wording of the statute is slightly different from the Gibbs test, the Supreme Court has interpreted the statutory relatedness requirement of § 1367(a) as Congress's codification of the "common nucleus of operative fact" test of Gibbs. Voda v. Cordis Corp., 476 F.3d 887, 894 (Fed. Cir. 2007) (citing Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 164-65 (1997); see Mars II, 24 F.3d at 1374.
56. See Elmer & Garcia, supra note 13, at 5.
57. Thomas, supra note 1, at 315.
58. See Elmer & Garcia, supra note 13, at 6.
59. U.S. Brief, supra note 44, at 9; Elmer & Garcia, supra note 13, at 6.
60. See U.S. Brief, supra note 44, at 14; Thomas, supra note 1, at 315.
forum. The relevant public interest factors, which relate to the convenience of the forum, include: (1) the burden placed on congested courts that lack a connection to the litigation, (2) the burden placed on jurors in a community unrelated to the litigation, and (3) local interest in having controversies decided at home.

The act of state doctrine provides another means by which U.S. courts can abstain from exercising jurisdiction over foreign patent claims. The doctrine essentially prohibits courts from reviewing the validity of public acts of a foreign sovereign performed within its own territory. For patents, the rationale for the doctrine is that only a court or the patent office in the country that granted the patent should have jurisdiction to invalidate it. In a foreign patent case, therefore, a dismissal based on the act of state doctrine has two requirements: (1) a foreign country issued a patent wherein the patent itself represents an "act of state," and (2) a U.S. court is reviewing the validity of that patent. Significantly, several U.S. courts have held that the doctrine is inapplicable to actions involving foreign patents, reasoning that the grant of a patent is a purely ministerial activity, which does not meet the first requirement of the doctrine.

Concerns of international comity may also preclude the consolidation of foreign patent claims in U.S. courts. Comity refers to the "spirit of cooperation" in which a domestic court approaches the resolution of cases involving the laws and interests of a foreign sovereign. Although the precise meaning of the concept remains unclear, the Supreme Court defined comity in Hilton v. Guyot as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." In Société Nationale Industrielle Aérospatiale v. United States District Court, the Supreme Court added an additional consideration to guide the comity analysis, advising courts to consider whether exercising jurisdiction would prejudice the rights of the foreign

62. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947); Elmer & Garcia, supra note 13, at n.32.
63. See Gulf Oil, 330 U.S. at 508-09; Elmer & Garcia, supra note 13, at n.33.
64. Thomas, supra note 1, at 315.
67. Elmer & Garcia, supra note 13, at 6.
69. Elmer & Garcia, supra note 13, at 6.
71. 159 U.S. 113, 163-64 (1895).
Because invalidating a foreign patent constitutes disrespect toward another sovereign, considerations of comity are most acute when, as is usually the case in patent infringement cases, the court must determine the validity of a patent as a result of an invalidity defense. Notions of comity have presented a substantial bar to foreign patent consolidation in U.S. case law.

Specific to supplemental jurisdiction, a court also has considerable discretion to decline jurisdiction over a non-federal claim under § 1367(c). The discretionary factors outlined in §1367(c) are, to a considerable extent, a restatement of the factors in a forum non conveniens analysis and require the district court to consider judicial economy, convenience, fairness to litigants, and comity. Section 1367(c)(1) allows the court to decline to exercise supplemental jurisdiction if the claim "raises a novel or complex issue of State law." Patent claims, however, do not necessarily raise especially novel or complex issues under the laws of the issuing country, decreasing the likelihood that § 1367(c)(1) will be applicable to foreign patent cases in U.S. courts. Additionally, § 1367(c)(2) gives the court discretion to decline to exercise supplemental jurisdiction "if the claim substantially predominates over the claim or claims over which the district court has original jurisdiction." Furthermore, § 1367(c)(4) permits a court to decline to exercise supplemental jurisdiction "in excep-

72. See Voda, 476 F.3d at 900 (citing Société Nationale Industrielle Aérospatiale, 482 U.S. at 543 n.27).
73. See Elmer & Garcia, supra note 13, at 6.
74. U.S. Brief, supra note 44, at 12.
76. Elmer & Garcia, supra note 13, at 7; see Dreyfuss, supra note 13, at 433. Section 1367(c) was intended to codify the discretion to exercise supplemental jurisdiction that the Supreme Court emphasized in Gibbs. U.S. Brief, supra note 44, at 4-5. 28 U.S.C. § 1367(c) provides:

The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if-(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

ternal circumstances" in which "there are other compelling reasons for declining jurisdiction."82

2. Multinational Patent Enforcement in U.S. Courts

American courts have historically been reluctant to adjudicate claims based on foreign intellectual property law, particularly patent law.83 Despite the practical advantages to the patentee,84 suits claiming infringement of foreign patents in U.S. courts have been relatively rare, suggesting that the general reluctance to assume such jurisdiction has led practitioners to believe that it would be futile to seek it.85

In Ortman v. Stanray, the first case in which a U.S. court addressed the possibility of pendent, or supplemental, jurisdiction over foreign patent claims,86 the district court exercised jurisdiction over the foreign claims.87 This is a rarity in U.S. courts, as subsequent case law demonstrates.88 The plaintiff, an Illinois resident, sued a Delaware corporation alleging infringement of a U.S. patent, as well as "equivalent" Canadian, Brazilian, and Mexican patents, which were all the basis of a contract between the plaintiff and the defendant.89 The Seventh Circuit noted that, because the district court had jurisdiction over the alleged infringement of the U.S. patent under § 1338(a), the issue was whether the district court had pendent jurisdiction over the foreign patent infringement claims.90 The court explained that "[u]nder ordinary circumstances, it would seem clear that plaintiff could not come into a United States District Court and sue for infringement of patents issued by Canada, Brazil and Mexico where such claim is based upon alleged acts of the defendant in each of the foreign countries named."91 Nevertheless, stating that all of the defendant's allegedly infringing domestic and foreign acts were similar, the court held that the doctrine of pendent jurisdiction could apply depending on the district court's interpretation of the contract between the parties.92 On remand, the district court found that the Gibbs test for pendent jurisdiction was satisfied because "charges arising from the sale and manufacture of the same instrumentality in various countries clearly arise from a 'common nucleus of operative fact.'"93 Thus, both the Seventh Circuit and the dis-

83. See Chisum, supra note 18, at 610.
84. See Professors' Brief, supra note 8, at 1
85. See Chisum, supra note 18, at 610.
86. See Brief for Defendant-Appellant, supra note 78, at 22.
88. See Thomas, supra note 1, at 318-22.
89. Ortman I, 371 F.2d at 155-56.
90. Id. at 156-57.
91. Id. at 156.
92. Id. at 158.
district court were receptive to the resolution of foreign patent claims under the doctrine of pendent jurisdiction.\textsuperscript{94} However, the unique factual situation—the foreign patents were entangled in a contractual controversy between two U.S. nationals in which there was minimal risk of offending foreign nations—may limit the applicability of the court’s holding to other foreign patent infringement claims.\textsuperscript{95}

In contrast, other U.S. courts have either indicated or assumed that they had authority to exercise jurisdiction over foreign patent claims but, nonetheless, have declined to exercise such jurisdiction.\textsuperscript{96} In a 1972 district court case, \textit{Packard Instrument Co. v. Beckman Instruments, Inc.}, another suit between two U.S. nationals, the plaintiff alleged infringement of its U.S. patent and nine corresponding patents from foreign countries.\textsuperscript{97} Seeking to dismiss the foreign patent claims, the defendant noted that it would plead a defense of invalidity to all of the infringement claims.\textsuperscript{98} The court assumed that it could exercise jurisdiction over the foreign patent claims on the basis of pendent jurisdiction or, alternatively, diversity jurisdiction,\textsuperscript{99} but it declined to assert jurisdiction for several reasons.\textsuperscript{100} First, the court’s determination that a foreign patent, “an act of an agency of a foreign government,” is invalid would raise “serious questions of comity.”\textsuperscript{101} The court also noted that a foreign country’s patent law is based on economic and social principles best understood by the courts of the granting nation.\textsuperscript{102} The court further stated that:

[j] it is not unlikely that the courts in the foreign countries whose patents are involved here would disagree with this court’s determinations on the validity of the patents. Those courts would at any rate be faced with the hard choice of accepting the inexpert determination of a foreign court or creating an unseemly conflict with the judgment of the court of another country.\textsuperscript{103}

Thus, the prospects for enforcement of the judgment by a foreign court were uncertain.\textsuperscript{104} Furthermore, translation difficulties would have inevitably arisen in dealing with the seven foreign languages necessary to adjudicate the foreign patents.\textsuperscript{105} Perhaps most importantly, the court was unconvinced of the need to exercise jurisdiction over the foreign patent

\textsuperscript{94} See Thomas, supra note 1, at 319.
\textsuperscript{95} See Chisum, supra note 18, at 611.
\textsuperscript{96} Thomas, supra note 1, at 320.
\textsuperscript{97} 346 F. Supp. 408, 409 (N.D. Ill. 1972).
\textsuperscript{98} \textit{Id.; see Chisum, supra note 18, at 611.}
\textsuperscript{99} \textit{Packard, 346 F. Supp. at 408.}
\textsuperscript{100} Chisum, supra note 18, at 611; Thomas, supra note 1, at 320.
\textsuperscript{101} \textit{Packard, 346 F. Supp. at 410.}
\textsuperscript{102} \textit{Id. at 410-11; see Chisum, supra note 18, at 612; Thomas, supra note 1, at 320.}
\textsuperscript{103} \textit{Packard, 346 F. Supp. at 410.}
\textsuperscript{104} See id.; Thomas, supra note 1, at 320.
\textsuperscript{105} See \textit{Packard, 346 F. Supp. at 411 (“Not only would this court be dependent upon legal opinions, undoubtedly conflicting, of experts in the laws of the foreign countries involved; the court would also be required to rely upon translations of those opinions and of the patents, statutes, regulations and court and administrative decisions on which the expert opinions are based. The risks of distortion of meaning in translation are apparent.””).}
claims "in order to give the plaintiff the relief to which it was entitled." 106 Because the defendant only manufactured the accused devices in the United States, enforcement of the U.S. patent alone would allow the plaintiff to obtain injunctive relief and recover damages for each infringing device. 107

Additionally, in the 1976 case Goldberg v. Cordis Corp., a district court declined to exercise jurisdiction over claims of infringement of Canadian and British patents on the basis of comity. 108 The court explained that "the validity of foreign patents would necessarily be in issue" in a foreign patent infringement claim. 109 Furthermore, determining the validity of foreign patents "would invite conflict with the administrative and judicial officers of those governments" and, thus, the power to adjudicate such conflicts should be exercised "with great reluctance." 110

Similarly, the Federal Circuit has displayed a conservative approach to the exercise of jurisdiction over foreign patent infringement claims. 111 In Mars Inc. v. Kabushiki-Kaisha Nippon Conlux, decided in 1994, the Federal Circuit held that a district court did not have supplemental jurisdiction over an infringement claim based on a Japanese patent. 112 The plaintiff, a U.S. national, filed an action in the Delaware district court against Nippon Conlux, a Japanese company, and Conlux U.S.A. Corporation, its U.S. subsidiary, for infringement of both a U.S. and a parallel Japanese patent. 113 The district court "assumed, without deciding, that it had authority under section 1367(a)" to hear the Japanese patent infringement claim but declined to exercise supplemental jurisdiction based on international comity and a § 1367(c) discretionary analysis. 114 Under the § 1367(c) analysis, the court reasoned that the case involved novel and complex issues of Japanese law and, therefore, the Japanese patent claims would substantially predominate over the U.S. patent claims. 115 In regard to comity, the court held that even if, as the plaintiff argued, Japanese law prevented the defendant from asserting invalidity as a defense to infringement so that the court would not have to rule directly on the validity of the Japanese patent, the claim still implicated the principles underlying comity because the court must decide whether "a Japanese company is prohibited under Japanese law from making or selling its products in Japan." 116 Additionally, the court noted that most courts that have considered the issue of whether to exercise jurisdiction over a foreign patent infringement claim have

106. See id.; Thomas, supra note 1, at 320.
107. See Packard, 346 F. Supp. at 411; Chisum, supra note 18, at 612.
109. Id.; see Brief for Defendant-Appellant, supra note 78, at 25.
110. Goldberg, 203 U.S.P.Q. at 718; see Brief for Defendant-Appellant, supra note 78, at 25.
111. Thomas, supra note 1, at 280.
112. 24 F.3d 1368, 1375-76 (Fed. Cir. 1994).
113. Id. at 1370.
114. Mars I, 825 F. Supp. 73, 76 (D. Del. 1993); Thomas, supra note 1, at 321.
115. Mars II, 24 F.3d at 1374.
refused to do so on account of comity concerns.\textsuperscript{117}

On appeal, however, the Federal Circuit held that the district court erred in assuming that it had supplemental jurisdiction over the Japanese patent claim under § 1367(a) because the U.S. and Japanese patents did not derive from a common nucleus of operative fact.\textsuperscript{118} The Federal Circuit distinguished Ortman, holding,\textsuperscript{119} 

"[I]n contrast to Ortman, neither 'similar acts' nor the 'same instrumentality' are at issue" in the foreign patent claims.\textsuperscript{120} In making this determination, the court noted four differences, now known as the "Mars factors," between: (1) the respective patents, (2) the accused devices, (3) the allegedly infringing acts, and (4) the governing laws.\textsuperscript{121} First, the U.S. patent claims were method claims, but the Japanese patent claim was an apparatus claim.\textsuperscript{122} Second, the range of accused devices in Japan was much broader than in the United States.\textsuperscript{123} Third, the allegedly infringing acts were different in that the defendant was charged with direct and induced infringement of the U.S. patent but only with direct infringement of the Japanese patent.\textsuperscript{124} Fourth, the governing laws were different.\textsuperscript{125} Commentators have argued that because these differences do not appear particularly significant individu-

\textsuperscript{117} Id. (citing Goldberg v. Cordis Corp., 203 U.S.P.Q. 717 (N.D. Ill. 1976), aff'd, 567 F.2d 392 (7th Cir. 1977); Packard Instrument Co. v. Beckman Instruments, Inc., 346 F. Supp. 408 (N.D. Ill. 1972)).

