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Implementation of UPC: So What

Matthieu Dhenne (Ipsilon) · Thursday, January 27th, 2022

A French government press release dated January 20, 2022, announces the creation of a harmonized intellectual property framework with the entry into force of the Unified Patent Court following the ratification of the international agreement concerning it. But what does it mean exactly for us?

Regular readers of this blog are aware of my passion for music and, in this instance, will note that the issue being raised today by the UPC is also one that has given rise to arguably one of the most majestic recordings in music history ([So What](#)). In any case, let's get down to our business: how will the JUB be set up? What are the consequences for practitioners?

The setting up of the UPC: the Provisional Application Period

This protocol automatically entered into force on Wednesday, January 19, that is, when thirteen states signed it. Now, as soon as the said protocol enters into force, preparations for the implementation of the UPC will begin. These include the appointment of Judges, the establishment of the registry, the development of the computer system and the finalization of the rules of procedure. The schedule of fees and recoverable costs will also have to be determined.

In any case, the protocol provides that certain provisions of the UPCA will only enter into force provisionally. This is for example the case for article 7, which defines the organization of the first instance phase of the court with its local and regional divisions and its central division in Paris (with the Munich and London sections), but also for articles 10 to 19, which concern the registry, the various administrative, budgetary and advisory committees as well as the judges and their training. The same applies to Article 35 on the Mediation Centre and Article 41, which provide that the Rules of Procedure will only be finally adopted by the Administrative Committee after the European Commission has given its opinion. Finally, the same applies to the provisions relating to the statutes of the court, and in particular those relating to the elections of the presidents of the first instance and of the Court of Appeal.

Consequences of the Establishment of the UPC

We can congratulate ourselves on the establishment of such a system which should facilitate harmonization on a European scale and limit forum shopping. From a French point of view, it will notably allow French Judges to work together with their European counterparts and highlight the value of French Judges specialized in industrial property litigation (and of the jurisdictions from which they will come). Indeed, French decisions are still too little noticed at the international level, whereas many patent litigations are transnational. This is to be deplored in view of the quality of these decisions: a simple comparison with those of their European counterparts is enough to convince oneself of this. Moreover, we can expect a movement of harmonization of European Patent Law.

However, some reservations and questions remain. It is a complex system, in particular because of the distinction between European patents and European patents with unitary effect. This unitary effect will moreover have a cost, since it will imply the implementation of many important expenses to defend European patents with unitary effect before the Court: we can wonder here more particularly about the capacity of SMEs and other start-ups to become actors of this system, but also about their possible vulnerability facing such “European” actions of significant international actors.

This overall complexity as well as the cost of litigation before the UPC—more particularly for SMEs and start-ups—could, paradoxically, reinforce the attractiveness of the national litigation system to the benefit of a French patent whose value has been reinforced by the PACTE Law, thus creating unexpected competition to the upcoming European system. It will then be necessary, as many practitioners recommend, to finalize what was started with the PACTE Law: France should be able to be directly designated or elected during the national phases of international applications according to the PCT.

Finally, the impact of BREXIT on the fate of the UPC is also an important question: what about the impact of the exit of such an actor from European litigation outside the Agreement? Where will the section that was to be located across the Channel be distributed? In France or Germany (where the headquarters and a section are already located respectively) or elsewhere?

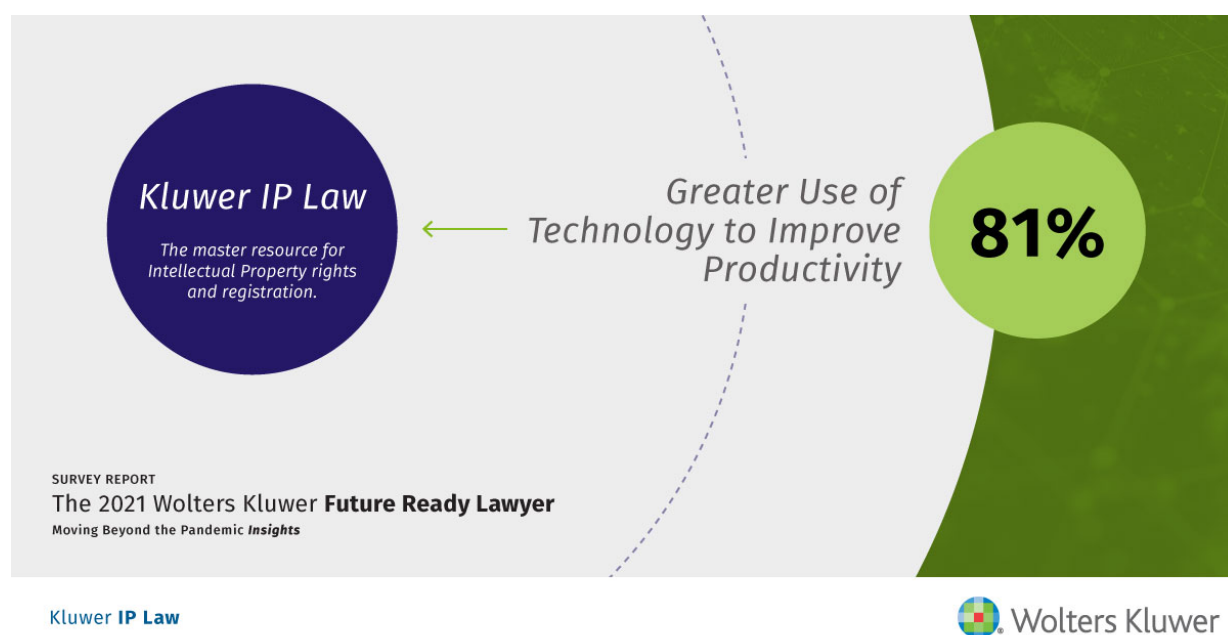
It seems to me that the centralization of the divisions at the level of the headquarters, in France, would be the most pragmatic solution (by facilitating the treatment of disputes) and the most logical since the most important organs of the European Patent Office are located in Germany and France constitutes the second European market. Let's hope that the French Presidency of the Union will give the French government enough inspiration to encourage such centralization.

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