

7/13/2018 | General

The Unified Patent Court – another twist in the road or just more of the same?

If you have nothing better to do, here is a link to the White Paper produced by UK Government on 12 July 2018 proposing a relationship between the UK and the EU post-Brexit – enjoy:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/724982/The_future_relatio

But what does it mean for the UPC? Well, quick out of the blocks, the UKIPO has produced the following:

"The UK intends to stay in the Unified Patent Court and unitary patent system after we leave the EU. The UPC and unitary patent project are an important means of simplifying the protection of innovative products throughout Europe. This Agreement sets the bar for the level of constructive cooperation that the UK seeks with European partners in the future."

"UK participation in the UPC and Unitary Patent will extend the benefits of these systems to businesses operating in the UK."

"The UK will work with our European Partners to ensure the Unitary Patent and Unified Patent Court continue on a firm legal basis. This will need to reflect the change in the UK's status as we cease to be an EU Member State, which will require negotiations with our European Partners. We look forward to beginning those negotiations with our European Partners so as to ensure the continuing success of this new system."

This reflects paragraph 151 of the voluminous tome: "The UK has ratified the Unified Patent Court Agreement and intends to explore staying in the Court and unitary patent system after the UK leaves the EU."

Which says just about the square root of not very much. They also like motherhood and apple pie as I understand it.

The stumbling block remains the jurisdiction of the Court of Justice of the European Union (CJEU) – one of Prime Minister May's "red lines" that cannot be crossed is that the UK will no longer bound by its rulings. According to this proposal the UK will take control of all law making but "take into account" of CJEU rulings in areas where it has been agreed that equivalent laws in the UK and the EU have been enacted. Is that enough? The supremacy of the CJEU in the EU is one of its red lines, so square that circle if you will because observing the CJEU doesn't sound very binding to me. However, never underestimate the capacity for the EU to make a fudge if it needs to if the will is there.

The fact is that the UK government's position is hopeful, but not encouraging. Even if this White Paper forms the basis of an agreement (we don't yet know how this proposal is going to be received by the EU) it seems to me that the only way the UK can remain in the UPC post-Brexit is via a fudge of the UPC Agreement itself. That will require a substantive change which will mean it has to go back to the drawing board to be renegotiated. And there are plenty of national vested interests around the EU member states who will jump at the chance to have another go at their particular hobby horse. Better to run with the UPC minus the UK than risk it all falling apart? Does the UK get

ditched for certainty, or tolerated with all the attendant risks of total failure?

We are no nearer clarity whatever the UKIPO might wish for. The odds have to be on a UPC without the UK but let's wait and see - as usual. Sorry.

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