\textsuperscript{118} Mars II, 24 F.3d at 1375-76.


\textsuperscript{120} Mars II, 24 F.3d at 1375.


\textsuperscript{122} Mars II, 24 F.3d at 1375; see Brief for Defendant-Appellant, supra note 78, at 27. A method claim is a patent claim that describes a method of making or using objects or substances to achieve a useful result. See Black's Law Dictionary 1161 (8th ed. 2004); Chisum et al., supra note 3, at 92. A method claim patents the combination of acts or steps, not the resulting product. Chisum et al., supra note 3, at 93. In contrast, an apparatus claim is a patent claim on a mechanical device or structure, which must recite the connection of the components and how they function together. See Black's Law Dictionary, supra, at 1160; Chisum et al., supra note 3, at 93. The court did not consider whether the distinction in the claim formats had a substantive effect on the facts of the case. Thomas, supra note 1, at 323.

\textsuperscript{123} Mars II, 24 F.3d. at 1375; see Brief for Defendant-Appellant, supra note 78, at 27. The court, however, admitted that some of the accused devices in Japan may have been similar to the U.S. device. Mars II, 24 F.3d at 1375; Thomas, supra note 1, at 323-24.

\textsuperscript{124} Mars II, 24 F.3d. at 1375; see Brief for Defendant-Appellant, supra note 78, at 27. This difference is perhaps most puzzling given that the Japanese claim of direct infringement was a subset of the U.S. claim of direct and indirect infringement. Thomas, supra note 1, at 324.

\textsuperscript{125} Mars II, 24 F.3d. at 1375.
ally or even as a whole, the Federal Circuit's position that the U.S. and Japanese patent claims did not derive from a "common nucleus of operative fact" is "tenuous at best." Going further, in dicta, the court anticipated that the plaintiff would replead jurisdiction based on diversity of citizenship. The court noted that such an attempt would be futile because the trial court already made findings pertinent to a forum non conveniens analysis that supported dismissal, including translation issues, the difficulty of resolving complex issues of Japanese procedural and substantive law, and that "general concerns respecting international comity counsel against exercising jurisdiction over a matter involving a Japanese patent, Japanese law, and acts of a Japanese defendant in Japan." This dicta confirms the Federal Circuit's hostility toward foreign patent claims. Certainly, with such a rigorous application of the forum non conveniens doctrine, a U.S. court would rarely assume jurisdiction over a foreign patent claim. Although, as dicta, its precedential effect may be limited, its "chilling effect" has resulted in few attempts to seek multinational patent enforcement in U.S. courts.

In subsequent cases involving foreign intellectual property claims, district courts have had opposing interpretations of Mars and its implications for the availability of jurisdiction over foreign patent claims in U.S. courts. Mars has sometimes been interpreted to stand for a broad per se rule that U.S. courts never have supplemental jurisdiction over foreign patent claims. In the 1995 case Berkshire Furniture Co., Inc. v. Glattstein, for example, a district court noted that in Mars, "the Court of Appeals for the Federal Circuit held that U.S. courts do not have... supplemental jurisdiction to litigate foreign patents in the same action in which U.S. intellectual properties are in issue." Nevertheless, in Medigene AG v. Loyola University of Chicago, another district court relied on § 1367 and Mars to find supplemental jurisdiction over claims related to the inventorship of foreign

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126. See supra note 122-124; Thomas, supra note 1, at 323-24.
127. Chisum, supra note 18, at 613.
128. Mars II, 24 F.3d at 1375-76.
129. Id. at 1376.
130. See Chisum, supra note 18, at 613; Wegner, supra note 18, at 27.
131. Thomas, supra note 1, at 324.
132. Id.
133. Wegner, supra note 18, at 27.
135. Id. Berkshire did not involve patent claims; rather, the plaintiff asked the court to adjudicate the validity of foreign design registrations. Id. at 1560.
136. Id. at 1561. Courts have also cited Mars for its recognition that "general concerns respecting international comity counsel against exercising jurisdiction over a matter involving a Japanese patent and the acts of a Japanese defendant in Japan," see S. Megga Telecommunications Ltd. v. Lucent Techs., Inc., No. 96-357-SLR, 1997 WL 86413 (D. Del. Feb. 14, 1997) (quoting Mars II, 24 F.3d 1368, 1376 (Fed. Cir. 1994)); Berkshire, 921 F. Supp at 1561 (quoting Mars II, 24 F.3d at 1376), which is a less controversial proposition given its recurrence in U.S. case law.
In its motion to dismiss counts of the defendant's counterclaim, the plaintiff relied on Mars for the proposition that disputes about foreign patent applications are beyond the jurisdictional reach of § 1367(a). The district court, however, disagreed and denied the motion, ruling, "We do not read that case to support any such broad rule. Rather, the discussion of the Court made clear that in appropriate circumstances Section 1367 permits exercise of supplemental jurisdiction over a claim for infringement of a foreign patent." The court held that, in contrast to the facts in Mars, the Medigene defendant's counterclaim alleged that the foreign patent applications pertained to the same invention and involved the same co-inventorship issue as the U.S. patent, which warranted the existence of supplemental jurisdiction. Certainly, the opposing interpretations of Mars regarding the availability of supplemental jurisdiction over foreign patent claims in the United States required clarification.


1. The Voda Decision

In Voda v. Cordis Corp., the Federal Circuit addressed the jurisdictional reach of U.S. courts to adjudicate foreign patent disputes pursuant to supplemental jurisdiction. In so doing, the court perpetuated the conservative approach of U.S. courts, particularly the Federal Circuit, to multinational patent enforcement, largely eliminating any hope for multinational patent enforcement in U.S. courts.

On October 30, 2003, Dr. Voda, an Oklahoma cardiologist, filed an action against Cordis Corporation, a Florida medical device corporation, in the Western District of Oklahoma seeking damages for alleged infringement of three U.S. patents protecting guiding catheters in angi-
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oplasty. During discovery, Dr. Voda learned that Cordis sold the allegedly infringing catheter in Canada and Europe. On June 14, 2004, Dr. Voda, arguing that 28 U.S.C. § 1367(a) gave the district court supplemental jurisdiction, moved to amend his complaint to assert the infringement of his European, British, French, German, and Canadian foreign patents. Dr. Voda's foreign patents resulted from a common PCT application, which was an amended version of Dr. Voda's original U.S. patent application. The three U.S. patents already at issue in the case resulted from continuation applications of this original U.S. patent application. Dr. Voda admitted that there was some subject matter in the U.S. patents already at issue that was not present in the foreign patents but insisted that the claims of the U.S. patents and the foreign patents were "substantially identical."

After considering both parties' briefs, the district court granted Dr. Voda's motion to amend his complaint to add infringement claims based on his foreign patents. Although Cordis cited Mars for the proposition that U.S. courts do not have supplemental jurisdiction over foreign patent infringement claims in a U.S. patent suit, the district court, like that in Medigene, disagreed, holding that "Mars . . . does not support such a broad rule." The district court pointed out that the Mars court distinguished that case from Ortmann, in which all of the defendant's allegedly

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146. See id. at 890-91; Order Granting Amendment, supra note 20; Brief for Defendant-Appellant, supra note 78, at 2; Elmer & Garcia, supra note 13, at 4. Dr. Voda's three U.S. patents at issue in the case were U.S. Patent No. 5,445,625; 6,083,213; and 6,475,195. Brief for Defendant-Appellant, supra note 78, at xiii.

147. Brief for Appellee, supra note 19, at 10; see Brief for Defendant-Appellant, supra note 78, at 12.

148. Dr. Voda did not assert any other statutory basis for subject matter jurisdiction. Voda, 476 F.3d at 893 n.5. Therefore, although the parties disputed on appeal whether diversity jurisdiction under § 1332 provided an alternative basis for jurisdiction over Dr. Voda's foreign patent infringement claims, the Federal Circuit declined to decide whether the district court could properly exercise jurisdiction based on diversity. Id. at 905.

149. Brief for Appellee, supra note 19, at 10-11; Elmer & Garcia, supra note 13, at 4. The five foreign patents that Dr. Voda sought to include in his amended complaint are: (1) European Patent No. 0 568 624, (2) German Patent No. DE 69 23 20 95, (3) British Patent No. GB 568 624, (4) French Patent No. FR568624, and (5) Canadian Patent No. CA 2,100,785. Voda, 476 F.3d at 890; Brief for Defendant-Appellant, supra note 78, at 2.

150. See Voda, 476 F.3d at 890; Brief for Defendant-Appellant, supra note 78, at 8.

151. A continuation application is an application that is filed while an earlier-filed "parent" application is pending, which carries on the prosecution of some or all of the original parent application. See BLACK'S LAW DICTIONARY, supra note 122, at 1159.

152. See Brief for Appellee, supra note 19, at 5-6; Brief for Defendant-Appellant, supra note 78, at 5-10, for a detailed description of the patent prosecution history for each of the patents at issue in Voda.

153. Brief for Appellee, supra note 19, at 7.

154. Voda, 476 F.3d at 891; Order Granting Amendment, supra note 20; Brief for Appellee, supra note 19, at 10-11.


156. Order Granting Amendment, supra note 20.
infringing domestic and foreign acts were similar.\textsuperscript{157} Noting that “this case is more akin to Ortman than to Mars,” the district court found that it would have supplemental jurisdiction over Dr. Voda’s foreign patent infringement claims.\textsuperscript{158}

On August 27, 2004, Cordis moved for reconsideration or, alternatively, for the decision to be certified for appeal.\textsuperscript{159} On January 7, 2005, the district court denied reconsideration but granted Cordis’s motion to certify the order for interlocutory appeal, finding that:

the issue of its jurisdiction over the foreign patents presents a controlling question of law on which a substantial ground for difference of opinion exists and the resolution of which would materially advance the ultimate resolution of this action. The court is loathe to put the parties to the expense of litigating the foreign patents if indeed it does not have subject matter jurisdiction over those claims.\textsuperscript{160}

Cordis then petitioned for review on the issue of “whether the district court has supplemental subject matter jurisdiction over Dr. Voda’s five foreign patents.”\textsuperscript{161} “Because of the paucity of law surrounding this issue,” the Federal Circuit granted Cordis’s interlocutory appeal on February 22, 2005.\textsuperscript{162} The pending Federal Circuit decision in \textit{Voda} sparked increased debate about the availability of multinational patent enforcement in U.S. courts, as evidenced by the five amici curiae briefs on behalf of the United States, the American Intellectual Property Law Association (AIPLA), the Intellectual Property Owners Association (IPOA),\textsuperscript{163} the Federal Circuit Bar Association, and several law professors.\textsuperscript{164}

\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Brief for Appellee, \textit{supra} note 19, at 12; Brief for Defendant-Appellant, \textit{supra} note 78, at 3; Elmer & Garcia, \textit{supra} note 13, at 4.
\textsuperscript{161} \textit{See} Order Granting Appeal, \textit{supra} note 21.
\textsuperscript{162} Brief for Defendant-Appellant, \textit{supra} note 78, at 3. The Federal Circuit has shown “extreme reluctance” to accept an interlocutory appeal in a patent case, which makes \textit{Voda} “all the more surprising as the Federal Circuit oddly granted an interlocutory appeal . . . with very few of the critical facts needed for a decision.” Wegner, \textit{supra} note 18, at 33. Evidencing the lack of a developed record on the foreign patents, in view of the appeal, Cordis did not answer Dr. Voda’s amended complaint and no discovery was taken on the foreign patents. Brief for Defendant-Appellant, \textit{supra} note 78, at 3.
\textsuperscript{163} An executive from Johnson & Johnson, which owns the defendant, Cordis Corporation, holds one of the forty-five board positions in the IPOA. Igielski, \textit{supra} note 121.
After oral arguments on January 12, 2006, the Federal Circuit eventually handed down a long-awaited opinion more than a year later. On February 1, 2007, in a 2-1 decision, the panel majority ruled that the district court abused its discretion by assuming jurisdiction over Dr. Voda's foreign patents. The majority clearly set forth the two-part test for the appropriate exercise of supplemental jurisdiction pursuant to § 1367, requiring both (1) the presence of jurisdiction under § 1367(a) and (2) an "appropriate decision" to exercise that jurisdiction under § 1367(c). Finding that the district court abused its discretion under the second prong of the analysis in failing to decline jurisdiction under § 1367(c), the court did not squarely address the first prong of the analysis, whether the district court had authority to exercise supplemental jurisdiction under § 1367(a). Thus, the court refocused the inquiry from whether the district court "could" exercise jurisdiction over Dr. Voda's foreign patent infringement claims under § 1367(a) to whether it "ought" to have done so "as a matter of judicial discretion under § 1367(c)."

