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.”

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 the aptly named — in a terminative. Regardless of which interpretation can be outcome determinative. Regardless of which claim is at issue in the proposed 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.

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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 single translation is the creation of a Unified Patent Court to enforce Unitary Patents.

The proposed UPC would create a single system under which European patents, including any Unitary Patent, would be judged. The UPC would not be a single court, such as the U.S. Court of Appeals for the Federal Circuit. 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.

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