

Editorial

A Hole in the Simple Market

Don't say it too loud, but the Single Market didn't magically appear at midnight on 31 December last. A lot of it was there on cue, but for intellectual property lawyers there wasn't much to get excited about.

Recognised in the 1992 white paper as an essential part of the process of completing the internal market, intellectual property had been on the Community's agenda from the start. But even those existing proposals which that document merely adopted and assimilated to the programme (like the Community Patent Convention and the Trade Marks Regulation) are still stalled.

In the copyright field, it is true, there has been a flurry of legislative activity: two directives have been adopted since the Commission published its green paper, "Copyright and the Challenge of Technology"; the Council has pronounced (by Resolution rather than by Decision as originally envisaged) on membership of the Berne and Rome Convention systems; and three further draft directives continue to occupy the legislative organs of the Community.

The Community Patent Convention, on the other hand, remains impaled on the horns of the "two-tier" dilemma: whether to go ahead with those Member States able to proceed, or to wait for the rest to join in. Spain refuses to subscribe to a two-tier solution, arguing that it committed itself on joining the Community only to adhere to a convention which all the other members of the club accepted. This has more to do with securing the Community Trade Marks Office for Madrid than with anything actually to do with patents. So, for reasons with no logic in law, patents and trade marks become inextricably linked.

The CTMO's site remains the great stumbling block to the creation of the trade marks system which will prove so useful to Community industry. Perhaps the importance of the Community Patent has evaporated in the waiting – the existing European Patent Convention, on which the CPC will be built, already does most of the things the CPC is intended to deliver – but there is nothing to do the job of the Community Trade Marks

Regulation. The Madrid Agreement brings together too few States, and has drawbacks such as the need for a national registration and the possibility of central attack which make it unacceptable to the present non-members whose adherence is essential to its increased utility.

The second part of the Community's approach to trade marks is to harmonise the laws of the Member States, so that the only reason for going for national as opposed to Community protection is the scope and extent of the protection the applicant actually needs (which determines to a large extent the cost of securing protection). The Directive was adapted by the Council now four years ago, but still the UK has conspicuously failed to meet its requirements. Legislative time must urgently be found to comply with the Directive's requirements, which stipulated the end of 1992 as the deadline (and that after it had already been extended by a year).

Then there is the draft Community Designs Regulation and the accompanying Directive. The most difficult area of Community intellectual property law, the Commission wisely left designs until last: but, having produced a proposal which received a generally warm welcome, the Commission has run into the obstacle of the vested interest

of the UK car body panel industry. It is a measure of the difficulties inherent in trying to legislate for design protection (as the British government can testify) that this sector can hold up the entire process of reform.

The Commission should have known things would not be easy: in the early sixties a working party on the subject concluded that even with only six Member States the subject was best left alone. But even in post-Single Act Europe national vested interests seem capable of denying the vast majority a rational Community-wide intellectual property system.

Article 100A, by which Mrs Thatcher (as she then was) took more steps down the road to federal government than the keenest proponents of Maastricht imagine in their wildest dreams, cannot help the Community Patent Convention or the Trade Mark Regulation (the fate of which turns on a decision about a package of institutions needing homes). But it can speed the introduction of harmonised industrial design protection, paving the way for a regulation creating a new unitary right and ridding us forever of the destructive special interest pleading which has so long beset this area of the law.

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