Under the first prong of the supplemental jurisdiction analysis, whether § 1367(a) authorizes supplemental jurisdiction over foreign patent claims, the majority noted that the district court was correct in that Mars did not establish a per se rule barring U.S. courts from adjudicating foreign patents. Thus, the court clarified the opposing interpretations of Mars in earlier district court decisions. Further, the court explained that the Mars factors do not supplant the Gibbs test codified in § 1367(a) and are neither an exhaustive list of factors to consider nor necessary conditions for finding supplemental jurisdiction under § 1367(a). The court, however, objected to the district court's failure to articulate any analysis of relevant factors, merely concluding that "allegations in the amended complaint demonstrate that this case is more akin to Ortman than to Mars," which does not answer the legal question of
whether the claims satisfy the *Gibbs* test.\(^\text{179}\) Nevertheless, reasoning that it was “more prudent . . . not to decide this ‘common nucleus of operative fact’ question in the first instance,”\(^\text{180}\) the court refrained from deciding whether Dr. Voda’s foreign patent infringement claims satisfied the threshold requirement of § 1367(a).\(^\text{181}\)

Instead, the court’s decision turned on the district court’s abuse of discretion in assuming jurisdiction over the foreign patent claims without performing a proper § 1367(c) discretionary analysis.\(^\text{182}\) The court held that the § 1367(c) considerations of comity, judicial economy, convenience, fairness, and other exceptional circumstances, including international treaty obligations, constitute compelling reasons to decline jurisdiction in this case.\(^\text{183}\) Although the interlocutory appeal was taken on the pleadings, the Federal Circuit demanded a thorough analysis of these factors as a “condition precedent to the proper exercise of [supplemental] jurisdiction,” emphasizing that § 1367(c) requires a case-specific inquiry at every stage of litigation.\(^\text{184}\) In regard to each factor, the court set “tough standards”\(^\text{185}\)—further displaying the Federal Circuit’s hostility toward the adjudication of foreign patent claims in U.S. courts.

First, the court noted that a district court’s exercise of supplemental jurisdiction over foreign patent claims could undermine the international treaty obligations of the United States, constituting an exceptional circumstance to decline jurisdiction under § 1367(c)(4).\(^\text{186}\) The international patent treaties, including the Paris Convention, the PCT, and TRIPS, to which the United States and each foreign country whose patents were at issue are parties, do not contemplate or allow one jurisdiction to adjudicate the patents of another.\(^\text{187}\) Although conceding that the treaties do not expressly prohibit courts from adjudicating foreign patent claims, the court explained that each affirms the independence of member nations’ patent granting and adjudication systems.\(^\text{188}\) Therefore, regardless of the harmonization trend that these treaties may represent, the court found that “we as the U.S. judiciary should not unilaterally decide either for our government or for other foreign sovereigns that our courts will become the adjudicating body for any foreign patent with a [sufficiently related] U.S.

\(^{179}\) See id. at 896. 
\(^{180}\) Id. 
\(^{181}\) See id. at 897; Adams, supra note 143. 
\(^{182}\) See Voda, 476 F.3d at 898. 
\(^{183}\) See id. 
\(^{184}\) Igielski, supra note 121 (quoting Chicago v. Int’l Coll. of Surgeons, 522 U.S. 156, 173 (1997)). 
\(^{185}\) Id. 
\(^{186}\) Voda, 476 F.3d at 900. 
\(^{187}\) See id. at 898-99. 
\(^{188}\) See id. at 899. To inform its analysis, the court contrasted these treaties with the EPC, which has rules specifying courts of exclusive jurisdiction. See id. at 899 n.8. The court further noted that even members of the EPC have not been able to agree on a centralized European patent court. Id. See supra note 11 and infra Part II.C pp. 553-54 for a description of the EPC.
equivalent . . . .”189 Thus, for the Federal Circuit, the international patent treaties to which the United States is a party present a strong rationale to decline supplemental jurisdiction under § 1367(c).

Next, the court determined that comity strongly disfavors the exercise of supplemental jurisdiction over Dr. Voda’s foreign patent claims.190 The court held that the four considerations of comity from Société Nationale Industrielle Aérospatiale v. United States District Court191 did not support the district court’s exercise of supplemental jurisdiction because (1) there is no international duty to adjudicate the foreign claims, (2) Dr. Voda did not show that adjudicating his foreign patent claims would enhance convenience, (3) Dr. Voda failed to show that foreign courts would adequately protect his foreign patent rights, and (4) the exercise of jurisdiction could prejudice the rights of foreign governments.192 Thus, the court concluded that exercising jurisdiction over Dr. Voda’s foreign patent infringement claims would “undermine the ‘spirit of cooperation’ underlying the comity doctrine.”193

Further, the court concluded that exercising jurisdiction in this case would risk “unreasonable interference with the sovereign authority of other nations,” which ordinarily should be avoided.194 The court reasoned that because the foreign countries whose patents were at issue had specialized judges, resources, and procedures to foster integrity and consistency in the application of their patent laws, exercising jurisdiction over Dr. Voda’s foreign patents could disrupt their established procedures.195

The court also found that judicial economy failed to support the exercise of supplemental jurisdiction in this case because U.S. courts and juries lacked knowledge of and experience with the foreign patent regimes at issue.196 Going further, the court noted that, under § 1367(c)(2), the adjudication of Dr. Voda’s five foreign patents may substantially predominate his U.S. patent claims.197 Moreover, the court emphasized that the United States is not a member of any international treaty requiring foreign countries to recognize or enforce its judgments.198 Thus, the court countered the argument that consolidating foreign patent claims in one U.S. court would be more efficient with the “major drawback”199 of the

189. Voda, 476 F.3d at 900.
190. See id. at 900-03.
191. See supra p. 110 for a discussion of these factors.
192. See Voda, 476 F.3d at 901; Adams, supra note 143; Igielski, supra note 121.
193. Voda, 476 F.3d at 902.
194. See id. (quoting F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004)).
195. Id. at 902-03. By way of analogy, the court further pointed out that foreign courts’ exercise of jurisdiction over U.S. patent claims would destroy Congress’s attempt to unify U.S. patent jurisprudence by creating the Federal Circuit to which Congress granted exclusive jurisdiction to hear appeals on patent claims. Id. at 903.
196. Id.
197. Id.
198. See id.
199. John R. Schmertz & Mike Meier, In Reviewing District Court’s Finding of Supplemental Jurisdiction Over Foreign Patent Infringement Claims, Panel Majority of Federal
uncertainty of foreign enforcement due to the present lack of international mechanisms to secure the enforcement of U.S. judgments abroad.\footnote{199}

Finally, the court opined that the act of state doctrine may make the exercise of supplemental jurisdiction over foreign patent claims "fundamentally unfair."\footnote{200} Unconvinced that the grant of a patent by a sovereign is not an act of state, the court assumed, without deciding, that the act of state doctrine applied to foreign patent claims.\footnote{201} Under this assumption, U.S. courts could not question the validity of a foreign patent and would have to adjudicate the patent claim regardless of validity or enforceability.\footnote{202} Because many patent cases are resolved on validity or enforceability grounds, exercising such jurisdiction could be unfair to the alleged infringer.\footnote{203}

Based on this reasoning, the court concluded that the district court was compelled to decline supplemental jurisdiction over Dr. Voda’s foreign patent infringement claims under § 1367(c).\footnote{204} Because the district court failed to undertake any analysis under § 1367(c), the court held that the district court abused its discretion in exercising supplemental jurisdiction.\footnote{205} Therefore, the court vacated the order of the district court granting Dr. Voda leave to amend his complaint to add his foreign patent infringement claims pursuant to § 1367.\footnote{206}

In her lengthy dissent, Judge Pauline Newman concluded that the district court did not abuse its discretion in exercising jurisdiction over Dr. Voda’s foreign patent infringement claims.\footnote{207} The dissent argued that the criteria of § 1367 “reinforce, rather than negate, the district court’s exercise of discretion to accept Voda’s amended complaint.”\footnote{208} Specifically, the dissent vehemently contested the majority’s finding that judicial economy does not support the exercise of supplemental jurisdiction, arguing that “[i]t surely is not apparent that multiple litigation of the same issues in five countries and three languages is likely to be more economical of judicial time and litigation expense . . . than resolving all of the issues before one judge in one case and one language.”\footnote{209} Furthermore, the dissent argued that, rather than merely considering convenience to U.S. courts, the court could have considered the overwhelming convenience to both parties of avoiding multiple litigations in foreign countries.\footnote{210} Pointing to extensive supporting case law, the dissent argued that U.S. courts routinely


\footnote{200}{See Adams, supra note 143; Schmertz & Meier, supra note 199.}
\footnote{201}{Voda, 476 F.3d at 904.}
\footnote{202}{Id. at 903; see Adams, supra note 143; Schmertz & Meier, supra note 199.}
\footnote{203}{Voda, 476 F.3d at 904; see Adams, supra note 143.}
\footnote{204}{Voda, 476 F.3d at 904.}
\footnote{205}{Id.}
\footnote{206}{Id.}
\footnote{207}{Id. at 905.}
\footnote{208}{See Adams, supra note 143.}
\footnote{209}{Voda, 476 F.3d at 909 (Newman, J., dissenting).}
\footnote{210}{Id. at 913.}
\footnote{211}{See id. at 911; Lgielski, supra note 121.}
determine and apply foreign law.\(^{212}\) Adopting a view common to proponents of patent harmonization,\(^{213}\) the dissent emphasized that the application of foreign patent law would not be a significant challenge to U.S. courts because similar policies underlie the patent law of all industrialized nations.\(^{214}\)

Significantly, the dissent emphasized the broad restrictive effect of the majority's decision on the possibility of multinational patent enforcement in U.S. courts.\(^{215}\) Judge Newman's opinion stressed that the majority's "extreme limitation and bar"\(^{216}\) on the district court's exercise of discretion to assume supplemental jurisdiction over foreign patent claims "essentially eliminates" any such discretion in foreign patent cases.\(^{217}\) For Judge Newman, "in contrast to the case-specific analyses in precedent," under the majority's opinion, "it would always be an abuse of discretion for the district court to decide foreign patent issues, unless some sort of new treaty is produced."\(^{218}\)

2. Implications for Multinational Patent Enforcement in U.S. Courts

The dissent's characterization of the breadth of the Voda holding is likely not overstated,\(^{219}\) as the facts of Voda arguably approached an ideal case for consolidation of foreign patent claims.\(^{220}\) Both the plaintiff and the defendant were U.S. nationals.\(^{221}\) Furthermore, the foreign patents shared a common lineage in that they all originated from a common PCT application and, additionally, they were counterparts of the asserted U.S. patents.\(^{222}\) Moreover, the domestic and foreign acts constituting infringement were identical,\(^{223}\) involving direct infringement of a single accused

\(^{212}\) See Voda, 476 F.3d at 906-09 (Newman, J., dissenting); Takenaka, supra note 24.

\(^{213}\) See Professors' Brief, supra note 8, at 18-21 ("It is simply inaccurate to assert that assumption of foreign patent infringement claims will invariably lead U.S. courts into unknown landscapes. Core doctrines of the leading patent-issuing states are substantially similar to the point of identity . . . ."); Wegner, supra note 18, at 2; Takenaka, supra note 24.

\(^{214}\) See Voda, 476 F.3d at 917 (Newman, J., dissenting).

\(^{215}\) See id. at 906-17.

\(^{216}\) Id. at 917.

\(^{217}\) Id. at 910.

\(^{218}\) Id. at 909.

\(^{219}\) See Adams, supra note 143.

\(^{220}\) See Brief for Appellee, supra note 19, at 15 ("Indeed, if the facts of this case do not justify exercise of jurisdiction over some or all of the Counterpart Patents then this Court should simply forthrightly and plainly announce that no such claims should ever be entertained. And yet, the case for jurisdiction is strong—especially given the unique facts of this case.").


\(^{222}\) See Voda, 476 F.3d at 910-11 (Newman, J., dissenting); Elmer & Garcia, supra note 13, at 6. The parties disagreed about the extent of similarity between the patents; Cordis argued that the patents differed materially, whereas Dr. Voda argued that they differed only in slight respects. Voda, 476 F.3d at 895.

\(^{223}\) See Elmer & Garcia, supra note 13, at 6; Rader, supra note 14, at 5.
device.\textsuperscript{224} Finally, only monetary damages were sought against the defendant, a U.S. company with substantial U.S. assets,\textsuperscript{225} preventing the need for foreign enforcement of a judgment on the foreign patent claims.\textsuperscript{226} Despite the strong argument for supplemental jurisdiction based on these facts, the Federal Circuit still found that the district court abused its discretion in assuming supplemental jurisdiction over Dr. Voda's foreign patent infringement claims.

