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European Patent Litigation Alert

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Author:

Rebecca Halford-Harrison
rebecca.halford-harrison@klgates.com
+44.20.7360.8294

An EU Patent, but what about enforcement?

On 10 March 2011, the Council of the European Union agreed that there will be an EU Patent. Draft regulations will be proposed within the next few weeks. However, just before that, on 8 March 2011, the Court of Justice of the EU (the highest judicial body in the EU) issued an Opinion finding a centralized patent enforcement system is incompatible with EU law. In the future, how will patents work in the EU - and in the additional 11 non-EU states in Europe that can designate the current European Patent?

Approval for a new EU Patent

The European Parliament approved an Enhanced Cooperation Procedure for the European Patent System in February 2011. This has major implications for how the European Patent system operates. An Enhanced Cooperation Procedure may be used where not all EU countries agree on an issue. It allows for legislation to be applied only in participating countries. In this instance, 25 of the 27 Member States of the EU agreed to a unified European patent. Only Italy and Spain did not agree because they objected to the languages of the EU Patent keeping in line with current European Patent Office (EPO) practice, i.e. English, French and German for claims, and in one of those languages for the specification. They argued that either there should be a single reference language (English) or alternatively that Spanish and Italian should also be included. Since not every country agreed, the Enhanced Cooperation Procedure was the only option if the EU Patent was to proceed. The proposed legislation will provide that the EU Patent will come into effect by being available as a designation when prosecuting a patent through the EPO (i.e. as an EP(EU) rather than, for example EP(UK), EP(NL) and so on). However, it is understood that Spain and Italy may yet appeal the Council's ruling on the basis that restriction of language is not compatible with a single EU market.

But no specialized central enforcement system

While a single EU patent appears to be coming, little progress has been made on a common enforcement system. The proposal for a Unified Patent Litigation System (UPLS) was to create a separate centralized, specialized, patents court system for Europe with exclusive jurisdiction to hear patent infringement, non-infringement, revocation and related actions. These would include actions pertaining to patent licensing, special protection certificates and to give relief by way of injunctions or damages, and so on. This specialized court was to be a resource available to all 38 signatories to the European Patent Convention, not just the 27 EU Member States. There were to be local, regional and centralized courts, a central court of appeal and a registry.

The full panel of 23 judges of the Court of Justice of the European Union delivered their opinion, following a hearing in May 2010 reported here. The Court found that a judicial system that was outside the current judicial framework of the EU was incompatible with EU law. For the moment, that means no pan-European injunctions, no centralized decisions on infringement and no centralized decisions

on validity after the opposition period has expired. It also means, for now, that there will be no harmonization of interpretation of the European Patent Convention.

If patents were like trade marks, the system available for Community Trade Marks with national courts designated as "EU Patent Courts" and reference available to the Court of Justice on points of law would be fine. However, the difficulty with patents is that in order for the highest appeal system to make sense, it needs at least some judges who are used to understanding a wide variety of technology in great detail, generally with the help of experts. This would require a fundamental change to how the Court of Justice operates.

What next?

A European Patent, of the traditional sort (i.e. prosecuted through the EPO and designating any or all of the 38 signatory states), seems to be coming. When legislation is put into place, European patent applications will be able to designate 'EU' as one of the options. If national designations for EU countries are still used alongside that, then potentially conflicting decisions could be made for an EU designation and a Member State designation as they would be separate rights. Amendments to an EP(EU) patent would not necessarily be amendments to an EP(national) patent and vice versa. Strategically interesting filing decisions for patentees, and litigation decisions for potentially both patentees and their opponents, may be necessary depending upon whether patentees or their opponents want to allow the possibility of reference to an unspecialized Court of Justice of the EU and all the complications the Court's decisions may create. Without a specialist EU patents court, litigation in national courts with right of appeal to the Court of Justice seems to be the only route. Equally, for lower value patents or for small and medium enterprises, the hope is that limiting designations to EU, and more limited EU countries than previously would have been contemplated, may allow broadening of protection with very little extra cost and possibly even a saving.