The enemy within?
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From the outside and at a respectable distance, the economically intercommunicating territories of Europe look remarkably solid. Though the euro has not yet penetrated the entirety of the continent from which it takes its name, it is the official currency in 16 of the European Union’s 27 Member States and is accepted de facto in most shops and markets throughout the rest. Common rules govern many aspects of daily European life and the impression is received that the path to European integration is open to traffic in one direction only. Fortress Europe from without, Eurovision Song Contest from within, a shared culture and a shared future look assured.

The IP community knows this is not an accurate depiction of reality. Linguistic diversity means that a single trade mark is inappropriate for all countries. It also now seems that the body that grants the single Community trade mark (CTM) is itself something of a hate-object for the national (in the case of Benelux, regional) trade mark granting offices. The success of the CTM system has it seems brought about a hostile reaction from its localized and geographically limited forebears. That the Office for Harmonisation in the Internal Market (OHIM), which administers the CTM system, wishes to refund more than 300 million euros of excessive fees is a matter that has caused deep irritation among some national offices. Concern has been expressed that the popularity of the CTM with its users is the death-knell of national systems and that any overpaid fees should be deployed by way of subsidy so that the latter may remain viable. There is also resentment at the manner in which OHIM seeks to assert its pro-Community line in the face of opposition from the representatives of national offices who sit on its controlling committees. Like Gulliver in the hands of the Lilliputians, OHIM is constrained by whose individual strength is weak but whose collective position of power remains unassailable. If national offices can force OHIM to keep its fees high and to channel any residue towards their needs, the CTM system can be brought to its knees.

A further attack on the system has come from the position taken by the Benelux and Hungarian Offices that, for the purposes of ascertaining whether a CTM relied on in local opposition proceedings has been the subject of ‘genuine use’, use of a CTM in a single Member State of the European Union cannot be regarded as ‘genuine’. While this proposition is, I believe, wrong in law, it is at least a proposition which can be seriously argued and for which some support can be found. What is significant is not the fact that the issue of whether ‘genuine use’ of a CTM must involve a plurality of Member States has been raised; it was a question waiting to be asked and which, surprisingly, was left open by the legislators when the foundations of modern European trade mark were dug. The significance lies in the fact that the question is being asked now, the best part of 20 years since the Community system was concretized.

In the long term, the outcome of these little spats over the autonomy of national registries and the status of CTM use is assured. OHIM will eventually be governed centrally, from Brussels, and use of a CTM will be ‘genuine’ even if it is only in one Member State, so long as it conforms to the other criteria of use to which any mark is subject. The reason why these outcomes will prevail is that they are the only outcomes that are politically acceptable in a Europe which continues to grow closer, a Europe which is pressing for a Unified Patent Litigation System and which—love it or loathe it—will soon have one. So are national offices, and the national interests that cause them to raise their heads above the parapet, the enemy within? I think not. They may win some battles but they will lose the wars. Before they do so, however, they will have brought about at least one beneficial result: they will have forced their opponents to articulate their pan-Europeanism in terms which are more precise, more persuasive, and more complete than the hotchpotch of statements, recommendations, travaux, and decisions from which we must now seek to glean the pan-Europeanists’ intentions.