

Chicago Daily Law Bulletin®

Volume 160, No. 236

Europe's unitary patents may cut U.S. inventors' protection costs

In Douglas Adams' "Hitchhiker's Guide to the Galaxy," universal translation was achieved through the use of "babel fish" inserted into your ear. Star Trek achieved the same goal through the use of a small device — the aptly named universal translator.

The Council of Europe hopes to achieve an identical result with a Google program for translating patents called Patent Translate. The viability of a proposed Unitary Patent, offering affordable protection for U.S. inventions in Europe, may depend on its hopes being fulfilled.

I was always taught that translation was an art. Consider the iconic first sentence from Leo Tolstoy's classic work "Anna Karenina": "All happy families resemble one another, each unhappy family is unhappy in its own way." Depending on the translator, the sentence has been variously interpreted as "All happy families are alike; each unhappy family is unhappy in its own way" or "Happy families are all alike; every unhappy family is unhappy in its own way."

Such differences are often praised as evidence of a translator's sensitivity to the author's intended meaning. These differences can also destroy a successful patent suit where claim interpretation can be outcome determinative. Regardless of which country's laws apply, subtle differences between "resemble" and "are," and between "each" and "every" matter in the precise descriptive interpretive rules generally used to determine the scope of a patentable invention.

Patents have always been uniquely territorial inventions internationally. No matter how significant an invention may be, it is only protected in those countries where the patent holder has spent the time, money and effort to apply for domestic patent protection.

Perhaps, even more problematic, patents are required to possess such a high level of uniqueness

that failing to apply for protection at the right time can preclude patentability. For example, in the United States, patent holders are generally allowed a year in which to attempt to exploit a new invention publicly without losing the ability to secure patent protection. Yet this same permitted public use under U.S. law can result in a denial of patentability in countries that require "absolute" novelty.

International patent protection is costly. In addition to mounting application fees, patent holders must comply with a complex array of individual requirements, including the obligation to translate applications into individual languages.

To reduce some of these problems, the Patent Cooperation Treaty permits member countries to file a single national application and then take up to 30 months to designate additional countries for filing. But the PCT does not eliminate the need for costly translations and fees imposed by different countries.

The European Patent Convention similarly allows for the des-

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ignation of multiple countries upon the filing of a single application. Yet, like the PCT, the EPC also requires the filing of translations of the patent (referred to as validation) into nine languages for the description and 16 languages for the patent claims.

The proposed Unitary Patent will undeniably reduce costs, in part, by eliminating expensive translation requirements. Under the proposed Unitary Patent, a successful patent applicant under the EPC will have the right to elect to receive a unitary effect for the granted patent throughout member countries. This unitary effect would eliminate the general need for multiple translations so

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long as the patent specifications were available in English.

Under currently proposed regulations governing the Unitary Patent, only one translation into another language could be required for "information" purposes. Presumably such information would include using the translated version as an additional basis for comparison to ensure the accuracy of software-produced translations.

For decades, the European Union has periodically debated the utility of a Community Patent where a single application results in a community-wide patent grant. The Unitary Patent is not precisely a Community Patent, particularly since both Italy and Spain refuse to participate. But it may be the closest we will ever come to achieving such regional protection.

A Unitary Patent will undoubtedly make patent protection strategies more complex. It will co-exist with a wide array of other patent protection choices, including national patents and classical European patents granted under the EPC without a unitary effect. Pre-grant searches should eliminate conflicting patent grants among the three systems. But calibration

of future registration choices between national and regional protection will still be required to ensure optimal protection.

The Unitary Patent could provide strong benefits to U.S. inventors. It would allow patent protection in 25 countries upon a single filing, with a single translation. Even more significant than the cost savings may be the creation of a Unified Patent Court to enforce Unitary Patents.

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Instead, it would be a single court system, including trial and appellate courts at both a national and regional level. The proposed system would apply harmonized law to patent actions, leading to more predictable decisions. These decisions would be enforceable in all participating member states.

The risk of such single action precedent is that under the UPC a patent would be subject to a central attack seeking invalidation. One loss and the patent would be invalidated across a broad swath of countries. Translation issues would still remain since present UPC proposals allow for a range of translation choices, including translation into the language where the patent suit is instituted.

Neither the Unitary Patent nor the UPC has yet been ratified. Most EU patent experts predict, however, that both will become active within the next two years. Now is the time to start exploring when such regional protection should be sought over traditional national patent protection strategies.

In the meantime, we have to hope that patent translation devices become more precise, or the single translation benefits of the Unitary Patent could become a curse as meanings become mangled and the vaunted invention disclosure goals of the patent system disappear.