

# THE EUROPEAN PATENT SYSTEM

The Law and Practice  
of the  
European Patent Convention



Sweet & Maxwell

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## **The Law and Practice of the European Patent Convention**

by

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# **THE EUROPEAN PATENT SYSTEM**

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To  
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and  
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## PREFACE

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The European patent system gathers momentum impressively, pressed forward by the increasing number of European patent applications filed every year.

Fourteen years after the European Patent Office (the "EPO") opened in 1978, its current and forecast future scale of operations is such that industry worldwide needs to be aware, through its advisers, of the current state of the law in connection with the grant of European patents, as well as its trends. The aim of this book is to meet that need, and to provide guidance to patent practitioners, by presenting an objective picture of the jurisprudence which has so far been developed through the many decisions issued annually by the Boards of Appeal of the EPO. There are currently about a thousand appeals filed each year, and this number is expected to grow steadily.

As far as possible, decisions of the Boards of Appeal which have been published in the Official Journal of the European Patent Office ("O.J. EPO") before January 1, 1992 have been taken into account, as well as some decisions which have not been so published, and some which will be published in the near future.

It will be noticed that the author has generally refrained from expressing personal views upon points of law and interpretation which have not yet been decided by the Boards of Appeal or where divergent views have been expressed by different Boards of Appeal, such points being not yet settled by the Enlarged Board of Appeal. This is because the author may himself be a member of a Board of Appeal or the Enlarged Board of Appeal which is called upon to decide such points. The expression of personal views in such circumstances is, in the author's view, inappropriate.

\* \* \*

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The views which have been expressed in this book are entirely those of the author.

Gerald Paterson  
Munich, January 27, 1992



# INTRODUCTION

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The European Patent Convention provides a centralised system for granting European patents. Upon filing a European patent application at the European Patent Office, the applicant is required to designate the Contracting States to the Convention in which protection is desired. Upon grant, a European patent becomes a bundle of national patents having effect in each of such designated Contracting States. After grant, apart from the centralised opposition procedure before the European Patent Office which in accordance with the Convention may be commenced within nine months from grant, a European patent is no longer within the competence of the European Patent Office; the resulting bundle of national patents may only be challenged and enforced individually within the national jurisdictions of the designated States.

This book is primarily concerned with the jurisprudence which has been developed by the Boards of Appeal of the European Patent Office in Munich, through their decisions in appeals under the European Patent Convention concerning both European patent applications and oppositions by third parties to patents granted pursuant to such applications.

The departments of the European Patent Office which make decisions the subject of such appeals are the Receiving Section, the Examining Divisions and the Opposition Divisions. These are "first instance" departments.

The Receiving Section is in the branch of the European Patent Office at The Hague, and is responsible for the examination on filing and the examination as to formal requirements of each European patent application. A European Search Report is then drawn up by a Search Division, also based at The Hague.

An Examining Division is thereafter responsible for the substantive examination of each such application, as to whether the application or the invention to which it relates meets the requirements of the European Patent Convention, in particular the requirements for patentability, so that a European patent can be granted.

Within nine months from grant of a European patent, any person

may file an opposition to the granted patent, on one or more grounds which are specified in the Convention. An Opposition Division is responsible for the examination of such an opposition.

If a party to proceedings before a first instance department is "adversely affected" by a decision of such a department, he may appeal to a Board of Appeal ("the second instance"). Following examination of such an appeal, the Board of Appeal issues reasons for its decision on the appeal in writing.

This book commences with a chapter discussing the interpretation of the European Patent Convention within its legal framework. Since, as stated above, the book is primarily concerned with the jurisprudence of the Boards of Appeal, the second chapter then describes both the organisation of the Boards of Appeal and the procedure to be followed in proceedings before them.

Subsequent chapters describe in particular the contents of a patent application as required under the European Patent Convention, the procedure before the Examining Divisions and the Opposition Divisions, and the requirements for patentability. The discussion is centred upon decisions of the Boards of Appeal which have been issued in relation to each such topic.

The penultimate chapter discusses the determination of the extent of the protection which is conferred by a European patent, both in proceedings before the European Patent Office having regard to relevant Board of Appeal decisions, and also in infringement proceedings before some national courts.

The final chapter considers the jurisdictional relationship between proceedings before the departments of the European Patent Office, patent proceedings before national courts, and proceedings before the Common Appeal Court, as envisaged by the Community Patent Convention (which is not yet in force).

Where appropriate, a comparison has been made between the jurisprudence of the Boards of Appeal and the law as stated by the courts in the United Kingdom.

In this connection, however, an important difference between the system of precedent applied within the Boards of Appeal and that applied by courts within the United Kingdom must be noted. A conventional textbook of national law in the United Kingdom would normally attempt to state the law as at a particular date, having regard to judgments issued prior to that date. This is possible because of the system of precedent which operates within the United Kingdom, whereby a court is bound to follow previous judgments on a point of law, not only of higher courts within the United Kingdom, but effectively also of courts at the same level. In contrast, within the European

Patent Office, and under the European Patent Convention, individual Boards of Appeal are not bound to follow previous decisions of other Boards of Appeal on a point of law; they normally will, but they may not. Even the first instance departments of the European Patent Office are not bound under the Convention to follow previous decisions of the Boards of Appeal on points of law, although they almost always do. The function of the Enlarged Board of Appeal is to “ensure uniform application of the law” through its decisions. The system of precedent provided under the Convention by the Enlarged Board of Appeal and its relationship with individual Boards of Appeal is discussed further in Chapter 2.

Nevertheless, as discussed in Chapter 1, the individual decisions of the Boards of Appeal provide an essential guide to the system of law and practice under the European Patent Convention.

## A NOTE ON THE IDENTIFICATION OF DECISIONS

Every decision issued by a Board of Appeal is identified by a letter, a number and the year in which it was issued. The different categories of decision issued by the Boards of Appeal with which this book is concerned are identified by letters as follows:

Enlarged Board of Appeal	— G
Legal Board of Appeal	— J
Technical Boards of Appeal	— T

Almost every decision issued by a Board of Appeal is also identified by a “headword,” consisting of the name of the applicant or patentee, and a short title.

The European Patent Office has adopted the practice of referring to individual decisions generally by number, rather than by headword or name of the applicant or patentee. This practice has been followed in the text of this book. In the United Kingdom, however, by long tradition, legal judgments are identified by the names of the parties. Following this tradition, decisions of the Boards of Appeal are commonly referred to and identified in the United Kingdom by the name of the applicant or patentee, rather than by their numbers.

In order to help the identification of individual decisions referred to in this book, every numbered decision in the text is referred to in a footnote with its headword and with a reference to its place of publication, if any. Decisions which have not been published either in the Official Journal or in the European Patent Office Reports are accompanied by their date of issue. A decision which is scheduled for publica-

tion in the Official Journal but is not yet so published is additionally marked with a (P).

The tables of EPO cases at the beginning of the book correlate the numbers of the decisions with their headwords. The decisions are set out first in numerical and then in alphabetical order so that references may be located whether one knows the number or only the name of a particular decision. Tables of cases are also provided at the end of each chapter to facilitate finding decisions within the particular subject area of that chapter.

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