Therefore, although the \textit{Voda} decision did not completely eliminate the possibility of supplemental jurisdiction over foreign patent claims, it largely forecloses any such opportunity.\textsuperscript{227} With the exception of the obligations of the United States under international patent treaties, the majority nominally made its analysis specific to Dr. Voda’s foreign patent claims;\textsuperscript{228} however, the dissent is correct in that most of the Federal Circuit's findings are generic to all foreign patent claims.\textsuperscript{229} For example, the majority neither analyzed the specific patent judicial systems of any of the foreign countries whose patents were at issue nor addressed the extent of difference between U.S. patent law and the patent laws of the foreign countries whose patents were at issue.\textsuperscript{230} Furthermore, although the court noted that a change in circumstances, such as "if the United States were to enter into a new international patent treaty," might alter the analysis,\textsuperscript{231} there are currently no plans for such a treaty.\textsuperscript{232} Finally, despite the particularly low risk of offending a foreign sovereign because the case involved only U.S. parties and no foreign sovereign's cooperation would have been necessary to secure the requested monetary judgment, the Federal Circuit still found that comity was a compelling basis to decline jurisdiction over the foreign patent claims.\textsuperscript{233} Thus, the \textit{Voda} court's comity analysis appears to largely preempt federal jurisdiction over foreign patent claims.\textsuperscript{234}

As such, it would be difficult to imagine a foreign patent claim that would pass the Federal Circuit's rigorous analysis laid out in both \textit{Mars} and \textit{Voda}. For diversity jurisdiction cases, the rigorous application of the forum non conveniens doctrine in the \textit{Mars} dicta ensures that U.S. courts would properly assume jurisdiction over foreign patents based on diversity

\begin{footnotes}
\item[224] See \textit{Voda}, 476 F.3d at 895; Igielski, \textit{supra} note 121.
\item[225] See Elmer & Garcia, \textit{supra} note 13, at 8 ("The most compelling case for consolidation occurs when the plaintiff seeks only a damage award and the enforcement of that award in the United States.").
\item[226] See Igielski, \textit{supra} note 121.
\item[227] See Takenaka, \textit{supra} note 24.
\item[228] See \textit{Voda}, 476 F.3d at 899-905.
\item[229] See \textit{id.} at 909 (Newman, J., dissenting); Adams, \textit{supra} note 143; Igielski, \textit{supra} note 121.
\item[230] See \textit{Voda}, 476 F.3d at 902-03; Adams, \textit{supra} note 143.
\item[231] See \textit{Voda}, 476 F.3d at 905.
\item[232] See \textit{id.} at 916 (Newman, J., dissenting).
\item[233] See Igielski, \textit{supra} note 121.
\item[234] See \textit{id.}
\end{footnotes}
jurisdiction only in rare cases.\textsuperscript{235} For supplemental jurisdiction, the two Federal Circuit decisions set tough standards for both prongs of the § 1367 analysis. First, in the § 1367(a) analysis of Mars, the Federal Circuit’s rigorous application of the Mars factors limits the number of foreign patent claims that would pass the “common nucleus of operative fact” test.\textsuperscript{236} Moreover, even if a claim were to pass the first prong of the supplemental jurisdiction analysis under § 1367(a), the Voda decision severely restricts judicial discretion to exercise jurisdiction under § 1367(c).\textsuperscript{237} Thus, as emphasized in Judge Newman’s dissent, Voda significantly limited the possibility of a U.S. court assuming supplemental jurisdiction over foreign patent infringement claims.\textsuperscript{238} Although the Voda decision may be disappointing for patent litigants that must pursue litigation in various national courts, Europe’s example demonstrates the wisdom of the Federal Circuit’s restriction of multinational patent enforcement in U.S. courts.

II. Europe


Although Europe has a streamlined method for national patent acquisition under the European Patent Convention (EPC),\textsuperscript{239} until recently, patentees had no recourse to a similarly centralized patent enforcement forum in Europe and, thus, had to pursue separate patent infringement litigations in national courts.\textsuperscript{240} The 1989 Dutch Supreme Court decision in Lincoln v. Interlas,\textsuperscript{241} however, began a trend of multinational patent enforcement, attacking the traditional territoriality of patent rights.\textsuperscript{242}

In Lincoln v. Interlas, the Dutch Supreme Court granted an injunction against trademark infringement in Belgium and Luxembourg in addition to the Netherlands.\textsuperscript{243} Interlas, a Dutch company, imported diesel welding units bearing the “Lincoln” trademark from the United States into the Netherlands, modified the units, and offered them for sale throughout Europe.\textsuperscript{244} The Dutch owners of the “Lincoln” trademark sued Interlas in the Netherlands for trademark infringement.\textsuperscript{245} Because the plaintiffs’

\textsuperscript{235. See Mars II, 24 F.3d 1368, 1375–76 (Fed. Cir. 1994); Chisum, supra note 18, at 613; Thomas, supra note 1, at 324; Wegner, supra note 18, at 27. See supra pp. 535 for a discussion of the Mars dicta.}
\textsuperscript{236. See Mars II, 24 F.3d at 1375; Chisum, supra note 18, at 613. See supra pp. 533–34 for a discussion of the Mars § 1367(a) analysis.}
\textsuperscript{237. See Voda, 476 F.3d at 909 (Newman, J., dissenting); Adams, supra note 143; Igielski, supra note 121.}
\textsuperscript{238. See Takenaka, supra note 24.}
\textsuperscript{239. See supra note 11 and infra Part II.C pp. 553–54 for a description of the EPC.}
\textsuperscript{240. Thomas, supra note 1, at 299.}
\textsuperscript{241. Judgment of Nov. 24, 1989, HR, 1992 NJ 404 (Neth.).}
\textsuperscript{242. Bender, supra note 3, at 68; John Gladstone Mills III, A Transnational Patent Convention for the Acquisition and Enforcement of International Rights, 84 J. PAT. & TRADEMARK OFF. SOC’Y 83, 103 (2002); Thomas, supra note 1, at 299.}
\textsuperscript{243. Mills, supra note 242, at 104.}
\textsuperscript{244. Thomas, supra note 1, at 299.}
\textsuperscript{245. Mills, supra note 242, at 103; Thomas, supra note 1, at 299.}
trademark rights were also effective in Belgium and Luxembourg, the plaintiffs' requested relief included an injunction against infringement in each of these jurisdictions, which the lower court granted. On appeal, the defendants questioned the court's jurisdiction to issue the multinational injunction, but the Supreme Court rejected this argument, reasoning that to hold otherwise would lead to the "undesirable result" that the injured party must file suit in every country where infringement occurred. Thus, the Dutch Supreme Court specifically acknowledged that Dutch courts had the right to enforce intellectual property rights outside the Netherlands.

In view of the Interlas decision, Dutch lower courts granted several multinational injunctions in cases involving patent infringement litigation. For example, in the 1994 case, Chiron Corp. v. Organon AKZO Pharma-Organon Technika-UBI, the plaintiff, a U.S. company, sued four Dutch AKZO subsidiaries, one Belgium subsidiary, and a U.S. supplier. The court of appeals upheld the trial court decision to grant an injunction against all the defendants in the countries in which the plaintiff held a European patent.

Although no specific legislation authorizing multinational injunctions for patent infringement exists, Dutch courts issuing such injunctions relied primarily on two different international agreements: the EPC and the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. Because Dutch domestic patent law is integrated into the European system through the EPC, Dutch courts acknowledged the success of the EPC and reasoned that a single legal determination under Dutch law is sufficient to establish patent status throughout Europe and, in fact, is preferable to multiple suits for both simplicity and the credibility of the European patent system. Further, as the Netherlands is a member of the EU, Dutch courts relied on the Brussels Convention, which applies only to member states of the EU. The Brus-

246. Thomas, supra note 1, at 299.
Thomas, supra note 1, at 300.
248. Bender, supra note 3, at 68.
251. Bender, supra note 3, at 70.
252. Id.
253. Shaw, supra note 26, at 1.
254. Thomas, supra note 1, at 301.
255. See id. at 301.
256. See Bender, supra note 3, at 71; Mills, supra note 242, at 105; Thomas, supra note 1,
at 301.
The Brussels Convention mandates contracting states to recognize and enforce jurisdictionally valid judgments rendered in one EU state.\textsuperscript{258}

To the extent that Dutch courts issued multinational injunctions outside of Europe, such reliance on the EPC and the Brussels Convention ended, making the validity of such injunctions more questionable.\textsuperscript{259} Nevertheless, Dutch courts considered themselves competent to adjudicate non-European patents.\textsuperscript{260} For example, in the 1992 case of \textit{Philips v. Hemogram},\textsuperscript{261} a Dutch court granted an injunction covering all nations in which the plaintiff held parallel patents, including Argentina, Australia, Brazil, Belgium, Denmark, Germany, Finland, Hungary, Sweden, and the Netherlands.\textsuperscript{262}

The \textit{Interlas} line of cases altered patent law's traditional territorial approach, which historically has required separate litigations in various national courts, and in so doing created a strategic innovation for the management of international patent portfolios and international patent litigations.\textsuperscript{258}

\textsuperscript{258} Thomas, \textit{supra} note 1, at 301–02. The Dutch courts relied on Article 24 of the Brussels Convention, a jurisdictional mandate, which provides that “[a]pplication may be made to the courts of a Contracting State for such provisional, including protective, measures, as may be available under the laws of that state, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.” Brussels Convention, \textit{supra} note 257, art. 24; Thomas, \textit{supra} note 1, at 302. Other jurisdictional provisions of the Brussels Convention are less supportive of the Dutch approach, including Article 16(4), which provides for exclusive jurisdiction in proceedings concerning the registration or validity of patents in “the courts of the Contracting State in which the deposit or registration has been applied for, taken place or is under the terms of an international convention deemed to have taken place.” Thomas, \textit{supra} note 1, at 302–03; see Brussels Convention, \textit{supra} note 257, art. 16(4). Nevertheless, Article 16(4) has been of little consequence because the Dutch action granting preliminary relief is a summary proceeding called a “kort geding,” which is not subject to ordinary rules of evidence and has no pre-trial discovery and no oral testimony from witnesses. Mills, \textit{supra} note 242, at 106; Thomas, \textit{supra} note 1, at 302. Because the kort geding procedure is considered provisional, Dutch courts ordinarily do not resolve validity and simply determine the likelihood of success elsewhere. Thomas, \textit{supra} note 1, at 302–03. See \textit{infra} Part II.B for a more detailed discussion of the articles of the Brussels Convention on which plaintiffs seeking multinational patent enforcement in courts of contracting states relied, as well as the ECJ’s determination of the applicability of these provisions.

\textsuperscript{259} Thomas, \textit{supra} note 1, at 303.

\textsuperscript{260} \textit{Id.}


\textsuperscript{262} Mills, \textit{supra} note 242, at 69; Thomas, \textit{supra} note 1, at 303–04.
As a result of the willingness of Dutch courts to grant multinational injunctions, the Netherlands quickly became the preferred forum for patent infringement litigation in Europe in the 1990s. Although other European countries, most notably Germany, embraced the Dutch multinational approach to patent litigation, the inefficiencies and difficulties of multinational patent enforcement in European courts prevented it from becoming the "dominant model" of enforcing patent rights in multiple countries. In addition to lingering questions about its legality, the use of multinational patent enforcement in national courts often led to various national validity or anti-suit related follow-up or collateral proceedings in the courts of foreign nations that granted the patents-in-suit, leading to increased costs and delay.

The Dutch approach remained controversial and was not embraced throughout the EU. Specifically, courts in the United Kingdom developed an opposing body of patent cases in which they refused to grant multinational patent injunctions. In the 1995 case, *Chiron Corp. v. Organon Teknika Ltd. (No 10)*, for example, Mr. Justice Aldous specifically rejected multinational patent injunctions, stating in dicta, "At one time I wondered whether it would be right for this court to do the same as the Dutch court, but have concluded that it would not be right for this court to grant an injunction which had effect outside the United Kingdom."

**B. The ECJ Assault on Multinational Patent Enforcement**

1. *Roche and GAT*

   In two decisions handed down on July 13, 2006, *Roche Nederland v. Primus* and *Gesellschaft fur Antriebstechnik mbH & Co. KG v. Lamellen und Kupplungsbau Beteiligungs KG (GAT)*, the ECJ effectively ended...
the practice of multinational injunctions for patent infringement.\textsuperscript{275} The ECJ clarified that a European patent is merely a bundle of national and territorial patent rights and, thus, reaffirmed the historic territoriality of patent law despite the increasing harmonization of European patent laws.\textsuperscript{276} After proceedings lasting more than three years, the ECJ released both decisions on the same day "like a shot from a double-barrel-rifle at the concept [of multinational patent enforcement]."\textsuperscript{277}

In seeking multinational injunctions for patent infringement against multiple defendants domiciled throughout Europe, plaintiffs had made use of the Article 6(1) exception to Article 2 of the Brussels Convention.\textsuperscript{278} Article 2 of the Convention provides that persons domiciled in a contracting state of the Brussels Convention must be sued in the courts of that state.\textsuperscript{279} Article 6(1) provides an exception: when a plaintiff is suing multiple defendants domiciled in different contracting states, the defendants may be sued in any contracting state where one of the defendants is domiciled.\textsuperscript{280}

In the primary case, Roche, the ECJ, reasoning that there is never a sufficient connection between foreign patent claims to necessitate consolidation, effectively eliminated the possibility of using an Article 6(1) exception to bring a consolidated patent infringement suit against multiple defendants domiciled in different countries.\textsuperscript{281} The plaintiffs, Dr. Primus and Dr. Goldenberg, two U.S. doctors, attempted to make use of the Article 6(1) exception, bringing an infringement action in the Netherlands against Roche Nederland, a Dutch company, and eight other companies in the Roche group domiciled in the United States, Belgium, Germany, France, the United Kingdom, Switzerland, Austria, and Sweden.\textsuperscript{282} The plaintiffs alleged that the nine co-defendants' conduct infringed the plaintiffs' European patent in their respective countries.\textsuperscript{283} The eight non-Dutch companies in the Roche group contested the jurisdiction of the Dutch court.\textsuperscript{284} requested the preliminary ruling must apply the court's ruling to the facts of the case.

