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An EU Patent? Proposal for enhanced cooperation

Brian Cordery (Bristows) · Wednesday, January 12th, 2011

The pan-generational failure to agree a system enabling unitary patent protection among the countries of the EPC and/or EU is well known among innovators, patent attorneys and lawyers alike. Following renewed efforts in recent years, particularly under the presidencies of Sweden and Belgium, substantial stumbling blocks remain. One unfortunate development last summer was the challenge presented by a leak from within the CJEU (formerly known as the ECJ) of an opinion of the Advocate General, that the proposed agreement creating a unified patent litigation system would be incompatible with European Union law. The establishment of such a court or litigation system is, of course, integral to the functioning of a unified patent system.

However the most intractable problem has long been the question of language., with battle lines drawn between those wanting a three language system (English, French and German) and those wanting either a multi-language system or an English-only system, but not one which would rank their language behind French and German as well as English. France and Germany have consistently opposed any surrender of their national languages (which of course remain official languages of the EPO) to an English-only system; whilst Italy and Spain in particular have long refused to agree to a system in which patent claims are not translated into their national languages but continue to be translated into German and French. Negotiations finally broke down in October 2010., with Spain and Italy vetoing the three language proposal.

Following this breakdown, the European Council announced that a large majority of delegations considered “enhanced-cooperation” the only option available for making progress towards creation of a unified EU patent system. This procedure may be described as a coalition of the willing, under which those countries who support a particular proposal may request the Commission to ask the Council to decide that this coalition may proceed in the absence of other, dissenting Member States. On 14 December, a proposal was published for a Council Decision authorising enhanced cooperation in this field. The proposal is, unfortunately, somewhat confusing in its language, and requires some explanation.. In particular, it is stated that for participating Member States, the common simplified translation arrangements would result in the following:

(a) translation requirements would be limited to the requirements established under the EPC, without prejudice to proportionate transitional arrangements providing for additional translations on a temporary basis, without legal value and purely for information purposes; and

(b) no requirement to file a translation with national patent offices and no payment of publication fees.

Proposal (a) may be read to suggest that the translation requirements would be the same as those under the EPC, including the requirement for patent proprietors to file full translations into the local language in each Member State in which validation is required (subject to the London Agreement under which some states have dispensed with this requirement). This is not, however, the intention. What is meant (per sub-paragraph (b)) is, in fact, that the once granted, a patent published in one of the three languages (English, French or German) and with a translation of the claims (only) into the other two languages, will be valid as a unitary right throughout the EU without any further translations being filed. Proposal (a) also raises the prospect of on-going translation requirements for "information purposes". It may be feared that a system which still requires multiple translations in the medium term is unlikely to offer the anticipated cost savings underpinning the proposal for enhanced cooperation. However, what is intended is that *machine translations* would perform this function.

Under the Treaty on European Union, the enhanced cooperation procedure must only be used as a last resort if agreement cannot be reached among all the Member States. It may be thought that given the huge efforts over the past decade, this would be a formality. However, Italy and Spain have written to the Commission suggesting they will resist the creation of the area of enhanced cooperation.. Early indications are that Spain and Italy will take the position that despite the decade of negotiations, it is still too early to conclude that unanimity cannot be achieved. They may also take the position that enhanced cooperation would not further the objectives of the Union but would undermine the internal market or economic cohesion or distort competition. The 14 December proposal asserts that the "current less advantageous framework conditions for innovation makes the Union a less attractive place to create and innovate, for both European and non-European inventors". It is difficult to see how the establishment of unitary patent protection in Europe would encourage innovation in Europe. The process, merits and costs of patenting in Europe do not discriminate between applicants from within or outside the EU. It is doubtful at least that the cost of patenting in a home market would influence an entity's location. Far more pertinent consideration would be the location of skilled workforce and the applicable tax laws, both of which vary widely within and outside the EU. Nevertheless, the 14 December proposal relies on the assertion that innovation would be encouraged to conclude that "[e]nhanced cooperation in the area of unitary patent protection for a group of Member States would thus protect the interests of the Union as it would improve its competitive position and its attractiveness for the rest of the world". If this is (despite the doubts raised above) correct, it seems to follow that the existence of a unitary system among participating Member States must make the non-participating EU states relatively less attractive for innovation.

Before a unitary system can be established, there are a number of hurdles that would need to be overcome at the EU and by amendment to the EPC. This is not just a question of agreeing the language regime. For example, the CJEU will have to endorse whatever agreement is reached at a political level as being in accordance with EU law; whilst non-EU states will have a say in amendment of the EPC. Both potentially present opportunities for dissenting countries to block or delay proposals.

So despite the progress that has been made, the introduction of unitary patent protection in Europe remains far from certain at present. Substantial political and procedural hurdles remain. But perhaps within the professional lifetime of the younger interested individuals an EU Patent will be born.

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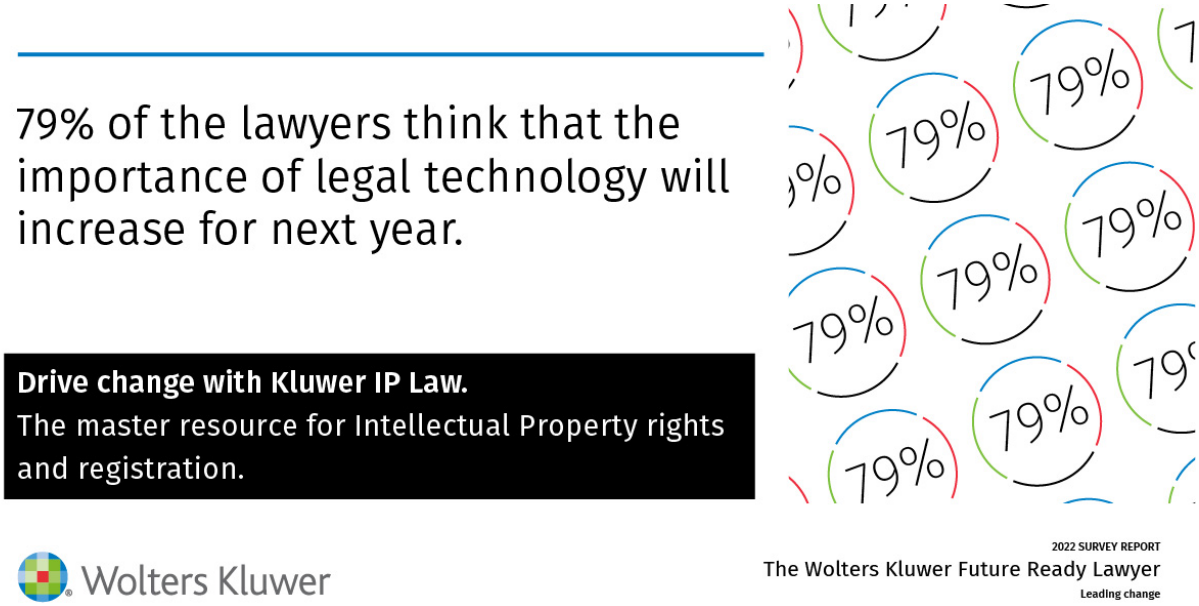

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