

Kluwer Patent Blog

Kluwer Patent Blog Poll: The Results

Rik Lambers (Brinkhof) · Thursday, December 11th, 2014



Literature and litigation go hand in hand. My fellow contributors aptly illustrated this, their recent posts moving to the cadence of the language of [Shakespeare](#) and [Montesquieu](#). To follow their footsteps, but on a more contemporary note on a future (some suggest: fantasy) subject: “*Brace yourselves, Winter is coming.*”

Well, Winter is not coming. At least not in the Netherlands, where 2014 is in the run to become the warmest year since 1706 (when Montesquieu was still a catholic schoolboy).

What is coming, is the UPC. Maybe not this Winter, or next year’s, but sometime in the future, and we better brace ourselves. We are currently climbing to the top of the roller coaster and it will be a wild ride (with anxious fun for those who like legal loops).

Those patent proprietors who rather pass the UPC ride, have the option to opt out their patents ex Art. 83 (3) UPC Agreement (‘UPCA’):

“Unless an action has already been brought before the Court, a proprietor of or an applicant for a European patent granted or applied for prior to the end of the transitional period [...] shall have the possibility to opt out from the exclusive competence of the Court.”

The opt-out provision has led to much discussion. First, does an opt-out actually lead to *not* riding the UPC, i.e. is the patent opted out from the UPC's competence all together or merely from the 'exclusive' competence of the UPC (an opt-out resulting in competence of national courts *next to* the competence of the UPC)? Second, if a patent is opted-out, should national courts then still apply the substantive law provisions of the UPCA (i.e. Chapter V) on the opted-out patent?

This last question was posed to you, the reader, as part of our [second Kluwer Patent Blog poll](#): *National courts should apply the substantial provisions of the UPCA on a European patent which is opted out from the UPCA.*

The poll results are in and we like to share them with you (click to enlarge the image):

Answer	Votes	Vote Count/Percentage
Yes		23 Votes(46%)
No		27 Votes(54%)

That is right, you split in the middle! OK, almost: 46% voted *Yes* (national courts should apply substantive UPCA law), and 54% voted *No* (national courts should not).

Again, as in the [first poll on bifurcation](#), the issue left you divided. What does this mean? That you are not (at) all convinced by the [Preparatory Committee's interpretation](#) of Article 83 UPCA? That a large minority of you share the views expressed in [the post on this blog](#), or CJEU Judge [Nicholas Forwood's personal observations](#) written on the CJEU's letterhead? That more work is to be done on the clarification of the opt-out provision, a view expressed during the current [UK IPO's consultation](#) on secondary legislation implementing the UPC? That none of the above can be deducted from a *Yes* or *No* poll?

We leave the reading of tea leaves to you and the comment section is open for your interpretation. But do brace yourselves, the UPC is coming.

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