Kluwer Patent Blog

Most popular posts in 2020

Kluwer Patent blogger · Thursday, December 24th, 2020

Familiar topics, new issues and a characteristic number one: welcome to the Kluwer Patent Blog's chart with most popular items of 2020.

As topics such as the EPO and the UPC usually – and also this year – dominate the top ten of most popular articles, we'd like to start with some posts ranked just a bit lower, but in our eyes equally interesting and a good display of the variety of articles on the blog. To begin with the blogpost 2020 is set to be a crucial year for Standard-Essential Patent litigation in Europe. The article discusses the divergences between various states in their interpretation of CJEU jurisprudence and the importance of the – then – upcoming judgment of the UK Supreme Court in Unwired Planet v Huawei. "The subsequent litigation in Germany, the Netherlands and the UK indicates that more detailed guidance is required from the CJEU in order for a harmonised approach to be taken by national courts. It remains to be seen what position the UK Supreme Court takes on the issue of SEPs and FRAND, and whether it will continue to reference the CJEU Huawei guidance in future litigation that takes place, post-Brexit."

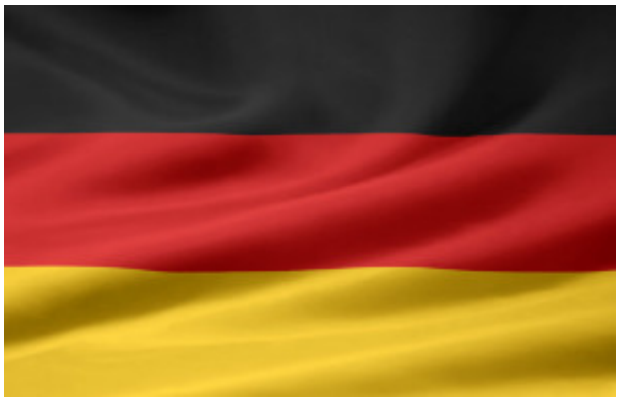
There were quite a few readers as well for the article Neurim under fire again? – The Advocate General's opinion in the Santen referral (C-673/18), a case concerning an SPC based on a second medical use/formulation patent. "Altogether, the suggested approach of applying Neurim that has been outlined by AG Pitruzzella (albeit only as a secondary option) appears remarkably balanced and well thought through. If adopted by the CJEU, it would finally put the widely acclaimed Neurim judgment that was rendered almost a decade ago on solid legal footing and would cement the availability of SPCs for new therapeutic applications of previously approved drugs."

The blogpost Compulsory licenses granted by public authorities: an application in the Covid-19 crisis in France? Part 1 discusses the emergency law France introduced on 23 March 2020 to deal with the covid-19 epidemic. "The existing legislative framework on compulsory licenses needs to be reviewed in order to better understand why this framework is so ill-suited to the current situation and why these emergency measures were therefore necessary."

Top ten

And then the ten most popular articles**.** In tenth position is an blogpost discussing a case in India: Monsanto v. Nuziveedu: A Missed Opportunity by the Supreme Court? "The primary issue (…) was whether NAS [an alternative method for pesticides and insecticides, ed.] becomes "a part of the plant or seed" after insertion? If answered in the affirmative, the matter fell within the scope of the PPV Act. However, if answered in the negative, it fell under the Patents Act. (…) Since the

matter involved such an important question of law relating to public policy, the SC [Supreme Court] thus missed an excellent opportunity by remanding the same, more so because it was well aware of the judicial errors committed by Delhi HC. Also, the peculiar circumstances of the instant case warranted that the Supreme Court exercise its extra-ordinary jurisdiction."



Number **nine**, Crucial decision on German constitutional complaint against UPCA to be published on Friday, and number **four**, Federal Constitutional Court voids the German UPCA Ratification Law, are two sides of the same coin. The decision of the FCC last March, crucial for the future of the new European patent system, had been waited for for three full years. "The constitutional appeal was successful, because the ratification law was not signed by the requisite 2/3 majority of the 'members of the Bundestag'. While the Bundestag's decision was unanimous, only about 35-38 MPs were present when it came to the final vote."

Since March a lot has happened, the parliamentary ratification was repeated in the proper way. But, as turned out this week, two new constitutional complaints were filed immediately after the end of the parliamentary procedure on 18 December 2020. As the Federal Constitutional Court doesn't release any details about the procedure, it is uncertain what the consequences of these new complaints may be, but new severe delays cannot be excluded.

