

Industry group: 'Unified Patent Court hands patent trolls a powerful weapon'

Kluwer Patent Blog

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Activities of Patent assertion entities (PAEs) in Europe are increasing dramatically and are encouraged by the Rules of Procedure of the upcoming Unified Patent Court, especially the possibility to obtain an EU wide injunction. This is argued by Intellectual Property 2 Innovate (IP2I), a coalition made up with nine companies 'that create innovative products and services in Europe', and two European industry groups that represent over 35 companies. Its members include Adidas, Bull, Daimler, Proximus, SAP, Spotify, Wilko, Intel and Google. IP2I says 'incomplete' and 'outdated' findings of a study of the European Commission fail to show how serious the problem is and calls for a range of measures. Kluwer IP Law interviewed Patrick Oliver, Executive Director of IP2I.

According to a recent IP2I *position paper*, an empirical study of the registers for recording patent ownership in Europe demonstrated that PAE purchases of European patents increased ten-fold from 2005 to 2015. Why do you think this is? Is it linked to the new Unitary Patent system?

'It seems clear that the PAE strategies that were so lucrative in the US are migrating to Europe. This may be due in part to the reforms recently introduced in the US that have decreased the attractiveness of and possibilities for abuses of the US patent legal system. It also took time for US-based trolls to understand and focus on opportunities in Europe. Undoubtedly, the publicity surrounding the single European patent and the UPC helped attract their interest beyond the US.

In the *position paper*, IP2I states: 'Without change, the UPC potentially creates an open invitation to PAEs. The threat of an injunction that applies across the European Union is a powerful weapon, and the UPC hands PAEs exactly such a weapon, which they are preparing to use. The UPC offers other attractions to PAEs also: they will have more time to prepare for the case than the defendant and they will be able to choose the ideal venue for the hearing.' Would IP2I like to see changes to the UPC's rules?

'The UPC rules have only recently been finalized so changes are unlikely in the near-term. Equally important, however, is the judicial practice by individual courts and in the different Member States. By calling attention to targeted abuses and the tremendous leverage that a permanent injunction can give a PAE, we hope to make judicial authorities more aware of how the procedures are used so that they will exercise their supervisory management authority and discretion to rule in the interests of innovation and consumers.

IP2I would like to eliminate the injunction gap in the UPC system and clarify judges' discretion in the granting of injunctions. We hope that in deciding the appropriate remedy, the courts will consider the complexity of the accused product relative to the minor nature of an asserted patent - how an injunction on the whole product in that circumstance creates leverage beyond the value of the patented technology, and whether the plaintiff is an PAE or a competitor, for example.'

In deciding on interim or permanent injunctions, UPC judges (see article 62 and 63 of the *UPCA* and 211 of the *Rules of Procedure*) have discretionary power. Isn't that enough?

'Article 62(2) of the UPC Agreement explicitly states that the UPC shall have the discretion to weigh up the interests of the parties and, in particular, take into account the potential harm to the defendant resulting from the granting of the injunction. This is indeed a clear statement and we support it. Article 62 applies only to provisional injunctions, however.

Article 63, which governs permanent injunctions, does not include this statement. More guidance regarding permanent injunctions would be preferable, but we also believe that Article 63, especially when read in light of governing EU law, does give judges the discretion to deny an injunction and apply an alternative remedy in appropriate cases. In particular, Article 63 gives judges discretion by stating that they "may grant an injunction". Furthermore, the UPC must apply EU law, including the Intellectual Property Enforcement Directive (IPRED), Article 12 of which requires flexibility and Article 3 of which requires equity and proportionality in remedies.

How judges exercise that discretion will have a significant impact on the attractiveness of the UPC to patent trolls and the patent system's ability to support or harm innovation. That is why IP2I is highlighting the tremendous leverage that a permanent injunction can give to a PAE asserting a minor patent applied to a complex, high-tech product.'

Another issue IP2I mentions in the *position paper* and an accompanying video is the injunction gap. Many observers have concluded this is not likely to become a problem at the UPC, as there are many differences with the German system and there is no obligation to bifurcate, for instance. This has apparently not diminished the industry's worries?

'Bifurcation in the UPC remains possible. Some argue that judges have the authority to police this. But, if any do not and instead grant an automatic injunction after a finding of infringement and before validity is decided, they could harm innovation and create significant leverage for PAEs. Even if only some divisions allow bifurcation, they will create a risk of 'forum shopping' whereby PAEs will initiate infringement proceedings before divisions that bifurcate more systematically.'

Are the Unitary Patent and the Unified Patent Court an improvement for the industry?

'The Unitary Patent and the Unified Patent Court undoubtedly present several advantages in terms of harmonisation, reduced costs and red tape, and more rationality in the management of patent portfolios. Industry generally applauds this effort. One should not, however, overlook its possible downsides. PAEs themselves have publicly stated that they look forward to operating in a system that will automatically grant EU-wide injunctions.'

The EU Commissioner for the Digital Single Market, Andrus Ansip, recently turned down a request for action from IP2I. Why?

'In his reply letter, VP Ansip recognises that the phenomenon of PAEs is increasing in the EU but believes that most of our proposed actions (see below) are either already in place or will be achieved through the UPC.

What we see is that the rates of PAE activity measured in Europe are similar to what they were in the US prior to the patent litigation explosion of the mid-2000s, and they are trending upward fast. The US did not act fast enough to tackle this problem, and it got out of hand. We are concerned that instead of listening to the market, the Commission will also wait until this rise is 'proven' before taking corrective action.

Additionally, the UPC won't have jurisdiction to hear disputes relating to national patents, which will remain within the competence of national courts. Our focus is not just on the UPC but on national patent procedures and practice as well. For instance, the Commission, in its response, only refers to increased transparency of UPC decisions, which will be accessible, without acknowledging the need or proposing concrete steps to improve the access to patent decisions rendered by national courts.'

What actions would you like to see from the European Commission or EU member states?

'The facts that we experience daily in the market are different from those the Commission has developed to date. Data and findings from the 2016 JRC study on PAEs in Europe are either incomplete or out-dated. For this reason, IP2I urges the Commission to carry out a comprehensive fact-finding exercise to better appreciate the scale of the phenomenon of PAEs in Europe.

IP2I also calls on the Commission and/or EU member states to implement the following policy changes: (1) give judges clear, increased judicial discretion in the management of patent cases and the granting of appropriate remedies to counter abuses, (2) provide damages in lieu of an injunction where appropriate, (3) bridge the injunction gap by coordinating infringement and validity decisions where they are separate, (4) enhance fee shifting regimes and requiring the posting of bonds for underfunded entities, (5) promote higher patent quality, as well as (6) greater transparency of litigation data for better informed policy and decision-making. The proposed changes 1, 2, 4 and 6 could potentially be implemented through amendments to the current EU IPR legal framework, whose review may occur this year.'

In an article of IAM Media, *Industry association claims that Europe is under attack from patent trolls: but where's the evidence?*, IP2I's position paper was criticized last week for not distinguishing between patent trolls and PAEs. According to IAM Media, 'those who do equate trolls with PAEs are seeking to create a debate that focuses not on patent quality, eligibility or infringement, but on the business model of the patent owner. They want people (more specifically legislators, policy-makers and courts) to make moral judgements about those asserting rights, not on those who might be infringing them.' What is your reaction to this?

'Links to most of our sources can be found on IP2I's website. Our position statement includes a discussion of PAEs and the different kinds of activities of concern to our members.'

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