Kluwer Patent Blog

‘Pro-patent bias is a serious risk at the Unified Patent Court’

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‘When all you have is a hammer, everything looks like a nail.’ At the EU Patent Package Congress in Brussels, organized on 17 October by the universities of Antwerp en Louvain attended by Kluwer IP Law, several speakers tackled the issue: is the creation of a specialized court for patent litigation necessarily positive?

For companies and innovation the answer, in theory, is yes. That’s why the Unified Patent Court (UPC) was created in the first place. Patent litigation would be centralized, and lawsuits in a large number of countries would no longer be necessary. Life was going to be a lot easier.

But specialization has its downsides too, critics in Brussels warned. The hammer metaphor has been used since the sixties of the last century to warn for overreliance on familiar tools or systems. In Brussels it was quoted by Rochelle Dreyfuss, a prominent IP and litigation expert from the US, to refer to the pro-patent bias that developed in the US Court of Appeals for the Federal Circuit (CAFC).

The CAFC was created in 1982 to handle all patent cases. The first 15 years of its decisions, only eight cases were reviewed, four of which were on procedural grounds. But over the last 15 years, the Supreme Court reviewed more than thirty cases, mostly placing stricter limits on substantial issues: patentability, validity and scope of patents, remedies.

What does the specialized judge think? ‘I am important, I do patents, therefore patents are important’, according to Rochelle Dreyfuss. She warned the UPC could also become a pro-patent court, not only because of its restricted focus, but for another reason as well. ‘The success of the new system cannot be entirely depending on people loving the UPC: all these judges that will be receiving a training in Hungary, for instance, or national and regional courts that will compete for patents holders’ business. They will inherently be in favor of the system.’

Dreyfuss’ concerns were echoed in a contribution of German political scientist Ingrid Schneider of the University of Hamburg, specialized in patent governance, and advisor for the German, Austrian and European Parliament on IP issues. Schneider qualifies the unitary patent (UP) as product of the ‘birth failure of the EU community patent’. She criticizes the lack of democratic control of parliaments and EU institutions on the UPC system and perceives a clear danger of tunnel vision and pro-patent bias. ‘It will be a hermetic, self-governing system of technocratic experts, the EPO, patent attorneys and large firms, with hardly any control mechanisms. It will only be semi-permeable for interests of patentees and have a disregard of public interests and human rights.’

Ingrid Schneider thinks the situation may become even more skewed than in the US. ‘As Spain and Italy disagreed to a EU-wide agreement, the so-called enhanced cooperation procedure was used to set up the UP package. This means EU institutions become mostly sidelined, including the European Court of Justice, which could act as a counterweight like the Supreme Court in the US.’

According to Esther van Zimmeren, expert in governance and IP law of the University of Antwerp and co-organizer of the Brussels congress, the UPC should learn from the experiences in the US and other countries. ‘In Japan, senior officials of the JPO are delegated to the IP courts and heard on patentability issues. The IP expertise comes from these officials. Judges are in a strict rotation system.’

Meanwhile, many critics pointed at the risk of forum shopping under the UPC system and the consequences this could have for the quality of patents. Plaintiffs will often be able to choose the division of the UPC where they will bring an action, because an alleged infringement occurs in many member states, for instance.

It may lead to competition between local and regional divisions that want to do business. Even more because the number of judges from the host country in the panel of a local division (one or two out of three) depends on the amount of cases (fifty is the crucial number) at the division (UPC Agreement art. 8).

As David Laliberté, director IP policy at Microsoft, argued: ‘Local divisions hearing a small amount of patent cases should not be penalized. Otherwise, they may have an incentive (real or perceived) to become pro-patentee and open the door to frivolous or abusive patent litigation in Europe.’

Ingrid Schneider painted an even grimmer picture: ‘A new court that wants to be liked by patentees, will strengthen patents, not nullify them. Standards will be lowered in the long run and several divisions may get involved in a patentability race to the bottom.’

Esther van Zimmeren agrees that there are many problems with the UPC. ‘Do we need it? Is it worth the enormous investments, in new buildings, trainings, IT-systems etc? I wished the court had had five more years to be set up. Then it would have been less of compromise, a better investment.’

David Laliberté of Microsoft is more optimistic, despite his concerns regarding forum shopping, bifurcation, injunctions and other issues: ‘We are collaborating with other industry players to address our concerns by recommending improvements to the UPC Rules of Procedure. We generally support the UP and UPC package, as it has the potential to cure problems and reduce the litigation costs of the old system. We look forward to participating in the upcoming consultation hearing on the Rules of Procedure.’

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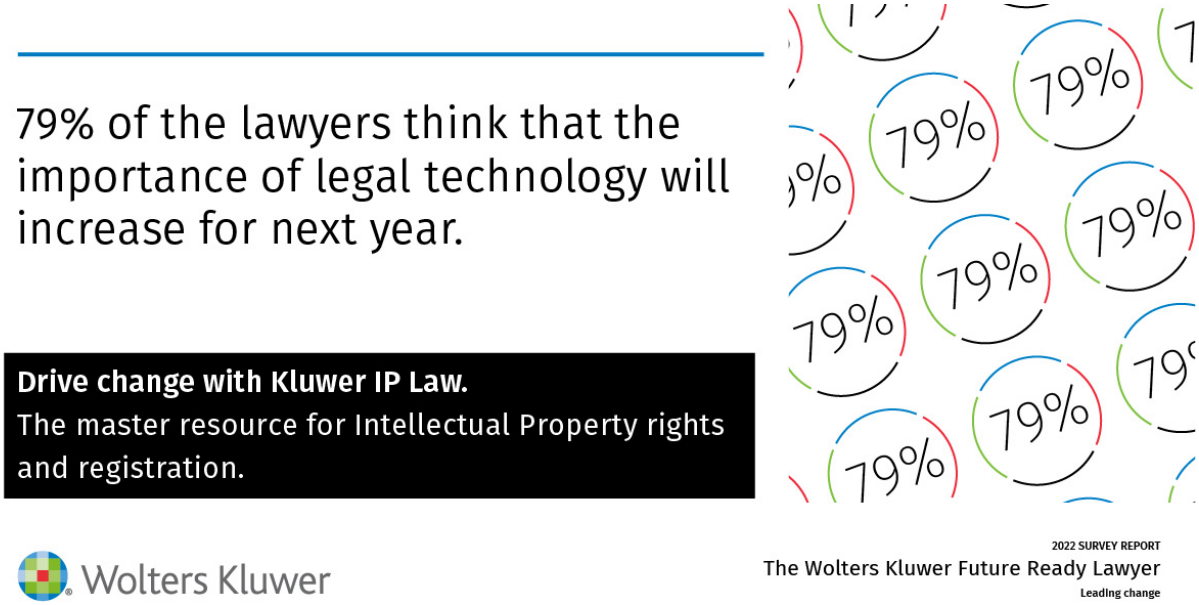

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