Number **eight**, a November article titled The EPO's Ride from Patentamt to Oktroybureau, is a critical post about the imposition of video conferencing at the EPO: "So, to cut it short, VICO as a means to hold oral proceedings in opposition proceedings were available since (at least) May 2020. Yet alas, they were not accepted by "the patent profession" to an extent sufficient to clear the EPO's backlog. Thus, time to tell the profession how to do it properly. Thank you, Mr. President. It is more the style of this communication that disturbs me than the substance of the President's decision. I (and I think this applies to the majority of the patent profession) do realize that we live in difficult times, and that oral proceedings in person before the Opposition Divisions are not exactly what should be done in order to keep your contacts to the necessary minimum. (…) But is this not the point in time where to conduct a public consultation and collect both the ideas of stakeholders and their concerns before announcing such a decision?"

A consultation. That's what was organized after the EPO launched plans for oral proceedings via video conference before the Board of Appeals. Response to EPO consultation: Don't impose oral proceedings by videoconference, was the number **seven** of year's list, discussing the outcome. The pros and cons of video conferencing were discussed at length as well below the article. No less than 73 comments, it must be a record for the blog, were filed. Although we hope to provide you with interesting posts ourselves, we have also been pleased to hear people like our blog because of the interesting discussions below the blogposts. Thank you!

Number **six**: back to the Unitary Patent system with the report: Preparatory Committee: The Unitary Patent system can be functional in a near future. More videoconferencing here: "The meeting, the first since March 2017, was 100% digital due to the corona pandemic and travel restrictions. According to the Preparatory Committee, it set 'a good precedent for the future working of the UPC as a digital court'."

Is the Unitary Patent system worthwhile without the UK?, is the title and question lingering above the UP system, even without the German struggles to complete ratification of the UPCA. In the blogpost, number **five**, Kevin Mooney, partner of Simmons & Simmons, reacts to the decision of the government of Boris Johnson last February to back out of the UP project. “For Kevin Mooney personally, the decision is a great deception as well. Everyone who has followed the steps toward the creation of the Unified Patent Court over the last years, has had at least one, more likely several meetings where Mooney, as Chairman of the Rules and Procedure Committee of the UPC Preparatory Committee, displayed his enthusiasm and told about the progress of the project. He was always full of confidence that despite the drawbacks, it would be a success sooner or later. “It was misplaced optimism, I’m afraid. I’ve devoted six years of my life to the Unified Patent Court. Over the years I’ve given 50 presentations about it; the only thing I had to change regularly was the expected opening date for the UPC. I never anticipated this would happen.”

News from and about Eponia, published in March, is number three in the list. Although the European Patent Office has not been in the news on the blog as frequently as in the past years, it seems the parliamentary questions in this post, of the liberal FDP in Germany about social and financial issues, are still relevant. Some of them: “3. In the opinion of the Government, are there any deficits in questions of financial management and the treatment of staff at the EPO? (…); 4. Was the Government aware of the accusations published in the press that staff rights were being violated by surveillance and by labour law restrictions under the EPO’s previous management and what is its view thereon?; 5. To the knowledge of the Government, have complaints been made to the police against the EPO? 6. Was the Government aware of the accusation published in the press of employee surveillance by an internal investigation unit under the EPO’s previous management, and what is its assessment thereon?”

Last week a strike was held at the EPO once more which, according to the trade union SUEPO “will be the start of a year of social conflict to defend the future of the Staff and their families.” The Central Staff Commission called upon colleagues to join the strike: ‘Regrettably, we can only report a continued erosion of our work package, an erosion that has even accelerated during these times of pandemic’.”

What’s the worst that could happen – Constitutional complaints against the EPO in Germany is the number two in the line up of best read articles this year. A post which was published almost a year ago, but which is as relevant now as then, taking into account it discusses the five constitutional complaints which are pending before the Federal Constitutional Court. A decision was expected in 2020 but didn’t materialize and is now awaited in the upcoming months, or in any case 2021. “At issue is the lack of sufficient legal remedies at the EPO against negative decisions of the Boards of Appeal. I believe there is a clear risk that the BVerfG will uphold at least some of the constitutional complaints relating to the EPO. Such an outcome would likely mean that the European Patent Convention (EPC) in its present form is incompatible with the German constitution.”

Corona, what else? Isn’t it very much in style that the best read post of the Kluwer Patent Blog of 2020, the number 1, concerns the pandemic that has impacted the lives of all of us so deeply? German Government Plans Possibilities to Limit Patents In View of Corona Pandemic is an article of 24 March 2020, in which Simon Klopschinski of Rospatt Osten Pross explains the government intends enacting amendments to the German Act on the Prevention and Control of Infectious Diseases in Humans (…), which could also have an impact on patents. (…) The intended changes stipulate (…) that in an ‘epidemic situation’: “In order to ensure supply of products in the event of

a crisis, the effect of a patent can also be restricted in accordance with § 13 Patent Act, for example, in order to be able to produce vital active ingredients or medicines." The amendments entered into force a few days later.

We wish you all the best for 2021 and hope to see you back on these pages.

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This entry was posted on Thursday, December 24th, 2020 at 7:07 am and is filed under Brexit, European Union, Germany, UPC
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