Kluwer Patent Blog

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Rik Lambers (Brinkhof) · Friday, June 28th, 2013

Now is the winter of our discontent, or so some may have thought when the Unified Patent Court ("UPC") agreement was signed on 19 February of this year. The rain came mainly from Spain, which started a fresh challenge to the legality of the Unitary Patent and Language Regulations before the CJEU this spring. And while the living seems easy this summertime, not so much for patent trolls. As our US contributor recently reported, the White House opened the legislative hunt on, in more flattering terms, these non-practising entities (NPEs). This prompted our Spanish contributor's question whether trolls will be kept at bay in Europe?

And what will fall bring us this year? At least the results of our first Kluwer Patent Blog poll. We would like to hear from you, our readers, and have your opinion on the previous seasons' patent activities. We will start with a much discussed topic that you will likely have given some thought: the option to bifurcate under Unified Patent Court procedure, and the implications this may have on litigation by NPEs.

Being the summertime, and the sun shining abundantly over most of Europe at this moment, we would like to start from a positive note, an envisioned goal of the unitary patent as considered in December 2012's Unitary Patent Regulation:

> *(4) Unitary patent protection will foster scientific and technological advances and the functioning of the internal market by making access to the patent system easier, less costly and legally secure. It will also improve the level of patent protection by making it possible to obtain uniform patent protection in the participating Member States and eliminate costs and complexity for undertakings throughout the Union. It should be available to proprietors of a European patent from both the participating Member States and from other States, regardless of their nationality, residence or place of establishment.*

This vision of uniform protection comes together with pan-European enforcement. A patent holder may claim and receive a pan-European injunction by litigating before one of the UPC divisions. On the other hand, the UPC agreement provides for a pan-European revocation of the patent by one decision. The action for infringement and a counterclaim for invalidity need not, however, be tried and judged at the same time by the same division. This is a consequence of the option to bifurcate under the UPC (Art. 33 UPC agreement), i.e. a division may decide to refer a counterclaim for revocation to the central division and proceed with the infringement action.

It is argued that the bifurcation option will be favourable to NPEs, which may shop for divisions that are inclined to bifurcate in order to obtain a pan-European injunction before the validity of the patent is tested (or threaten companies beforehand into patent licences to avoid such an injunction). As a result, the argument continues, NPE litigation in Europe will rise, with an increase in litigation costs, to the disadvantage of European industry.

But will it come to that? Will the UPC system end up being bifurcated, as some in the industry have argued? Will NPEs flee the White House's hunt and seek refuge at carefully selected UPC divisions? Food for your thoughts over the summer.

The poll is accessible below. You may also access the poll in the upper right corner of this website. Your responses are anonymous, although you may include your name and email address at the end of the poll, if you wish. The poll will remain open through August 31st 2013. We will compile the results in a special post on the Blog after the summer.

[SURVEYS 1]

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