

# Kluwer Patent Blog

## Ensuring the impartiality of part-time judges at the Unified Patent Court and the Swiss Federal Patent Court

Simon Holzer (MLL Meyerlustenberger Lachenal Froriep Ltd.) · Thursday, February 28th, 2013

Ensuring the independence and integrity of its judges is crucial for every court system.

After its first year of existence, the Swiss Federal Patent Court has slightly amended its [Guidelines on Independence](#) for the part-time judges of the Federal Patent Court. However, those guidelines have proven to be very useful in practice.

It is interesting to compare these guidelines with Article 7 of the planned [Statute of the Unified Patent Court](#), which also concerns the impartiality of the judges of the new Unified Patent Court.

Since both court systems are based on a pool of judges, including part-time judges, both systems have to deal with the possible conflicts of interest of those judges.

To ensure the independence of the judicial activity of the judges in the pool of judges Article 7 of the Statute of the Unified Patent Court provides that judges may not take part in the proceedings of a case in which they:

- (a) have taken part as adviser;
- (b) have been a party or have acted for one of the parties;
- (c) have been called upon to pronounce as a member of a court, tribunal, board of appeal, arbitration or mediation panel, a commission of inquiry or in any other capacity;
- (d) have a personal or financial interest in the case or in relation to one of the parties; or
- (e) are related to one of the parties or the representatives of the parties by family ties.

For once, the provisions of Swiss solution turn out to be considerably more detailed on the same topic.

For example, Article 4 of the Swiss Federal Patent Court's Guidelines on Independence provides as follows:

A Court member shall recuse him- or herself due to personal interest in a matter for the following reasons:

- a. The member is one of the parties to the dispute or is employed in a company that is closely affiliated with one of the parties to the dispute.
- b. The member advises or has advised one of the parties to the dispute or a third party in the matter in dispute or has otherwise influenced the matter in dispute in the capacity of a body or employee of such a party.
- c. The member advises or has advised one of the parties to the dispute in another matter during the previous three years and this activity is associated with significant income or is performed on a regular basis for the party to the dispute.
- d. The member advises or has advised a third party against one of the parties to the dispute in another matter during the previous year and this activity was associated with significant income or is performed on a regular basis against the party to the dispute.
- e. The member is or has been a body or employee of one of the parties to the dispute during the previous three years or has otherwise exerted a perceptible influence on one of the parties to the dispute, or possesses significant assets or other interests in one of the parties to the dispute or a closely affiliated company or has a vested interest in the outcome of the matter in dispute.
- f. The company for which a member of the Federal Patent Court works outside of the Court or a closely affiliated company advises or has previously advised one of the parties to the dispute or a third party in the same matter. The company for which a member of the Federal Patent Court works outside of the Court or a closely affiliated company advises or has previously advised one of the parties to the dispute in another matter during the previous three years or possesses significant assets or other interests in one of the parties to the dispute or a closely affiliated company or has a vested interest in the outcome of the matter in dispute.
- h. The company for which a member of the Federal Patent Court works outside of the Court or a closely affiliated company advises or has previously advised one of third parties against one of the parties to the dispute in another matter during the previous year and the activity was associated with significant income or is performed regularly against the party to the dispute.
- i. The member has publicly stated an opinion on the matter, whether in a written, verbal or other manner; this shall not extend to positions of a fundamentally general nature or publications of a legal or technical nature without a direct link to the matter.

Especially with regard to patent attorneys working as part-time judges of the Swiss Federal Patent Court the Guidelines on Independence carve out some situations that seem unproblematic but could arise rather often in practice.

Article 5 of the Guidelines on Independence rules that purely administrative activities for achieving or maintaining the validity of the Swiss part of a European patent of one of the parties to the dispute shall not be deemed to constitute advisory or grounds for recusal as long as the patent is not the matter in controversy in the dispute and provided that no significant income or income over and beyond the income for strictly administrative work is received through this administrative work for the party to the dispute.

In addition, purely administrative activities shall extend to the following in particular:

- a. Formal assumption of representation and the role as a service address in proceedings involving the Swiss Federal Institute of Intellectual Property.
- b. The submission of translations.
- c. The payment of fees and charges, in particular annual fees.

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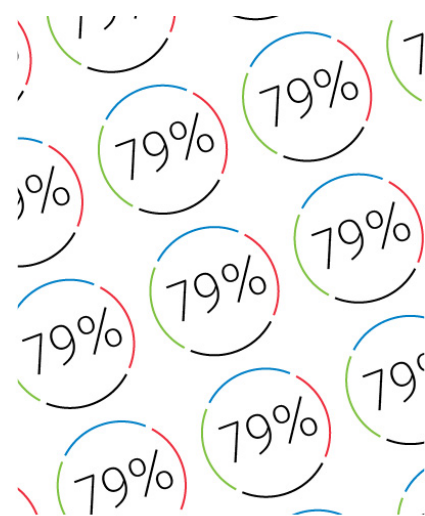
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