\textsuperscript{275} See Shaw, supra note 26, at 1.
\textsuperscript{277} Schuster, supra note 35.
\textsuperscript{278} Shaw, supra note 26, at 1.
\textsuperscript{279} Brussels Convention, supra note 257, art. 2.
\textsuperscript{280} Id. art. 6(1).
\textsuperscript{282} Roche, 2006 E.C.R. 1-6535, at para. 13-14; Klinkert et al, supra note 281.
\textsuperscript{284} Roche, 2006 E.C.R. 1-6535, at para. 13-14; Klinkert et al, supra note 281.
Although the lower court determined that it had jurisdiction, the Dutch Supreme Court, on appeal, stayed the proceedings and submitted two questions to the ECJ. First, the Dutch Supreme Court asked the ECJ to determine whether the Article 6(1) jurisdiction exception applies where a number of different companies established in various contracting states are accused of infringing a common European patent in different contracting states. Second, the court asked the ECJ to clarify within the Article 6(1) jurisdiction exception the relevance of whether the alleged infringing acts of the defendants are identical or similar, the defendants are part of the same group of companies, and the defendants are acting under a common policy.

Addressing the first question, the ECJ found that, under relevant case law, Article 6(1) applies only if the different acts of the various defendants are connected in such a way that "it is expedient to determine the actions together in order to avoid the risk of irreconcilable judgments." The ECJ determined that, even if the concept of the risk of "irreconcilable judgments" is defined broadly as the risk of "contradictory decisions," there is no such risk in the case of alleged patent infringement committed by different defendants in different countries. Because the defendants are different and the alleged infringement occurred in different countries, the factual situation for each individual action will also be different. Similarly, the legal situation is different because a European patent is governed by the national law of the contracting state for which it was granted.

Addressing the second question, the ECJ concluded that this holding

286. Roche, 2006 E.C.R. 1-6535, at para. 16-17; Shaw, supra note 26, at 1. The Supreme Court referred the following questions to the ECJ for a preliminary ruling: "(1) Is there a connection, as required for the application of Article 6(1) of the Brussels Convention, between a patent infringement action brought by a holder of a European patent against a defendant having its registered office in the State of the court in which the proceedings are brought, on the one hand, and against various defendants having their registered offices in Contracting States other than that of the State of the court in which the proceedings are brought, on the other hand, who, according to the patent holder, are infringing that patent in one or more other Contracting States? (2) If the answer to Question 1 is not or not unreservedly in the affirmative, in what circumstances is such a connection deemed to exist, and is it relevant in this context whether, for example, the defendants form part of one and the same group of companies? the defendants are acting together on the basis of a common policy, and if so is the place from which that policy originates relevant? the alleged infringing acts of the various defendants are the same or virtually the same?" Roche, 2006 E.C.R. 1-6535, at para. 17. In the late 1990s, the ECJ was asked to clarify such questions in two prior cases but both cases settled before the ECJ could rule. See Schuster, supra note 35.
291. Id. at para. 27; Shaw, supra note 26, at 1.
292. See Roche, 2006 E.C.R. 1-6535, at para. 29-30; Shaw, supra note 26, at 1.
applies even if the defendant companies belong to the same group and acted in identical or similar ways in accordance with a common policy, because the legal situation would never be the same.  

From a practical standpoint, the ECJ also pointed out that the advantages of a consolidated action were limited because consolidation would multiply the number of courts with jurisdiction to hear a proceeding, which would undermine legal certainty and encourage forum shopping. Furthermore, as confirmed by the GAT decision, under Article 16(4) of the Brussels Convention, proceedings concerning the validity of a patent must take place in the national courts of the granting country. Thus, because patent validity is frequently challenged in infringement actions, some fragmentation of the proceedings is inevitable.

In GAT, the ECJ held that, under Article 16(4) of the Brussels Convention, patent validity is to be determined exclusively by the national courts of the granting state, which are uniquely qualified to assess the validity of a national patent. GAT, a German motor vehicle company, brought a declaratory action before a regional court in Germany seeking a declaration of noninfringement and, additionally, revocation of two French patents after LuK, another Germany motor vehicle company, alleged that GAT had infringed both of these patents. The regional court, the Landgericht Dusseldorf, held that it had international jurisdiction to adjudicate both the alleged infringement and invalidity actions and dismissed GAT’s action, holding the French patents at issue valid. On appeal, the higher regional court, the Oberlandesgericht Dusseldorf, stayed the proceedings and referred to the ECJ the question of whether the exclusive jurisdiction provision of Article 16(4) of the Brussels Convention applies to all proceedings relating to the registration or validity of a patent, including those in which invalidity is raised as a defense to infringement.

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294. *Id.* at para. 37–38; Klinkert et al., *supra* note 281; Shaw, *supra* 26, at 2.
296. *Id.* at para. 17; Klinkert et al., *supra* note 281.
297. Article 16(4) of the Brussels Convention, which is now Article 22(4) of the Brussels Regulation, Barraclough, *supra* note 276, provides that “in proceedings concerned with the registration or validity of patents, . . . the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or is under the terms of an international convention deemed to have taken place” shall have exclusive jurisdiction. Brussels Convention, *supra* note 257, art. 16(4).
301. *Gesellschaft fur Antriebstechnik*, 2006 E.C.R. I-6509, at para. 12; Klinkert et al., *supra* note 281. The Oberlandesgericht Dusseldorf referred the following question to the ECJ: “Should Article 16(4) of the Convention . . . be interpreted as meaning that the
Defining the scope of Article 16(4), the ECJ ruled that the Article "is to be interpreted as meaning that the rule of exclusive jurisdiction laid down therein concerns all proceedings relating to the registration or validity of a patent, irrespective of whether the issue is raised by way of an action or a plea of objection."\textsuperscript{302} The ECJ noted that the provision does not apply when validity is not challenged.\textsuperscript{303} Once the validity of a patent is challenged, however, irrespective of whether the party challenging validity brought proceedings specifically to invalidate the patent or merely raised invalidity as a defense to an infringement action, the national court of the patent-granting state has exclusive jurisdiction.\textsuperscript{304} The ECJ reasoned that to hold otherwise would undermine the binding nature of the exclusive jurisdiction provision of Article 16(4).\textsuperscript{305} Furthermore, circumventing the exclusive jurisdiction of Article 16(4) would increase the number of jurisdictions able to determine the validity of a patent, thereby undermining predictability by increasing the risk of conflicting decisions by different national courts, which the Brussels Convention specifically seeks to avoid.\textsuperscript{306}

2. Implications for Multinational Patent Enforcement in European National Courts

The ECJ's decisions severely limit the possibility of centralizing infringement claims on foreign patents before a single European national court, quelling the trend towards centralized patent infringement litigation in European jurisdictions.\textsuperscript{307} After Roche, multinational relief on a European patent is theoretically available in the limited circumstance in which a patentee sues a single defendant in its country of domicile for infringing activity in multiple states.\textsuperscript{308} Moreover, in light of GAT, the defendant simply has to challenge validity to limit the suit to the patent in that jurisdiction; the foreign patent infringement proceedings are then unable to

\begin{itemize}
\item exclusive jurisdiction conferred by that provision on the courts of the Contracting State in which the deposit or registration of a patent has been applied for, has taken place or is deemed to have taken place under the terms of an international convention only applies if proceedings (with erga omnes effect) are brought to declare the patent invalid or are proceedings concerned with the validity of patents within the meaning of the aforementioned provision where the defendant in a patent infringement action or the claimant in a declaratory action to establish that a patent is not infringed pleads that the patent is invalid or void and that there is also no patent infringement for that reason, irrespective of whether the court seised of the proceedings considers the plea in objection to be substantiated or unsubstantiated and of when the plea in objection is raised in the course of proceedings?" \textit{Gesellschaft fur Antriebstechnik}, 2006 E.C.R. I-6509, at para. 12.
\item 303. Id. at para. 16; Klinkert et al., supra note 281; Shaw, supra note 26, at 2.
\item 304. Shaw, supra note 26, at 2; see \textit{Gesellschaft fur Antriebstechnik}, 2006 E.C.R. I-6509, at para. 25.
\item 306. \textit{Gesellschaft fur Antriebstechnik}, 2006 E.C.R. I-6509, at para. 28; Klinkert et al., supra note 281; Shaw, supra note 26, at 2.
\item 307. \textit{See} Bender, supra note 3, at 49; Klinkert et al., supra note 281; Shaw, supra note 26, at 1.
\item 308. Klinkert et al., supra note 281; Shaw, supra note 26, at 2.
\end{itemize}
proceed. As the ECJ noted in GAT, defendants usually challenge patent validity in an infringement action, further decreasing the likelihood of a case suitable for multinational patent enforcement. Given the ECJ’s decision, defendants desiring to make the litigation more difficult and expensive for plaintiffs will certainly be more apt to challenge validity, forcing the litigation to separate into different national litigations. Additionally, although it is unclear whether European courts would accept such a case after the ECJ decisions, the rulings seem to allow for companies accused or suspected of infringement without merit to seek, in the patentee’s domicile country, a single, consolidated declaration of non-infringement. Given the ruling in GAT, however, such an action could only proceed if the accused or suspected infringer does not need to argue that the patent is invalid because the non-infringement argument is sufficiently strong. In practice, therefore, multinational injunctions for patent infringement in Europe are “effectively dead.”

The ECJ’s decisions illustrate the need for a more harmonized approach to European patent litigation. As such, the decisions have accelerated negotiations toward alternative methods of multinational patent enforcement in Europe, the Community Patent and the European Patent Litigation Agreement (EPLA).

C. The Community Patent

The first harmonization of European patent law occurred with the Munich Convention on the Grant of European Patents, also known as the European Patent Convention (EPC), which was signed on October 5, 1973 and became effective on October 7, 1977. The EPC is a conglom- erate of thirty-one European states that have agreed to a common European patent granting system with a common European Patent Office (EPO) to search and examine patent applications. The EPC allows an applicant to file a single patent application with the EPO. If the EPO accepts the application, it grants a European patent, which is actually a bundle of patent rights in each of the states that are members of the EPC. For this reason, a European patent will sometimes be referred to as a “European patent with effect in...”

309. Klinkert et al., supra note 281; Shaw, supra note 26, at 2.
311. See Schuster, supra note 35.
312. See id. The patentee would never question the validity of its own patent because the patentee would immediately lose the action. Id.
313. Klinkert et al., supra note 281.
314. Shaw, supra note 26, at 2.
315. See Barraclough, supra note 276; Klinkert et al., supra note 281; Shaw, supra note 26, at 2.
316. Piotrautz, supra note 11, at 61.
318. EUROPEAN PATENT OFFICE, supra note 15, at 1; Di Cataldo, supra note 11, at 19. The EPC system is established outside the legal framework of the European Community Treaty so European countries that are not EU members can join the EPC. Sascha E. Schalkwijk, Community Patent: The EU Stuck Again?, INTELL. PROP. STRATEGIST (Law Journal Newsletters, Phila., Pa.), Sept. 2004.
319. Bender, supra note 3, at 58.
national patents for each state designated in the patent application. The EPC, however, does not provide for a common European patent litigation system. National courts, applying their respective national laws, adjudicate enforcement disputes, including infringement or revocation actions.

The EPC was originally intended only to be a provisional tool, the first step towards unifying the European patent system. Following the EPC, the Community Patent Convention (CPC) was to be the next step in creating a supranational European patent system. Although the EPC has been very successful, the CPC, which was signed in Luxembourg on December 15, 1975, has never become effective. The main idea of the CPC is that, for EU members, the European patent, after being granted by the EPO, would not be divided into separate national patents but would become a single "supranational unitary Community patent," enforceable under one uniform patent law in a special, centralized judicial system. Thus, the CPC was to "eliminate the post-grant territorial limitations" of the European patent within the EU. Immediately after signing, however, the CPC faced extensive problems that have prevented its ratification and, consequently, its taking effect.

The first problem facing the CPC was its competence to decide the validity of Community patents. The original text of the CPC gave the EPO exclusive competence to decide applications for the revocation of a Community patent but authorized member states to grant their national courts the competence to decide on counterclaims of invalidity in infringement suits. The national court's decision would bind only that particular state. This rule, however, is inconsistent with the idea that the Community patent is a single, supranational patent valid throughout the EU.

320. European Patent Office, supra note 15, at 1; Bender, supra note 3, at 57; Di Cataldo, supra note 11, at 20. The designation "European patent" is misleading. See Di Cataldo, supra note 11, at 20. "[I]n fact, there is no single European Patent. Instead, there are multiple national patents collectively referred to as a 'European Patent.'" Id.
322. Id.; Heath, supra note 317, at 12. There is a nine-month time limit for filing an opposition at the EPO, after which the party interested in seeking revocation must file revocation actions in all the states for which the European patent was granted. Euro-
324. Di Cataldo, supra note 11, at 19.
325. Bender, supra note 3, at 57, 59.
326. Di Cataldo, supra note 11, at 19; Schalkwijk, supra note 318.
327. Bender, supra note 3, at 57, 59; Di Cataldo, supra note 11, at 19.
328. Mossinghoff & Kuo, supra note 119, at 543.
329. Di Cataldo, supra note 11, at 27.
330. Id.
331. Id.
332. Id. This is the rule that currently applies in the EPC, which holds that a determination on the validity of a patent granted by the EPO is only binding on that particular state. Id.
333. Id.
As a result, some states requested a common court for Community patents. After fourteen years of discussion, the member states agreed on a solution embodied in the 1989 Agreement, which was signed on December 15, 1989. The agreement gave national courts the competence to decide invalidity in the first instance. Because the states could not accept the invalidation of a Community patent by another state's national court, the validity decisions of national courts could be appealed to a Community Patent Appeals Court (CoPAC). Although the main purpose of CoPAC was to avoid invalidation of a Community patent by a single national court, CoPAC would also ensure a unified final interpretation of the validity of a Community patent, furthering the goal of a unified European patent system. Nevertheless, largely on account of disputes over the translation requirements for Community patents, several member states did not ratify the second version of the CPC by the December 31, 1991 deadline and, consequently, it has not become effective.

