

EIP

To be, or not to be, that is the European patent

It seems a single EU patent, covering all the EU Member States other than Spain and Italy, may become a reality. How this would be litigated, however, remains unclear.

Obtaining and asserting patent rights throughout Europe can be a complicated and expensive process. Unlike other forms of intellectual property rights, such as registered trademarks or designs, there is currently no “European patent” that affords unitary protection, enforceable throughout the European Union. Instead, we have the European patent application; a centralised search and examination procedure conducted by the European Patent Office (EPO) which, once allowed, requires validation in each country where protection is desired. This results in a bundle of national patent rights, each enforceable by litigation in the country in which the application is validated. It is these territorial validation and litigation procedures which can make obtaining and enforcing comprehensive protection in Europe prohibitively expensive for some applicants.

Depending on the country, validation typically involves preparing a translation of at least the claims, and in many cases the entire patent specification. An agreement came into force in 2008 (‘The London Agreement’) which has helped to reduce the translation requirements for validation in certain countries, however obtaining protection in even just a few countries in Europe can still cost ten times as much as patent coverage in the US. Enforcement throughout Europe can be even more onerous for applicants, potentially requiring litigation and its associated expense in each country where infringement occurs.

Proposals to implement a unitary European patent have been actively under consideration for the last ten years, having been first proposed in the 1960s. However, the EU's Council of Ministers have been unable to agree on two central problems; the languages of prosecution (i.e. obtaining a granted patent) and the forum for litigation (i.e. enforcing or challenging a granted patent).

Proposals regarding prosecution have mainly centred on using the current official languages of the EPO (English, French and German), with notable opponents being Italy and Spain. The most recent negotiations failed in December 2010, and in order to move past the stalemate, the European Commission presented a proposal to utilise "enhanced cooperation" measures, which allow a group of EU Member States to adopt new common rules when a unanimous agreement cannot be made. The proposal was approved by the European Parliament in February of this year, and later by the Council of Ministers in March, constituting only the second time in history that enhanced cooperation has been approved. All of the EU's 27 Member States, except Italy and Spain, have requested to participate, cementing the creation of the EU patent as a tangible reality.

Agreeing on the forum for litigation has been more complicated however. Initial proposals for a unified patent litigation system were rejected by the Court of Justice of the EU (CJEU) earlier this month as being incompatible with the provisions of the EU treaties, objecting in particular to the effect of conferring power in applying and interpreting relevant EU law away from national courts and the CJEU, and to a court outside that framework. The Commission was quick to respond to this, expressing both optimism for finding a solution to the objections raised by the CJEU, and a desire to resolve these quickly; promising to present revised proposals in the near future.

It now seems inevitable that the EU Patent will arrive, potentially within the next few years, and bring with it affordable, pan-European patent protection. How the litigation side of the equation will resolve itself is yet to be seen, with some corners predicting a system where national courts will be able to rule in relation to a pan-European patent right (as is the case with community trademarks and designs), and others predicting the introduction of a new European patent court, with exclusive jurisdiction. Until this happens, however, European patent applications must continue to be filed and enforced under the current system.