The World Patent and the World Patent Litigation System

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Imagine: Wouldn't it be fantastic to have one single patent which you could apply for at the WPO, the World Patent Office? A World Patent, which would be valid worldwide and which could be enforced in each single country of the world with worldwide effect? Decisions of the national local chambers of the World Patent Court (WPC) could be appealed at the WPSGC, the World Patent Global Supreme Court. Wouldn't this be a major breakthrough in improving IP protection and decreasing patent costs for the industry?
Well as always, the problem comes with the details: Shall the system allow distinguishing between first, second and third World Patents? Will there be an exemption for extraterrestrial use? And what about the language regime?

While Europe is still struggling to establish a unitary patent and a European litigation system, the IP judges of the world already seem to have a much broader perspective.

The global perspective of Patent Judges could be witnessed at the (already) 6th Interna-tional Judges Conference which took place in Brussels from May 23 until May 25. It was, in terms of quantity, quality and diversity a truly impressive gathering of Patent Judges.

65 Judges from all five continents have been participating. Judges from Australia, Bel-gium, Brazil, Canada, China, the Czech Republic, Ecuador, Finland, France, Germany, Hungary, India, Israel, Italy, Japan, Korea, Luxembourg, Malaysia, The Netherlands, Pa-nama, Paraguay, Poland, Portugal, Romania, Russia, Singapore, South Africa, Sweden, Switzerland, Taiwan, Thailand, Turkey, the United Kingdom and the United States have been there, among them an impressive number of Supreme Court judges.

The conference offered opportunities for internal discussions between them and at in plenary sessions.

Most importantly, during the conference they have agreed to establish a provisional World Patent Court which has already heard four (!) cases during the conference, which is impressive in view of the average duration of court proceedings in the national courts.

Four chambers of the WPC have been established; each of them publicly discussed one case.

The first chamber had to deal with medical devices: GlucoCare sells a small, pocketsize electronic meter, the GlucoCare-meter for controlling the blood glucose levels of di-abetic patients and disposable test strips which are designed to be read by the Gluco-seCare-meter. While the GlucoseCare-meter is provided for free, the test strips are very popular. The patent for the chemistry of the test strips has already expired, how-ever GlucoCare owns a patent covering the specific configuration (a triangular notch) of its test strips, which provides significant advantages in collecting the blood samples. GlucoCare has granted a license to a first generic with a royalty rate increasing with the volume, which practically limits the market share to 5% of GlucoCare's market share.

Generic 2 is offering an infringing test strip of inferior quality at a steep discount, re-sulting in a market share of already 25% after only three months. This market share is rising 5 % a month, which will render GlucoCare's business unprofitable within a year.

Due to the high price of GlucoCare's test strips, many patients do not test their blood glucose with the required frequency.

The court had to decide what remedies would be available to GlucoCare both prelimi-narily and after a full trial.

The Court decided that GlucoCare should be able to obtain an injunction; a preliminary one in expedited proceedings and a permanent one after proceedings on the merits have been finalized. It was also ruled that no compulsory license should be granted to Generic 2. However, this decision was not unanimous. There was a dissenting opinion of the US judge, who argued that an injunction should not be granted automatically, but only after a thorough review of all interests involved.

The court further decided that Generic 2 would be liable for damages. GlucoCare could either ask for lost profits, the profits of the generic or a reasonable royalty. The court was vague with respect to the amount to be paid. One of the judges (who happened to be Dutch but could have been German, too) confessed that his previous national experience with damage awards is rather underdeveloped, usually the court "guesses" the damages, which causes the parties to settle prior to a judgment.

The second chamber of the World Patent Court had to rule on the validity of a patent for flexible solar panels with a multi-layer-barrier film. Here the court reached a unanimous decision with respect to the result. However, again, there was a dissenting opinion of the US judge with respect to the relevance of secondary evidence for the decision, for instance a long felt need, market success or the like. He argued that these elements, although not necessarily equally important, should play a role in determining the inventive step. The other judges were reluctant to put much weight on these elements and ruled out that they could materially change the picture.

The third chamber of the World Patent Court had to decide upon the procedural rules it is going to apply for the proceedings, in particular whether and to what extent dis-covery should be allowed. The court ruled that, if allowed at all, discovery should be limited to aspects which will definitely be relevant to the case. Once again, there was a dissenting opinion of the US-judge, who felt obliged to allow for unlimited disclosure, even if delays proceedings and increases the costs significantly. Since the details remained unclear, the court adjourned the final decision.

The fourth chamber was asked to provide suggestions for a revision of the World patent law with respect to exceptions of patentability. Should patents be allowed for diagnosis and medical treatments, business methods patents and computer programs?

The court ruled that patents for diagnosis and medical treatments should be allowed, however physicians should be privileged. The court denied to allow patents for busi-ness methods and computer programs and insisted on technicality as a mandatory requirement of patentability. Once again, there was a dissenting opinion of the US judge, who wished to allow patents on business methods and computer programs. According to his opinion, the requirement of novelty and inventive step should suffice to sieve out unwanted protection.

These first four cases of the World Patent Court revealed that there is a broad consensus between the vast majority of the various national judges about the basic principles of the law and the proceedings to be applied in future. It proved to be a promising test run for the future World Patent System.

In the meantime the nations continued to reform their national patent laws, as was reported on the occasion of the conference.

As of January 1, 2012 Switzerland will establish a Swiss Federal Patent Court, which will have jurisdiction for all patent related proceedings. The designated President of this court, Judge Brändle, intends to provide fast and efficient proceedings and to set-tle about 50% of the cases filed. Wouldn't it be nice to resolve patent disputes on the occasion of skiing holidays in the Swiss Alps?

In the US the New Patent Reform Bill passed the Senate and the House of Representatives and will come into force with some additional amendments in the near future.
It will include a small belated revolution: It will change the system from "first to invent" to "first to file", which for better marketing is called the "first inventor to file" system. Further key elements include a twelve month grace period, a new definition of prior art now including public disclosures in any country, the introduction of a prior use defense for all patents and the deletion of the best mode requirement as basis for patent nullification. The law will also introduce a new procedure similar to the opposition known in the rest of the world: the so called Post Grant Review of patents at the USPTO. Well, the US lawmakers were definitely neither the first to invent nor the first to file these provisions, but better well copied than no progress.

China is continuing its long march for an effective patent system and reported continuing progress according to the most recent five-year plan of the government.

Last but not least once again the never ending story of European Patent system reform was told.

Maybe we will already have a World Patent and a World Patent Court in the meantime. Enough qualified judges are available.

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