The increased frequency of infringement suits across Europe over the last ten years, along with the frequent non-uniform interpretations and decisions of European national courts on EPO-granted patents, has raised awareness of the importance of enforcement and sparked renewed attempts to overcome the difficulties preventing a workable Community Patent. The 2003 amended proposal includes a more extensive Community patent jurisdiction under the aegis of the ECJ, which would have jurisdiction over disputes regarding the invalidity or infringement of a Community patent. A new Community Patent Court, rather than national courts, would exercise the jurisdiction of the ECJ in the first instance.
The proposal also establishes a specialized patent appeal chamber within the Court of First Instance, consisting of judges having greater expertise in patent law. In exceptional cases, the ECJ could review a decision of the Court of First Instance. The Community Patent Court's judgments would be effective throughout the EU.

The detailed proposal also provides for the logistical arrangements of proceedings before the Community Patent Court. The proceedings can take place in any official EU language if the parties so request and the Community Patent Court consents. Nevertheless, the proposal established two default rules. First, if the defendant is domiciled in an EU member state, the language of the proceedings before the Community Patent Court would be the official EU language of that state or, if there is more than one official language, the defendant can choose from the official languages. Second, if the defendant is not domiciled in an EU member state, the language of the proceedings would be the official EU language of the state that granted the Community patent. Additionally, the Community Patent Court would operate under a uniform set of procedural rules. Given that the Community Patent Court's judgments are effective throughout the EU, for Community patents, the uniform jurisdictional system of the Community Patent Court would avoid the expense, inconvenience, and confusion inherent in patent litigation involving several national courts.

Although the Community Patent concept has such clear advantages, residual difficulties, especially concerning the extent and legal effect of translations, continue to prevent an effective agreement.

D. The European Patent Litigation Agreement (EPLA)

Faced with an unpromising deadlock in the Community Patent initiative, EPC member states began to explore other options to end the inconsistency of patent protection in Europe. As European Commissioner for Internal Market and Services, Charlie McGreevy, explained in a presentation to the European Parliament, “In an ideal world, the Community Patent

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344. See 2003 Commission Proposal, supra note 343, at 6-7; Press Release, supra note 343. The Community Patent Court will consist of seven judges, including a president. 2003 Commission Proposal, supra note 343, at 7. The judges will be divided into two chambers of three. Id. The seventh judge will be available for reinforcement as needed; for example, if a judge is ill or the president must assume administration-related tasks. Id.


347. Id.


349. See id.

350. See id.

351. See id.

352. Press Release, supra note 343.

353. See id. Of course, disputes involving national patents or European patents would not be subject to the jurisdiction of the Community Patent Court and, thus, would still be decided by individual national courts. Id.

354. Schalkwijk, supra note 318.

is the solution. But in the real world, this is not possible. Should we sit around doing nothing? No, that would be grossly irresponsible.\textsuperscript{356} As such, the EPC member states established a Working Party on Litigation in June 1999 with the mandate to submit an \textit{optional} agreement on an integrated judicial system for European patent litigation, the European Patent Litigation Agreement (EPLA).\textsuperscript{357} The goal of the EPLA is to improve the European patent system by creating an efficient litigation system to increase legal certainty by ensuring uniform patent law interpretation.\textsuperscript{358} Another objective of the proposed EPLA is to reduce the number of cases requiring multiple separate actions, thereby reducing costs for parties.\textsuperscript{359} Unlike the Community Patent initiative, the proposed EPLA would consist only of a judicial system to interpret European patents granted through the EPO; it would not revise the patent granting system to create a unified Community patent, a further goal of the Community Patent initiative.\textsuperscript{360}

The integrated judicial system in the EPLA draft agreement provides for a new European Patent Judiciary, which is to be composed of the European Patent Court and a supervisory body, the Administrative Committee.\textsuperscript{361} The European Patent Court, which would have jurisdiction to hear infringement and revocation actions concerning European patents across any state that accedes to the EPLA, would consist of the Court of First Instance and the Court of Appeal, both of which would be comprised of international panels of legally and technically qualified judges.\textsuperscript{362} The Court of First Instance would consist of a Central Division and several Regional Divisions.\textsuperscript{363} The single common Court of Appeal would hear appeals from the Courts of First Instance.\textsuperscript{364} Furthermore, the draft agreement enables the Court of Appeal, acting as Facultative Advisory Council, to deliver non-binding opinions on any point of law concerning European or harmonized national patent law to national courts trying infringement and validity actions.\textsuperscript{365} The common Court of Appeal would help guarantee consistent case law, improving legal certainty for European patents.\textsuperscript{366}

If a state decides to join the EPLA, it must choose between transferring jurisdiction to the European Patent Court or merely allowing its courts to

\begin{itemize}
  \item \textsuperscript{357} \textit{EUROPEAN PATENT OFFICE, supra note 15, at 1.} The main states active in the Working Party on Litigation are Denmark, Germany, Finland, France, Luxembourg, Monaco, the Netherlands, Sweden, Switzerland, and the United Kingdom. \textit{id.} at 5.
  \item \textsuperscript{358} \textit{id.} at 8.
  \item \textsuperscript{359} \textit{id.} at 9.
  \item \textsuperscript{360} \textit{See id. at 4; Di Cataldo, supra note 11, at 19.}
  \item \textsuperscript{361} \textit{EUROPEAN PATENT OFFICE, supra note 15, at 5-6.}
  \item \textsuperscript{362} \textit{Id.} On request by the European Patent Court, the ECJ will issue preliminary rulings binding on the European Patent Court in so far as its decision takes effect in a member state of the European Union. \textit{Id.} at 7.
  \item \textsuperscript{363} \textit{Id.} at 6.
  \item \textsuperscript{364} \textit{Id.}
  \item \textsuperscript{365} \textit{Id.}
  \item \textsuperscript{366} \textit{See Patents: All-English Patents Seen Looming, EUR. REP. (European Info. Serv., London), Dec. 21, 2006.}
\end{itemize}
present requests for opinions to the Facultative Advisory Council.\textsuperscript{367}

In contrast to the unified judicial system for European patents, national courts would continue to handle infringement and revocation proceedings concerning national patents.\textsuperscript{368} Additionally, national courts would retain jurisdiction to order provisional and protective measures in disputes relating to both national and European patents.\textsuperscript{369}

The EPLA also has an extensively detailed language regime based on that of the EPC granting system but adapted to post-grant litigation.\textsuperscript{370} In a proceeding before the Central Division, the language of the proceeding would be that of the proceeding before the EPO.\textsuperscript{371} Furthermore, in a proceeding before a Regional Division located in a state having an EPO official language as an official language, the language of the proceeding would be that language.\textsuperscript{372} Finally, in a proceeding before a Regional Division located in a state having either more than one or no official language that is an EPO official language, the language of the proceeding would be any official language of the EPO that the state designates.\textsuperscript{373} The language of the proceeding before the Court of Appeal would always be the language of the first-instance proceedings.\textsuperscript{374} Upon agreement by the parties, the court may allow the use of another language during all or part of the proceedings.\textsuperscript{375}

As support for the EPLA from judges, academics, members of the European industry, and expert groups increases, optimism about the successful conclusion of EPLA negotiations continues to rise.\textsuperscript{376} Results of the European Commission’s January 2006 survey of European practitioners revealed that the majority of participants support the draft EPLA.\textsuperscript{377} Specifically, most support the language regime, the specialized judges that ensure high quality decisions, and the judicial system that balances simple access to court through regional divisions with legal certainty through the central Court of Appeal.\textsuperscript{378} Supporters also point to decreased litigation costs on account of a single, centralized suit rather than multiple disjointed proceedings.\textsuperscript{379} For example, Member of the European Parliament (MEP)

\begin{itemize}
\item \textsuperscript{367} European Patent Office, supra note 15, at 5.
\item \textsuperscript{368} Id.
\item \textsuperscript{369} Id.
\item \textsuperscript{370} Id. at 6.
\item \textsuperscript{371} Id.
\item \textsuperscript{372} Id.
\item \textsuperscript{373} Id.
\item \textsuperscript{374} Id.
\item \textsuperscript{375} Id. at 7. To provide for a situation in which the parties agree on a language other than an official language of the EPO, the rules of procedure will have further rules on simultaneous interpretation during oral proceedings and translation of the file. Id.
\item \textsuperscript{376} Id. at 9; Next Steps, supra note 29; see Schalkwijk, supra note 318.
\item \textsuperscript{378} Id.
\item \textsuperscript{379} Next Steps, supra note 29; Industrial Property: McGreevy’s Concerted Push for Patents, EUR. REP. (European Info. Serv., London), Sept. 25, 2006 [hereinafter Industrial Property].
\end{itemize}
Klaus-Heiner Lehne argues that a patent dispute in three EU countries would be 45% cheaper in the EPLA than with the disjointed litigations currently necessary. In fact, as the European Commission's Internal Market Spokesman, Oliver Drewes, points out, despite puzzling comments to the contrary, the EPLA would not be more expensive for litigants than the current system, because "[o]ne of the ongoing ideas is that you could also go to a local court, not a European court."

The initiative, however, is not without its problems. The main concerns relate to the judicial system and costs. The debate over the judicial system focuses on the degree of centralization and the nature of the local Courts of First Instance. Another crucial concern is that the EPLA would drastically increase patent litigation costs. Although the position is contested, some MEPs argue that small companies could face litigation bills of 97,000 to 415,000 Euros for a medium-scale action under the proposed EPLA. Additionally, some countries, especially France, object to the language scheme, which concentrates on the EPC official languages. France has highlighted constitutional concerns for the EU, arguing that it is unacceptable to create a non-EU legal system with a non-EU court. Additionally, France has raised institutional compatibility concerns regarding possible contradictions between the EPLA's proposed intergovernmental court and the judicial order established by European Community treaties. Finally, because the EPLA is an optional additional agreement, if the EPLA were adopted, EPC contracting states would have the option not to sign and, thus, could continue using the EPC in its present form. It is likely that a number of EPC contracting states would not participate.

380. Industrial Property, supra note 379.
381. Id.
384. This represents approximately $130,600-$558,500. See FIN. MGMT. SERV., TREASURY REPORTING RATES (2007) (reporting that, as of June 30, 2007, $1 equals 0.7430 Euros).
388. Industrial Property, supra note 379.
389. Schalkwijk, supra note 318.
390. Id.
The patent litigation system in Europe has generated an extraordinary level of interest, as evidenced not only by the European Commission’s initiative to institute a consultation on the European patent system that began in January 2006 but also by the “unprecedented” 2,515 responses to the survey. As a result of this heightened interest, on September 8, 2006, Charlie McGreevy vowed to make a “concerted push to improve the patent system in Europe.” As McGreevy explained, the consultation results make clear that there is widespread industry support for the Community Patent concept, but not for the “current Community Patent deal on the table—the 2003 Common Political Approach,” which fails to offer an affordable and competitive Community patent. Many remain unsatisfied with the proposed language regime, as well as the seemingly inadequate jurisdictional arrangements.

In addition to supporting the Community Patent concept, both industry and attorneys favor the Community’s involvement in the EPLA. The two initiatives are no longer seen as mutually exclusive, because even if the Community Patent were to become effective with a common patent judicial system, the EPLA offers a unified jurisdiction for the hundreds of thousands of patents that the EPO already granted. Thus, McGreevy prudently intends to pursue both, proposing a “two-prong approach”: (1) advance the Community Patent with new ideas and (2) in parallel, bring the EPLA negotiations to finality.

The European Parliament’s joint resolution of October 12, 2006 seconded McGreevy’s double-pronged “concerted push.” Similar to McGreevy, the joint resolution called on the Commission to explore “all possible ways of improving the patent and patent litigation systems,” which includes not only further revised proposals for a Community Patent but also discussions on the EPLA. As MEP Sharon Bowles remarked, “In the
Parliament, we all wish to see a Community Patent in place eventually rather than a system based on a different multi-national convention. But the Community Patent proposals as they stand now are hopelessly stuck. In regard to the EPLA, the MEPs called for greater democratic control, increased judicial independence, more guarantees on litigation costs, and a proposal for the EPLA court's rules of procedure.

Although the European Community postponed its self-imposed 2006 end-of-year deadline for presenting a communication on European patent strategy because member states could not agree on the proposal, given McGreevy's and the European Parliament's recent statements and efforts, there is good reason for optimism in regard to future improvements in the European patent litigation system.

III. Lessons from Europe

A. Continued Territoriality Reinforces Comity Concerns

After Interlas, advocates of the exercise of jurisdiction over foreign patent claims in U.S. courts bemoaned the "parochial" attitude of the United States toward multinational patent enforcement in comparison to European courts, specifically the Dutch. Because multinational patent enforcement was "garden variety" in many European countries, advocates dismissed as "completely absurd" the concerns that assertion of jurisdiction over foreign patents in U.S. courts would undermine principles of international comity. Relying heavily on the "Dutch-inspired movement toward a compellingly different world patent enforcement regime," these advocates argued that the United States should recognize and accelerate global trends toward multinational patent enforcement in national courts.

