

Kluwer Patent Blog

Constitutional Law Alert for the EPO

Thorsten Bausch (Hoffmann Eitle) · Monday, February 19th, 2018

What can people, in particular citizens of Munich and Bavaria, do if they feel that elementary constitutional rights are infringed, not somewhere abroad and far away, but literally next door, at the Isar river banks or in the Pschorrhöfe building?

Unfortunately, this is no rhetorical question. If such things happen in the jurisdiction of German courts and under German government, German citizens can discuss them with the relevant office or authority, seek redress to court, or they can choose the political pathway and vote for a party that at least promises to deal with the violation by changing the law, if others choose to ignore it.

But what if the authority in question is the European Patent Office, for which the EPC Contracting States have agreed the following in Article 3 of the [Protocol on Privileges and Immunities](#) of the European Patent Organisation:

Within the scope of its official activities the Organisation shall have immunity from jurisdiction and execution, (...)

In effect, this means there is no court available to address such alleged violations. At the EPO level, there are no independent courts, and in particular the Boards of Appeal are no such independent courts, as has been discussed and shown many times on this blog. The examples of [Mr. Mennessier](#) and [Mr. Corcoran](#) provide ample evidence how dependent the individual Board of Appeal members are on decisions and actions by the EPO's executive branch. The [non-decision by the Enlarged Board of Appeal](#) on Mr. Corcoran shows how intimidated even the members of the "highest judicial instance within the EPO" are and how threatened they feel in the absence of support by the Administrative Council. The Boards of Appeal have been moved, mostly against their will and on a very questionable legal foundation, to different premises outside Munich by a decision of the Administrative Council on a proposal by the President. Yet they still have [no autonomy from the EPO President](#), neither financially, nor organizational, nor otherwise.

The political way to change and improve these deplorable circumstances is a thorny one. But at least some brave Bavarians have meanwhile woken up and rise to the challenge. As can be seen in the following [Antrag FW Landtag](#) (unfortunately, in

German only), the state representatives of the “Freie Wähler” (free voters) party are requesting the Bavarian State Parliament to decide as follows:

The state government is requested to plead, on a national and European level, for measures within the European Patent Office that ensure independence of the Boards of Appeal and thus guarantee effective legal protection.

The reasoning is basically the story about Mr. Corcoran and the ILOAT decision, reinforced by the opinion by Prof. Broß. In addition, reference is made to the four pending constitutional complaints before the Federal Constitutional Court in regard to the EPO and “as a highlight” the complaint against the UPCA, which the representatives characterize as follows:

This happened before the successful request for a provisional order (File no. 2 BvR 739/97) which might be directed at the concerns with regard to the rule of law in proceedings before the EPO.

The authors of the Freie Wähler petition conclude:

Therefore, the state government should get involved, on a federal and European level, in order to abolish the existing deficits in legal protection and to make sure that the high reputation of this international organization is not damaged any further.

Who are the “Freie Wähler”? Well, I can tell you for sure that they are no revolutionaries; just look at their [website](#) or listen to the most recent [speech](#) of their chairman Mr. Aiwanger. They characterize themselves as *„an important force in the political center. We support a policy that puts the human front and central, beyond any party ideology: factual, independent and close to citizens.”* I think this is a fair description. They may not be very influential on a federal level, but their main ambition is to make an independent, non-ideological and value-conservative policy on a local and state level. If the Freie Wähler stand up and file a pretty sensible and non-ideological resolution like this one, then I would not be surprised if it will actually be passed by the state parliament on 20/2/2018. At least I hope so, even though it will obviously not change much in the short run.

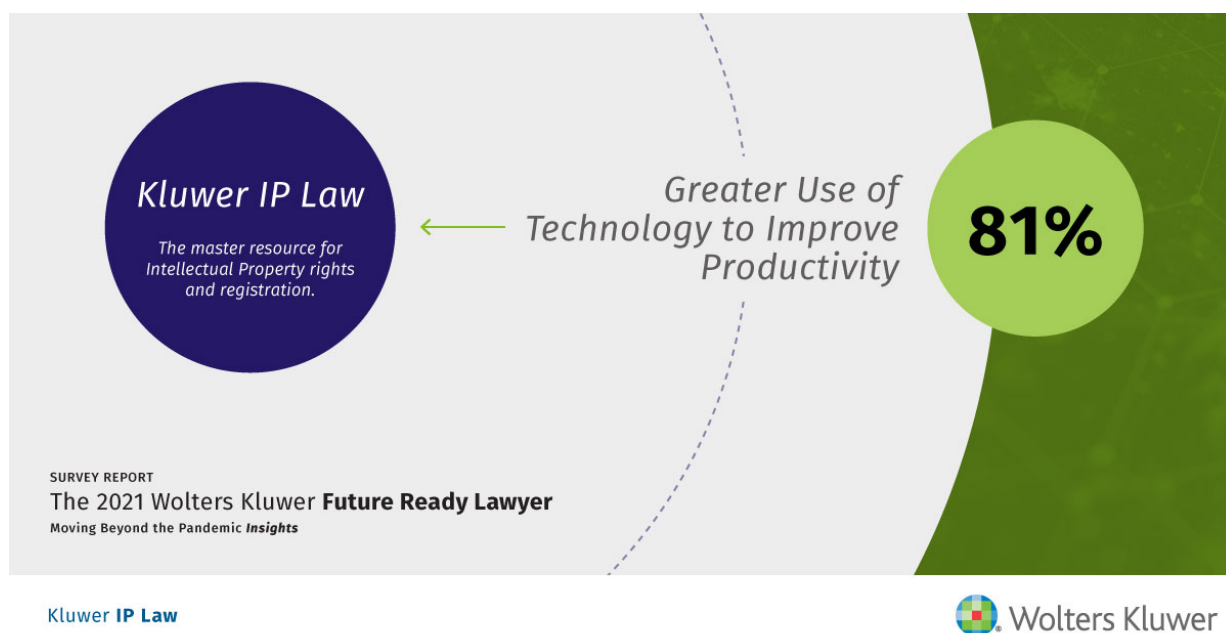
But even if it does not, motions like this should really ring the alarm bells both at the Administrative Council level and in the German Ministry of Justice. We cannot and should not just sit and watch what happens on the Isar riverbanks. The EPO has deserved better and our constitutions demand it.

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