

One country at a time

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You sometimes see “Worldwide Patent Protected” or “Patented Worldwide” on a product, but what does this mean? There is no such thing as a worldwide patent. Patents are granted on a country-by-country basis, with only a few exceptions.

Presently you can file a regional patent application at the European Patent Office which will be examined centrally. However, once the European Patent Office has confirmed the application is allowable, you still have to go through validation in each one of the European countries that you want a patent. The result is a separate patent in each European country each having the same claims. Due to the cost of validating and maintaining patents in a lot of countries most European patent applications are only validated in three to five countries out of a possible 27.

Change in the works

Attempts to set up a unitary European patent to cover the whole of Europe date all the way back to the 1970s. However, it is looking more and more likely that this will become a reality.

On 11 December 2012 the European Parliament voted positively on the latest proposals for a unitary patent and on 20 January 2013 the regulations came into force.

However, the regulations will only apply once agreement can be reached on a Unified Patent Court. The flip side of a unitary patent is that enforcement of the patent, i.e. suing parties which infringe the patent, or validity of the patent must also be considered centrally. An agreement on the structure of the new court was signed by 25 European Union States on 19 February 2013, but it will need to be ratified by at least 13 states, including France, Germany and the United Kingdom before it can enter into force.

At the time of writing this article, it had only been ratified by three states.¹ You will appreciate the pace of law reform in each country can vary dramatically, particularly with elections in some countries. When the agreement will pass the finishing line is anyone’s guess.

There is one other thing that may yet upset the unitary patent proposal. Spain has brought two last minute actions before the Court of Justice against the regulations for the unitary patent.² The objections are largely technical in nature and include an objection that the European Patent Office will have the power to grant the unitary patent but will not be subject to judicial review. Whether or not these are ultimately successful there will at least be a delay while they are considered.

Pros and Cons

When (or maybe if) the European unity patent becomes available there will be a transition period where applicants

can opt out of the unitary patent and stick with the existing system of having separate patents in each country.

Why might you want to do this?

The fees associated with the unitary patent have not yet been confirmed, but it is predicted that the unitary patent will be more expensive to maintain than patents in three or four countries. So if you only wanted patent protection in a limited number of European countries, it may be cheaper to opt out of the unitary patent.

The major disadvantage of the unitary patent will be its “all or nothing” effect. It will give patent protection across Europe, but the patent could also be found invalid across the whole of Europe. This will lead to very high stakes litigation at the new Unified Patent Court. Not only will the court decisions have huge ramifications, the court and the law itself will initially be new and untried. No-one will want to have the first case taken to the new court.

Despite these potential drawbacks a recent survey of individuals responsible for their company’s European patent portfolio completed by British firm Allen & Overy has shown 74% expect it to be positive for their company.³ Maybe people just like the idea of having a patent in as many places as possible. It still seems unlikely there will ever be a “Worldwide patent”.

If you have any queries regarding intellectual property related matters (including patents, trademarks, copyright or licensing), please contact:

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References

1. Austria ratified the agreement on 6 August 2013, France ratified on 14 March 2014 and Sweden ratified on 5 June 2014.
2. Cases C-146/13 and C-147/13 at Court of Justice.
3. <http://www.allenoverly.com/publications/en-gb/Pages/Research-reveals-growing-business-support-for-UPC-%E2%80%93-crown-jewel-patents-opted-in;-move-to-Europe-for-major-patent-disputes.aspx>.



Katherine Hebditch of Baldwins Intellectual Property in Auckland specialises in chemistry and biotechnology patents. Katherine obtained her PhD in organic chemistry from the University of Manchester in the UK in 2004. She is currently working towards registration as a patent attorney.