



Lost in translation? – A review of the post–grant requirements for translation of patent specifications in Europe



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ABSTRACT

This article considers the various mechanisms by which granted patent rights, and their supporting disclosures, have been made available in local languages throughout Europe over the past several decades. It considers the legal background to the development of different translation requirements at different points in time, and how this has affected the burden upon the patent owner in maintaining their patent rights in force. It highlights the sources for obtaining translated documents, and how this process will change again if the EU's Regulations on granting unitary effect commence operation later this decade.

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1. Introduction

The continent of Europe is home to a multitude of languages; depending upon where the boundary of the continent is drawn, these may include languages written in a range of different alphabets, and derived from more than one linguistic family. Since the 1990s, following the break-up of the Soviet Union and of Yugoslavia, some languages which were formerly treated as minority dialects have become the official language of newly-created independent states. The European Union (EU), with 28 member states as of 2015, recognises no fewer than 24 official languages [1], whilst the European Patent Office (EPO) has 38 member states [2], including a number such as Turkey and Iceland whose languages are not included amongst the EU list.

The patent system is typically described as a bargain, or balance, between legal protection and public disclosure. Broadly speaking, the extent of legal protection may be defined by the claims, whereas the disclosure of the invention for the benefit of the general public is found in the body of the specification. It therefore follows that both parts of a patent document should be accessible if the balance is to be kept. It appears only reasonable that when

newly-granted patent rights enter into force, which are capable of being used to constrain the freedom of action of all citizens and enterprises in a given territory, then those same citizens and enterprises should be given the opportunity to acquaint themselves with the nature of those rights. This would imply, at the very least, that granted patent claims should be issued in the *lingua franca* of every territory. If the full bargain is to be maintained, then translation of the body of the specification, to enable others to learn about the nature of the invention, should also be expected.

The principal purpose of this paper is to provide an understanding of the legal background as to why post–grant translations of European Patent specifications happen at all, and to identify possible sources of supply for these translations over the last several decades of operation of the EPO. It is beyond the scope of this paper to consider either the policy questions at the European level of how so-called minority languages can be accommodated, or issues of strategy for applicant companies wishing to minimise (or at least economise upon) their translation costs. Either of these issues could form the basis for a separate study, which might be particularly appropriate to conduct in the next few years as European industry considers the transition to the new ‘unitary effect’ regime.

2. The function of translations

There are at least two reasons why a patent information

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professional may find it useful to investigate patent translations in Europe. The first reason is straightforward information awareness. The present translation requirements under the European Patent Convention (EPC) and related national legislation mean that professional human translations of the complete specification of granted EP patents may be available to third parties, at marginal cost. Knowing this fact could potentially save a research-based company large amounts of money each year, by circumventing any need to commission their own translations in order to consult these technical documents. The availability of a post-grant translation for a specific document will vary, depending upon the language of the original specification (source language), the language of the desired translation (target language) and the designated states at grant. The availability of post-grant translations via national IP offices has also varied throughout the operational life of the EPO, as member states have introduced or modified their national laws. In the future, the extent of preparation and publication of these post-grant translations will again change in response to the unitary effect regulations, for certain (but not all) EPO member states. At a time when many research companies are under budget restraints, it is incumbent upon professional information staff to be informed of the most cost-effective means to obtain the documents which they need.

The second reason is that the deposit of post-grant translations is commonly an intrinsic part of the national validation steps required after the grant of a European Patent. Although it is neither definitive nor legally binding, the evidence that a translation has been lodged (or not lodged) is *indicative* of whether the grant has entered into force in each designated state. As such, these quasi-legal status events may be a useful means of gaining a rapid 'first insight' into whether validation could have taken place. This information should then be supplemented by consulting the national register, to establish the absolute status.

3. Overview of different translation regimes in Europe

The requirements for a patent applicant or proprietor to prepare translations of their specification have changed over time. It may be helpful to regard them as falling into five distinct phases, or regimes. Three such regimes, and their associated requirements, are in force across the European continent today; a further two are likely to be implemented in the next 10–20 years. Each phase will be outlined briefly in this section. The most important current phases will be expanded in sections 4 and 5 of this paper.

3.1. Phase I: national patent protection only

Prior to the start of operations at the EPO, the only method by which a patent applicant could obtain protection across the continent of Europe was by filing a national application in each country where protection was sought. Under the Paris Convention system, this would mean that the applicant would need to have their application in a form which was acceptable to each national IP office by the end of the Convention year – in practice, by around 11 months after priority. In the 1960s and 1970s, it was relatively rare for a national office to accept a filing in any language other than an official language of the country concerned. This meant that, for example, a U.S.-based company which had made a priority filing in English at the USPTO had a maximum of 11 months in which to commission translations into French, German, Spanish, Italian etc. for deposit at each European national office. In practice, they would

often have a shorter time than that, since the decisions as to which Convention filings were to be made – and hence which translations would be needed – might not be concluded until much closer to the end of the Convention year, effectively creating very tight deadlines for the completion of the official documents.

This process of Convention filing meant that much of the expense of supplying translations was incurred very early in the patent application process, effectively 'front-loading' the costs of seeking multi-national patent protection. Of course, if any of the national patent offices rejected the application, the money spent on translation was wasted; no benefit in the form of granted patent rights would ever be obtained.

3.2. Phase II: initial operations at the EPO

When the European Patent Office opened its doors for business on 1st June 1978, the initial outcome was a simplification of the application process for the member states, which at that point numbered only seven. From the beginning, the EPO has allowed applicants to file an application in a language other than one of the three official EPO languages, with a requirement that it be translated into any one of English, French or German within a short time period [3]. After centralised examination in an official language, the text of the final granted document is issued in the same language, but with the claims section supplemented by translations into the other two [4]. At this early point in the EPO's life, this arrangement seemed to be a reasonable solution. The first EP grants were issued in early 1980 and, as expected, were distributed across all three official languages of the Office. The proportion of English:-German:French granted documents has been broadly stable at 6:3:1 since the first publications to date [5].

However, as more and more countries became member states of the EPO, the issuance of a granted patent specification in which no part was readily available in a state's official language became more problematic. This was partly solved by most states invoking their optional right under the EPC, to require the deposit of post-grant translations [6]. However, this has led to a complex situation where patent proprietors are faced with spiralling costs at the moment of patent grant, simply in order to ensure that their patent enters into force in each desired state. These costs are in addition to national renewal fees.

Despite these disadvantages, the EPO's operations have achieved a major time-shift in the cost burden to the applicant. Instead of having to lodge multiple translations at the point of filing, with the potential of wasted resource if no patent is granted, this expense is now shifted to the end of the patent prosecution process, once the final form of the claims are known and the patent has been granted. This means that the financial outlay has been pushed back by an average of 3–4 years. If the applicant has opted to enter the EPO via the Patent Co-operation Treaty route, this builds in an additional period wherein the application text can remain in its original language.

3.3. Phase III: the implementation of the London Agreement

Despite the advantages of centralised examination in a limited set of languages, it soon became clear that the expanding membership of the EPO was not being well-served in terms of information disclosure. During the 1990s, efforts began to negotiate a solution. Major steps forward came through an intergovernmental conference in Paris in 1999 [7], and were finally concluded at a

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