402. Id.
403. Id.
405. Certainly, such improvements cannot be expected soon. As President of the EPO, Alain Pompidou, admits, even if the problems with the agreements were solved immediately, it would take approximately five to eight years for the court system to be established. See Patents: All-English Patents Seen Looming, supra note 404.
406. Thomas, supra note 1, at 280.
407. See, e.g., Thomas, supra note 1, at 280, 346, 352 (asserting that, in accepting jurisdiction over foreign patents, U.S. courts would be following the Dutch movement toward international patent enforcement); Wegner, supra note 18, at 3, 12-15 (arguing that the conservative American approach to transnational enforcement has left the United States behind Europe and Japan, who are both leaders in the area).
408. Wegner, supra note 18, at 10, 12, 15-17; see Professors' Brief, supra note 8, at 14.
409. Thomas, supra note 1, at 346.
410. Id. at 346; Wegner, supra note 18, at 12; see Professors' Brief, supra note 8, at 12; Brief for Appellee, supra note 19, at 47-49. Advocates pointed out that foreign national courts' greater amenability to foreign patent claims put U.S. industry, without the ability to rely on its own courts for consolidated patent claims, at a comparative disadvantage. Professors' Brief, supra note 8, at 12.
The July 13, 2006 ECJ decisions in Roche and GAT, decided while the Voda decision was pending in the Federal Circuit, however, largely halted the European multinational patent enforcement trend, emphasizing the continued territoriality of patent law despite continued efforts to the contrary.\footnote{411} In so doing, the ECJ eliminated such arguments, forcefully presented in the Voda briefs supporting consolidation and scholarly literature, which pointed to European case law to belittle international comity\footnote{412} and encouraged U.S. courts to follow European trends toward multinational patent enforcement.\footnote{413} In contrast to these arguments, recent European trends counsel against widespread multinational patent enforcement in national courts. Thus, in Voda, the Federal Circuit, emphasizing comity considerations, wisely followed the example of the ECJ in further limiting the opportunity for U.S. courts to exercise jurisdiction over foreign patent claims.\footnote{414}

The ECJ decisions in Roche and GAT emphasize that patents remain national instruments, disputes over which are usually appropriate for the national courts of the granting nation, especially when validity is in dispute.\footnote{415} The ECJ's re-emphasis on the territoriality of European patent law is of particular importance because Europe led the way in multinational patent enforcement.\footnote{416} Significantly, the ECJ itself exists to defend the harmonization of European legal standards and has worked in this direction on the basis of conventions meant to overcome the traditional concept that each nation is individually responsible for its own legal standards and the assertion and enforcement of rights in its territory.\footnote{417} Furthermore, the basic principles of the EU, a cooperative association of European states, clash with the concept of limited patent enforceability, leading to the increasing harmonization and unification of European patent laws through agreements such as the EPC.\footnote{418} Additionally, within the EU, the Brussels Convention requires all contracting states to recognize and

\footnote{411. See Shaw, supra note 26, at 1.}
\footnote{412. See Professors' Brief, supra note 8, at 14; Wegner, supra note 18, at 10, 12, 15-17.}
\footnote{413. See Brief for Appellee, supra note 19, at 47-49; Professors' Brief, supra note 8, at 12-14; Thomas, supra note 1, at 346; Wegner, supra note 18, at 12, 15-17, 122.}
\footnote{414. See Voda v. Cordis Corp., 476 F.3d 887, 900-03 (Fed. Cir. 2007); Takenaka, supra note 24.}
\footnote{415. See Case C-4/03, Gesellschaft fur Antriebstechnik mbH & Co. KG v. Lamellen und Kupplungsbau Beteiligungs KG, 2006 E.C.R. I-6509, para. 22 ("[T]he exclusive jurisdiction in proceedings concerned with the registration or validity of patents conferred upon the courts of the Contracting State in which the deposit or registration has been applied for or made is justified by the fact that those courts are best placed to adjudicate upon cases in which the dispute itself concerns the validity of the patent or the existence of the deposit or registration."). Barraclough, supra note 276; Shaw, supra note 26, at 1.}
\footnote{416. See Wegner, supra note 18, at 12.}
\footnote{417. Schuster, supra note 35.}
\footnote{418. Bender, supra note 3, at 49.}
\footnote{419. See Di Cataldo, supra note 11, at 19; Piotraut, supra note 11, at 61-62. In addition to creating a European patent, the EPC established uniform provisions for determining the validity and scope of European patents that are binding on national judges. Schuster, supra note 35.}
enforce the judgments of other contracting states' courts that are rendered within the parameters of the Convention.\textsuperscript{420} Despite these factors, which make European courts, especially those of EU member states, a much more ideal venue for multinational patent enforcement than those of the United States,\textsuperscript{421} the ECJ largely quelled the possibility for multinational patent enforcement,\textsuperscript{422} displaying an undeniable "mistrust for the Dutch approach" to multinational patent enforcement.\textsuperscript{423} At a minimum, the ECJ decisions reinforced the "international consensus" that courts of one sovereign nation cannot rule on the validity of another nation's patents.\textsuperscript{424} The broader implication, however, is that, in the large majority of circumstances, national courts are not an appropriate forum for multinational patent enforcement,\textsuperscript{425} even within countries that have similar patent laws\textsuperscript{426} and agreements to recognize and enforce national courts' judgments.\textsuperscript{427}

Despite both the Community Patent and EPLA's goal of unifying the European patent system beyond national borders, the initiatives provide further evidence of European nations' general refusal to allow a foreign national court to determine the validity of patents effective in their territory. In Community Patent negotiations, the problems concerning the competence to invalidate a Community patent exhibit this hesitance,\textsuperscript{428} as contracting states would not accept a foreign national court's invalidation of a Community patent, an instrument which, given the proposed common granting system, would have less territorial attachment to the sovereign nation than a national patent granted in a national patent office.\textsuperscript{429} Specifically, in the original CPC plans, member states had the authority to grant their national courts the competence to determine the validity of a Community patent only in the context of a counterclaim to an infringement action and, furthermore, such a determination would only be binding on that particular state.\textsuperscript{430} Moreover, the revised 1989 Agreement gave national courts the competence to decide invalidity in the first instance, but because the states would not accept a foreign national court's invalidation of a Community patent, the validity decisions of national courts could be appealed to a CoPAC.\textsuperscript{431} The insistence on an appellate court to review

\textsuperscript{420} See Dreyfuss, supra note 13, at 426.
\textsuperscript{421} See Rasser, supra note 36 ("As the United States is not a member of anything that even approaches the EU in terms of level of cooperation, one might not expect the issue of jurisdiction over the alleged infringement of a foreign patent "to play much of a role in U[S]. court practice.").
\textsuperscript{422} See Shaw, supra note 26, at 1.
\textsuperscript{423} See Thomas, supra note 1, at 351.
\textsuperscript{424} See Brief for Defendant-Appellant, supra note 78, at 33.
\textsuperscript{425} Klinkert et al., supra note 281; Shaw, supra note 26, at 2.
\textsuperscript{426} See Di Cataldo, supra note 11, at 19; Piotrata, supra note 11, at 61-62.
\textsuperscript{427} See Brief for Defendant-Appellant, supra note 78, at 34; Thomas, supra note 1, at 301-02.
\textsuperscript{428} See Di Cataldo, supra note 11, at 27.
\textsuperscript{429} Schalkwijk, supra note 318.
\textsuperscript{430} Di Cataldo, supra note 11, at 27.
\textsuperscript{431} Id.
a national courts' determination on the validity of a Community patent suggests that European nations are not prepared to accept a foreign national court's invalidation of a patent effective in their country. In contrast to their refusal to allow foreign national courts to judge patent invalidity, the most recent agreements for both the Community Patent and the EPLA show that European nations are more receptive to allowing a common multinational patent court or judicial system to adjudicate patents valid in their territory.\textsuperscript{432} Thus, although the current network of patent treaties shows that European nations appreciate that they must work together to ensure patent protection for their own inventors,\textsuperscript{433} European nations undeniably remain hesitant to permit other national courts to adjudicate their own patents.

European nations' reluctance to allow foreign national courts to adjudicate their patents confirms that international comity concerns undoubtedly linger when one national court asserts jurisdiction over a foreign country's patent, suggesting the wisdom of Federal Circuit's hesitance to permit U.S. courts to assume jurisdiction over foreign patent claims, particularly on account of comity concerns.\textsuperscript{434} "As long as the force of a patent instrument remains tied to territorial boundaries,"\textsuperscript{435} comity considerations, which continue to be the main obstacle to the exercise of jurisdiction over foreign patent claims in U.S. case law,\textsuperscript{436} are inevitable in an extraterritorial patent adjudication.\textsuperscript{437} As such, European developments seem to serve as a clear warning to U.S. courts to exercise jurisdiction over foreign patents in very limited circumstances to avoid offending other nations' sovereignty.

B. The Current Realities of Multinational Patent Enforcement in National Courts

In Europe, the ECJ's decisions basically eliminate the possibility of multinational patent enforcement for EU nations.\textsuperscript{438} It is true that the ECJ did leave a window of opportunity for multinational patent enforcement where a patentee sues a single defendant in its country of domicile and the defendant does not challenge patent validity.\textsuperscript{439} The reality, however, is

\textsuperscript{432} See Press Release, supra note 343; \textit{European Patent Office}, \textit{supra} note 15, at 5-6. In the EPLA, national courts must retain authority over infringement and revocation actions concerning national patents, but participating nations can transfer jurisdiction over European patents granted by the EPO to the common European Patent Court. See \textit{European Patent Office}, \textit{supra} note 15, at 5-6. In the latest Community Patent proposal, the Community Patent Court would have jurisdiction over Community patents, but national courts would retain jurisdiction over national patents and European patents. Press Release, \textit{supra} note 343.

\textsuperscript{433} Thomas, \textit{supra} note 1, at 325-26.

\textsuperscript{434} See Voda v. Cordis Corp., 476 F.3d 887, 900-03 (Fed. Cir. 2007); \textit{Mars II}, 24 F.3d 1368, 1376 (Fed. Cir. 1994).

\textsuperscript{435} Thomas, \textit{supra} note 1, at 340.

\textsuperscript{436} See Rader, \textit{supra} note 14, at 6.

\textsuperscript{437} Thomas, \textit{supra} note 1, at 340.

\textsuperscript{438} See MacKendrick, \textit{supra} note 281, at 373.

\textsuperscript{439} See Klinkert et al., \textit{supra} note 281; Shaw, \textit{supra} note 26, at 2.
that such circumstances are bound to occur rarely, if ever.\textsuperscript{440} Although the full scope of the decisions,\textsuperscript{441} as well as the impact of the litigation on non-EU member states, remains to be seen,\textsuperscript{442} the ECJ decisions have undoubtedly largely limited the occurrence of multinational patent litigation in European countries.\textsuperscript{443}

Similarly, in the United States, the Federal Circuit's decisions in \textit{Voda} and \textit{Mars}, which perpetuate U.S. courts' historically conservative approach to jurisdiction over foreign patent claims,\textsuperscript{444} have all but eliminated the possibility of a U.S. court exercising such jurisdiction.\textsuperscript{445} Both decisions emphasize comity concerns,\textsuperscript{446} which have been the most significant barrier to jurisdiction over foreign patent claims in U.S. case law.\textsuperscript{447} Given that the facts of \textit{Voda} presented a minimal risk of offending a foreign sovereign, the decision likely indicates that comity concerns remove the possibility of a U.S. court assuming jurisdiction over foreign patent claims in the vast majority of cases.\textsuperscript{448} With regard to supplemental jurisdiction over foreign patent claims, \textit{Mars} and \textit{Voda} set high standards for both prongs of the § 1367 analysis. Certainly, \textit{Mars}' strict § 1367(a) analysis for the existence of supplemental jurisdiction\textsuperscript{449} and \textit{Voda}'s limitation on judicial discretion to exercise supplemental jurisdiction under §1367(c)\textsuperscript{450} make it highly unlikely that a foreign patent claim would pass both prongs of the analysis. Moreover, the strict application of the forum non conveniens doctrine in the \textit{Mars} dicta largely forecloses the possibility of a U.S. court assuming jurisdiction over a foreign patent claim based on diversity jurisdiction.\textsuperscript{451} Thus, current U.S. case law emphasizes that only a rare foreign patent claim would survive a U.S. court's discretion not to exercise juris-

\begin{footnotes}
\textsuperscript{440} See Klinkert et al., \textit{supra} note 281; Shaw, \textit{supra} note 26, at 2. See \textit{supra} Part II.B pp. 133–34 for a more thorough discussion of the rare situations in which multinational patent enforcement is still permissible in the national courts of EU members after the ECJ decisions.

\textsuperscript{441} See MacKendrick, \textit{supra} note 281, at 373 (noting that the President of the District Court of The Hague held in a September 21, 2006 verdict that GAT does not affect cross-border injunctions in summary proceedings and granted a cross-border injunction for Germany).

\textsuperscript{442} See Professors' Brief, \textit{supra} note 8, at 12 n.9.

\textsuperscript{443} Schuster, \textit{supra} note 35.

\textsuperscript{444} See Voda v. Cordis Corp., 476 F.3d 887, 900–03 (Fed. Cir. 2007); Mars II, 24 F.3d 1368, 1376 (Fed. Cir. 1994); Chisum, \textit{supra} note 18, at 610; Wegner, \textit{supra} note 18, at 12–15.

\textsuperscript{445} See Chisum, \textit{supra} note 18, at 613; Takenaka, \textit{supra} note 24.

\textsuperscript{446} See Voda, 476 F.3d at 900–03; Mars II, 24 F.3d at 1376.

