

Kluwer Patent Blog

Basics of the Unitary Patent system. Part 8: saisie and provisional measures

Pieter Callens (Eubelius) · Monday, April 25th, 2016

Europe is preparing for the launch of the new Unitary Patent and the Unified Patent Court (UPC). A provisional phase for the UPC is expected to start later this year, with a view to a full start of the system in the spring of 2017. In a series of articles, Kluwer IP Law explains the upcoming changes and the consequences they have for patent practitioners. The eight' blogpost: saisie and provisional measures



Unitary Patent
and
Unified Patent Court
and what they mean for professionals

1. Can one obtain before the UPC an order to preserve evidence (saisie) and an order for inspection?

Yes. At the request of the applicant which has presented reasonably available evidence to support the claim that the patent has been infringed or is about to be infringed, the UPC may order prompt and effective provisional measures to preserve relevant evidence in respect of the alleged infringement, subject to the protection of confidential information. Such measures may include the detailed description, with or without the taking of samples, or the physical seizure of the infringing products, and, in appropriate cases, the materials and implements used in the production and/or distribution of those products and the documents relating thereto (article 60 (1) UPCA).

Furthermore, the UPC may at the request of the applicant who has presented evidence to support the claim that the patent has been infringed or is about to be infringed, order the inspection of premises. Such inspection of premises shall be conducted by a person appointed by the UPC.

Measures shall be ordered, if necessary without the other party having been heard, in particular where any delay is likely to cause irreparable harm to the proprietor of the patent, or where there is a demonstrable risk of evidence being destroyed.

2. Can a local division of the UPC order a saisie to be executed anywhere in the UPC territory?

Yes. One of the advantages of the UPC shall be that companies shall be able to obtain from the local division of their home country an order to preserve evidence and an inspection of premises which can be executed anywhere in the UPC territory. This is the consequence of the unified character of the UPC. The UPC is a court “common to all participating member states”.

3. Which law shall apply to the execution of the order to preserve evidence?

Rule 196.4. RoP provides that the person specified in the order to preserve evidence shall carry out the measures and present a written Report on the measures to preserve evidence, all in accordance with the national law of the place where the measures are executed. Therefore, in case of a saisie that needs to be executed in different member states, the UPC shall have to apply the national law of the place where the measures are executed.

4. Can the UPC order provisional and protective measures?

To stop alleged infringers and prevent the increase of damages for the patent proprietor, the UPC can order provisional and protective measures.

The UPC may, by way of order, grant injunctions against an alleged infringer or against an intermediary whose services are used by the alleged infringer, intended to prevent any imminent infringement, to prohibit, on a provisional basis and subject, where appropriate, to a recurring penalty payment, the continuation of the alleged infringement or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the rightholder. (article 62 UPCA). Before ordering such provisional and protective measures, the UPC shall weigh up the interest of all parties. The UPC shall have the discretion to weigh up the interests of the parties and in particular to take into account the potential harm for either of the parties resulting from the granting or the refusal of the injunction.

The UPC may also order the seizure or delivery up of the products suspected of infringing a patent so as to prevent their entry into, or movement, within the channels of commerce. If the applicant demonstrates circumstances likely to endanger the recovery of damages, the UPC may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of the bank accounts and of other assets of the alleged infringer.

5. Shall the UPC accept protective letters?

Yes. If a person, entitled to initiate proceedings before the UPC, considers it likely that an application for provisional measures against him as a defendant may be lodged before the UPC in the near future, he may file a Protective letter.

6. In which language does one have to file a Protective Letter? What is the cost of a Protective letter?

The Protective letter needs to be filed with the Registry in the language of the patent. Upon filing a Protective letter a fee of 200 EUR shall be due.

Pieter Callens (Eubelius, Belgium) is co-author of the book ‘Introduction to the Unitary Patent and the Unified Patent Court’. An updated version of this book shall become available in 2016.

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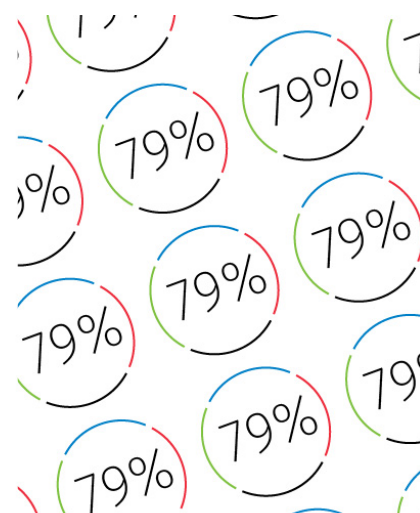
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