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Third Party SPC - Question Referred

Brian Cordery (Bristows) · Friday, March 8th, 2019

On 4 March 2019, we uploaded a post noting that the English Patents Court had decided to refer a question to the CJEU on whether it was permissible for a patentee to rely on a third party's MA to obtain an SPC in the absence of consent from that third party. We briefly summarised the history of the issue and noted that it was ripe for a reference.

The Court records now indicate that on 4 March, Arnold made an Order for a reference asking the following question: *“Does the SPC Regulation preclude the grant of an SPC to the proprietor of a basic patent in respect of a product which is the subject of a marketing authorisation held by a third party without that party's consent?”*

The fast framing of the question and sealing of the Order was no doubt spurred on by the looming scheduled date of departure of the UK from the European Union. Whilst the question is pending, the SPC action in the English Court has been stayed. It will be interesting to see how the CJEU reacts to the reference. Will the CJEU recognise the wider importance of the question and deal with the case as it would with any other question? Or will the CJEU, recognising the London postmark on the envelope from the Court, put the reference to the bottom of the pile? Or, in light of the findings of the English Court that the patent on which the SPC is based was invalid, might the CJEU conceivably decline to answer the reference or stay it pending the outcome of the appeal on the patent issues. Like Brexit itself, there is much uncertainty.

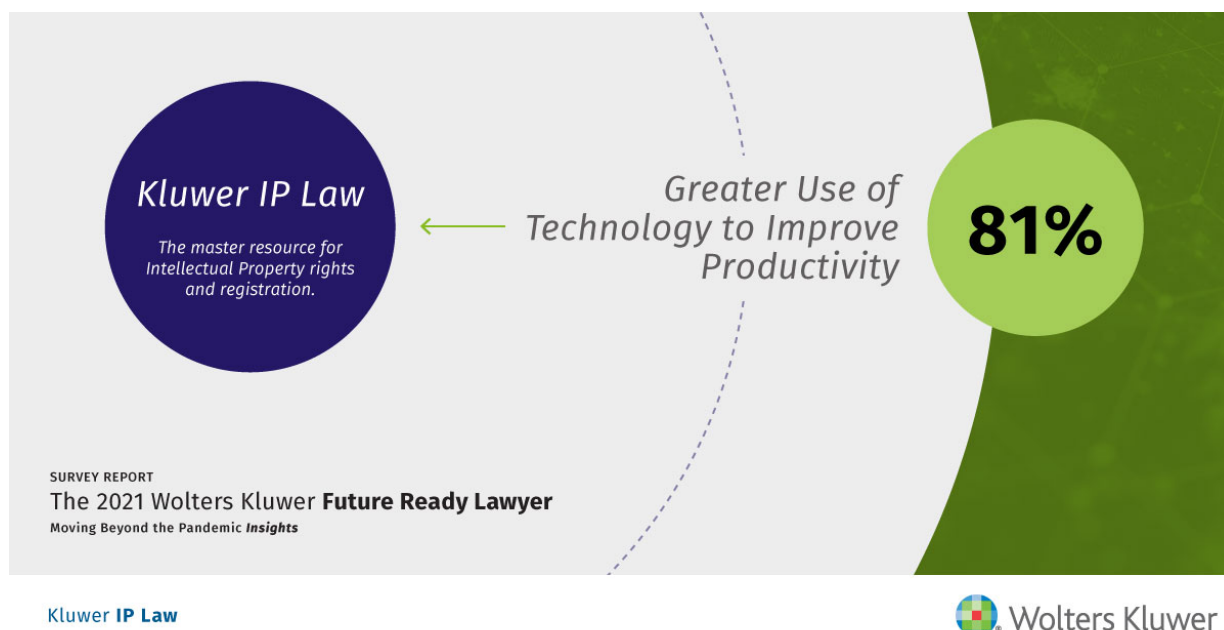
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This entry was posted on Friday, March 8th, 2019 at 5:26 pm and is filed under [European Union](#), [Patents](#), [Pharma](#), [Pharmaceutical patent](#), [Plausibility](#), [Second Medical Use](#), [SPC](#), [United Kingdom](#)

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