\textsuperscript{447} Rader, \textit{supra} note 14, at 6.

\textsuperscript{448} Igielski, \textit{supra} note 121. See \textit{supra} pp. 543–44 for a discussion of the strong argument for supplemental jurisdiction in \textit{Voda}.

\textsuperscript{449} See Mars II, 24 F.3d at 1375; Chisum, \textit{supra} note 18, at 613. See \textit{supra} pp. 533–34 for a discussion of the Mars § 1367(a) analysis.

\textsuperscript{450} See Voda, 476 F.3d at 909 (Newman, J., dissenting); Adams, \textit{supra} note 143; Igielski, \textit{supra} note 121. See \textit{supra} pp. 539–541 for a discussion of the \textit{Voda} § 1367(c) analysis.

\textsuperscript{451} See Mars II, 24 F.3d at 1375–76; Chisum, \textit{supra} note 18, at 613; Thomas, \textit{supra} note 1, at 324; Wegner, \textit{supra} note 18, at 27. See \textit{supra} p. 535 for a discussion of the \textit{Mars} dicta.
\end{footnotes}
diction based on forum non conveniens, comity concerns, and, for supplemental jurisdiction cases, the § 1367(c) discretionary analysis.\textsuperscript{452}

In addition to its rare permissibility, the realities of multinational patent litigation in national courts prevent it from being an ideal solution to patentees' problems.\textsuperscript{453} Even in Europe where numerous agreements have harmonized national patent law and provide for enforcement and recognition of national court decisions,\textsuperscript{454} suits for multinational patent enforcement in one national court often lead to unavoidable national validity or anti-suit related follow-up or collateral proceedings in foreign national courts.\textsuperscript{455} As a result, even during its peak in Europe in the mid-1990s, multinational patent litigation was never "the dominant model of choice" for patentees confronted with infringement in various countries.\textsuperscript{456} As the Federal Circuit emphasized in \textit{Voda}, for litigation in the United States, the additional uncertainty of enforcing the decision abroad makes multinational patent litigation even more problematic.\textsuperscript{457} Thus, the majority of cases in European and U.S. courts will never qualify for consolidation and, for those that do, the difficulties involved risk increased costs, delay, and uncertainty on account of parallel or collateral proceedings.\textsuperscript{458} As a result, consolidation of foreign patent claims will currently only prove to be expedient in a very small number of cases.\textsuperscript{459}

C. The Best Way Forward

The current realities of multinational patent enforcement in national courts illustrate that it is, at best, an "intermediate solution[ ]"\textsuperscript{460} on the path toward an integrated international patent enforcement system. Although there are undeniable benefits to the global litigation of patents, the current system of international treaties is not sufficiently developed to allow for the effective adjudication of foreign patents in national courts in most situations.\textsuperscript{461} An integral solution for piecemeal patent litigation on a nation-by-nation basis ultimately depends on a "much more long term and focused global plan of international treaties and conventions . . . ."\textsuperscript{462}

The ECJ's decisions in \textit{Roche} and \textit{GAT}, which curtail the multinational patent enforcement trend in European national courts, as well as the Fed-

\textsuperscript{453} Schuster, \textit{supra} note 35.
\textsuperscript{454} See Rasser, \textit{supra} note 36; Schuster, \textit{supra} note 35.
\textsuperscript{455} Schuster, \textit{supra} note 35.
\textsuperscript{456} Id.
\textsuperscript{457} See \textit{Voda}, 476 F.3d at 903; Elmer & Garcia, \textit{supra} note 13, at 9.
\textsuperscript{458} See \textit{Voda}, 476 F.3d at 903; Schuster, \textit{supra} note 35.
\textsuperscript{459} Elmer & Garcia, \textit{supra} note 13, at 4.
\textsuperscript{461} See \textit{Voda}, 476 F.3d at 898–900; Municoy, \textit{supra} note 66, at 342.
\textsuperscript{462} Elmer & Garcia, \textit{supra} note 13, at 9.
eral Circuit's decisions in Mars and Voda, which further restrict the possibility of multinational patent enforcement in U.S. courts, demonstrate the necessity of an international patent enforcement system to overcome the duplicative litigation currently required.463 Moreover, subsequent to the ECJ decisions, the increased emphasis on the EPLA, a common judicial system for European patents, and the Community Patent initiative, which encompasses not only a unified judicial system but also a unitary supranational patent, demonstrates the inevitability of such an international patent system.464 The European initiatives, which remain the only negotiations toward an international procedure for patent enforcement,465 are a prime illustration of the difficulties involved in establishing an international patent system, as well as the likely steps along the way.

As the Federal Circuit noted in Voda, an international agreement providing for the mutual recognition and enforcement of foreign judgments would undoubtedly make multinational patent enforcement in national courts a more practical solution by enabling the rendering court to make a plaintiff whole in a single proceeding.466 Such agreements exist on bilateral and regional bases,467 but an international agreement, embracing a more extensive network of countries, would provide for more effective multinational patent litigation.468 Efforts in the 1990s toward such an agreement, the Hague Conference on Private International Law, a proposed international agreement for the enforcement of foreign judgments in civil and commercial matters modeled after the Brussels Convention, ultimately failed.469 However, the progress towards an agreement to improve multinational litigation offers "significant hope for the future" of multinational patent enforcement in national courts.470 Nevertheless, the European example of multinational patent enforcement in national courts on the basis of the Brussels Convention suggests that general agreements to respect and enforce the judgments of foreign national courts do not fully streamline the multinational patent litigation process, because national validity or anti-suit related follow-up proceedings are unavoidable.471 In light of the European experience, agreements providing for mutual recognition of judgments in national courts are likely insufficient to provide the

464. See Mossinghoff & Kuo, supra note 119, at 547, 560 ("Will the [world patent system] be in effect by the year 2099? Without a doubt!").
466. See Voda, 476 F.3d at 903; Dreyfuss, supra note 13, at 424; Elmer & Garcia, supra note 13, at 7.
467. See, e.g., Brussels Convention, supra note 257.
468. See Dreyfuss, supra note 13, at 425.
469. Municyo, supra note 66, at 378-79.
470. Dreyfuss, supra note 13, at 425-41 (analyzing an intellectual property case both without and under the proposed Hague Convention to show the potential benefits to "international litigation and to the sound administration of intellectual property law"); see Rader, supra note 14, at 7.
471. See Elmer & Garcia, supra note 13, at 8; Schuster, supra note 35.
"consistent and economically available system of judicial interpretation and enforcement" necessary for effective patent enforcement.

After the ECJ decisions, the recent push primarily for a more realistic EPLA and, ultimately, for the ideal Community Patent suggests that Europe has realized that the appropriate means to ensure effective, uniform multinational patent enforcement is a multinational agreement establishing a common patent judicial system. An international patent judicial system or a single international patent court, on a global as opposed to a regional European level, would create a more streamlined method of multinational patent enforcement of national patents, avoiding the collateral and parallel proceedings that prevent multinational patent enforcement in national courts from functioning effectively. A single international patent court, similar to the CoPAC proposed in the 1989 Community Patent Agreement, or, ideally, a fully integrated patent judicial system, similar to the Community Patent Court envisaged in the 2003 Community Patent proposal or the European Patent Court planned in the EPLA, would ensure a uniform, final decision on each litigated national patent, which is often absent in present attempts at multinational patent enforcement in national courts. Additionally, uniform procedural rules of the international court would assuage another problem with the multinational patent litigation in national courts, which plunges foreign litigants into an unfamiliar system with often substantially different procedural laws. Furthermore, a detailed language regime would better anticipate the translational issues likely to occur when a court adjudicates multiple national patents.

As illustrated in Europe's aspiration for the implementation of the

473. See Closing Remarks, supra note 383; Next Steps, supra note 29.
475. See Elmer & Garcia, supra note 13, at 8; Schuster, supra note 35.
476. See DiCataldo, supra note 11, at 27.
477. See EUROPEAN PATENT OFFICE, supra note 15, at 5-6.
478. See Schuster, supra note 35. As the EPLA demonstrates, see Industrial Property, supra note 379 and Innovation/Intellectual Property, supra note 387, national sovereignty and constitutional concerns would undoubtedly be an issue in the delegation of power to an international body for patent enforcement. See Newman, supra note 472, at 7. Although the constitutionality of such a patent court is beyond the scope of this article, see David W. Okey, Constitutionality of a Multi-National Patent System, Part II, 81 J. Pat. & Trademark Off. Soc'y 927, 939-49 (1999) and Seifert, supra note 463, at 202-03, for an argument that an international patent court would not raise any constitutional issues in the United States. Additionally, see Newman, supra note 472, at 6, for the suggestion that, in order to avoid such national sovereignty concerns, a tribunal could be established in which nations do not yield their sovereignty, but rather citizens themselves would yield to the tribunal.
479. See Chisum, supra note 18, at 614; Municoy, supra note 66, at 372. U.S. civil procedure rules, which feature liberal discovery and the right to a jury trial, differ substantially from foreign procedural rules. Chisum, supra note 18, at 614. Such differences constitute a strong argument against the adjudication of foreign patent claims in U.S. courts. Id.
Community Patent, an ideal solution to multinational patent enforcement entails not only a common judicial system but also an international, global patent. A multinational organization, established by treaty, creating a global patent that is respected in all member states and enforced by an international patent court would allow for the most uniform interpretation and enforcement of global patent rights. Nevertheless, as the years of negotiations in the Community Patent initiative clearly show, there are many obstacles along the way to a truly international patent system. Given the increased harmonization of European patent law on account of the EPC, the establishment of a global patent, which would require the agreement of nations with more divergent patent laws, would likely be even more problematic than the establishment of a Community Patent within the EU. Therefore, such a fully harmonized international patent system complete with a global patent and international patent court is certainly not likely in the short term, but the obstacles do not appear to be insurmountable. As now Director of the Office of International Relations for the U.S. Patent and Trademark Office (USPTO), Lois E. Boland, stated, At some point in the future, we will have an international patent system . . . [in which] the right of an inventor will be universally recognized without having to seek patent protection in each of the countries of the world. It is likely that we will experience a number of intermediate solutions on the way to this true 'global patent,' but we have started down that path and we are not likely to turn back. Europe's example shows that progressive, intermediate steps toward effective multinational patent enforcement are on the horizon.

481. See 'Concerted Push' for European Patents, supra note 356 ("In an ideal world, the Community Patent is the solution.").
482. See Mossinghoff & Kuo, supra note 119, at 547.
483. See id. (predicting that, "[t]o be truly effective," the world patent system will grant "a single, unitary patent respected in all of the member states").
484. See generally Di Cataldo, supra note 11, at 27-29 (explaining the difficulties encountered in negotiations toward a Community Patent).
485. See id. at 27; Heath, supra note 317, at 17.
486. The implementation of a global patent entails a tremendous number of issues related to patent prosecution beyond those relating to enforcement, including translation requirements upon issuance, the definition of patentable subject matter, whether to require “best mode” disclosure, whether to require relevant prior art disclosure, post-grant procedures, claiming practice, and patent term extension. See Mossinghoff & Kuo, supra note 119, at 554-56; Seifert, supra note 463, at 201.
487. See Municoy, supra note 66, at 404; Seifert, supra note 463, at 202.
488. See Di Cataldo, supra note 11, at 27 ("Immediately after its signing, the CPC faced unsolvable non-strategic problems that have prevented its ratification and its becoming effective. These problems are not per se insurmountable; rather they are problems whose settlement has been prevented only by the sometimes, and all too often, resurgent chauvinism of the European States."); Newman, supra note 472, at 7.
490. See Mossinghoff & Kuo, supra note 119, at 547.
Conclusion

The historic territoriality of patent law fundamentally clashes with the increasingly global technology that it seeks to protect. As a result, in order to protect their inventions on an international level as required in today's global marketplace, inventors are forced to pursue duplicative litigations on a nation-by-nation basis. In response, advocates in both Europe and the United States have called for multinational patent enforcement, which has tremendous potential advantages over multiple suits in various national courts. Beginning in 1989, Dutch courts led Europe in a multinational patent enforcement trend, attacking the conventional territoriality of patent rights. In contrast, mainly due to international comity concerns, U.S. courts remain reluctant to exercise jurisdiction over foreign patent claims, leading to a handful of futile attempts to litigate foreign patents in the United States.

As the Federal Circuit's opinion on the issue awaited clarification in Voda v. Cordis Corp., intervening ECJ decisions crushed the multinational patent enforcement trend in European courts, leading to an increased emphasis on both the Community Patent and the EPLA in an attempt to unify the disjointed European patent litigation system. The ECJ decisions, which largely destroy the potential for multinational patent enforcement in European national courts, as well as the proposed judicial systems in the Community Patent initiative and the EPLA, demonstrate European nations' continued hesitance to allow foreign national courts to adjudicate patents effective in their territory and, thus, reinforce the logic of U.S. courts that have refused to exercise jurisdiction over foreign patent claims. Furthermore, the inefficiencies evident in past multinational patent enforcement efforts in European national courts establish that unavoidable parallel and collateral proceedings in foreign national courts result in substantial expense, delay, and uncertainty for litigants. As a result of these difficulties and the recent ECJ decisions, the drive for both the more-readily-attainable EPLA and the ideal Community Patent show that Europe has realized that multinational agreements to establish a common patent judicial system are the appropriate means to ensure uniform, efficient multinational patent enforcement. Thus, as past and present European initiatives illustrate, multinational patent enforcement in national courts is only an intermediate solution in the long and difficult path toward the effective protection of international patent rights.