Kluwer Patent Blog

2021: A Patentee Odyssey

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The Odyssey, which became synonymous for an eventful journey, originally refers to the perilous return of Odysseus to his homeland of Ithaca after the Trojan War. After the year 2020, marked by the COVID-19 pandemic, 2021 also announces numerous challenges for the world, and patentees will undoubtedly have their lot.

Without trying to take the part of the Pythia of Delphi, I would like to briefly evoke here some of the challenges that await patentees for 2021 in Europe, while suggesting personal leads for reflection.

UPC

Everyone (in the field of European Patent Law) has these initials on the lips at this beginning of 2021, after BREXIT led to the withdrawal of the United Kingdom, on the one hand, and the ratification of the Agreement by the German *Bundesrat* following the favorable decision of the German constitutional judge, on the other hand.

And now. What's next? Two new complaints have been submitted to the German Constitutional Court! Back to the future for the UPC? Difficult to answer by now: We do not know the opinion of the Court, especially if the request is going to be made to the German President to interrupt the ratification procedure, which, once again, only requires his signature to become Law.

At the same time, a petition led by academics – in which I took part – had already enjoined the *Bundesrat* to reject ratification. It is true that – as noted in the Report of the de Boufflers Institute to the European Commission – the current project has, among other issues, a significant (and not new) original weakness: It is not strictly speaking a "EU" project. The lack of involvement of the European Union undoubtedly explains, in part, the current lack of interest of the European leaders in this project, that is nevertheless fundamental economically speaking, particularly given the growing importance of innovation in "high income" countries.

Eventually, one last question remains: should we be satisfied with a project as imperfect as the UPC? It is not sure. If perfection is only divine, the "compromise" of putting the EU aside seems undesirable, notably when such European systems are working well in trademark and design Laws.

Nokia vs. Daimler

After Huawei vs. ZTE, this is the second FRAND case before the Court of Justice of the European Union (CJEU). This case is the result of both a fluctuating case law on the interpretation of the Huawei case and the plethora of litigations related to connected cars in Germany.

The CJEU is sometimes seen as a kind of Themis (i.e. the Ancient Greek God of Justice) that will (finally) separate the patentees and the implementers with its divine sword. Unfortunately, and as the referral itself proves it, instead of drawing such a sword, the Court has for the time being used a Themis banner with “competition law” written on it.

Of course, it seems legitimate to supervise FRAND negotiations and to give more details to patentees and implementers on the conformity of these negotiations with competition law. But a major problem recalled in the *Unwired* case remains ignored by the EUCJ: this reasoning based on competition law completely ignores that the FRAND commitment is given to a standardization organization, which rules that apply to this commitment should prevail in the event of a litigation. But such a focus on the origin of FRAND would nevertheless leads to more complex and fundamental problems: The role of these organizations (e.g. the lack of examination of essentiality) and their operation (e.g. particularly the standardization procedures). Thus, the recent Report of the “Pilot Project” on the check of essentiality may be a better lead for the future than the outcome of the EUCJ judgments.

G 1/19

One can doubt that the numbering “G 1/19” will be as successful in 2021 as the name “DABUS” in 2020. In the DABUS case, an applicant claimed to make an inventor out of a machine. But, honestly, apart from the expected media noise, we don’t really see the interest of such a request since at the end of the day the owner of the machine remained the owner of the patent (as the applicant has himself admitted).

The DABUS case had nonetheless the merit of directing the spotlight of patentability towards artificial intelligence (“AI”), although the wrong side was first illuminated: the subject of the patent right (i.e. the applicant and not the inventor, contrary to what the applicant claimed in DABUS) instead of its object (i.e. the invention).

The case G 1/19 currently before the EPO will perhaps be an opportunity to think about serious issues raised by AI. The sufficiency of disclosure requirement, for instance. Should the parameterized data on an AI be provided? Or the inventive step: Where does it lies when an AI participates in the inventive process?

Covid-19 and compulsory licensing

Last but not least. While the first vaccines are distributed in Europe, we cannot fail to note that the pandemic has shaken up the patent system[1]. In 2020, many patentees have purely and simply waived their rights, Germany has decreed expropriation. A few patent pledges were put in place. A few ex-officio licenses were also granted.

Overall, the results are not as positive as the patent pledges – often used as examples – suggest. It is still questionable whether we couldn’t make more vaccines if every manufacturer (and not only the patentees that own IP and know-how) could produce them. Faced with a new pandemic the European Union would certainly depend on countries where active ingredient factories are mainly located (i.e. China and India).

What about patents in this story? All the vaccines and treatments are linked to patents, patent applications, know how, and administrative authorizations. The existence of an *ex-officio* licensing system (really effective) could help to increase the production with new manufacturers on the market. It could also, at least, be a lever to encourage manufacturers to set up factories in EU (and it would not be a luxury with the foreseeable “social” context to come).

At the end of the day, the topic of compulsory licenses, finally mentioned by the European Commission in its last Action Plan on IP, seems too marginalized. Such a system, if it were efficient, would publicize the usefulness of patents, but above all, by doing so, we would avoid purely and simply plundering the patentees through expropriations. In French we could say “c’est un mal pour un bien”.

At any rate, if the question of the legitimacy of patent law is not to be systematically put back on the agenda, perhaps it should also be remembered that the use of a property right can (exceptionally) be limited and that this limitation of its absolute character is part of its social justification.

[1] M. Dhenne, *COVID-19: Hope for a New World of IP?* (October 19, 2020), available at SSRN: https://ssrn.com/abstract=3714584.

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