

Kluwer Patent Blog

‘Statistical data important for EPO opposition procedures and litigation at the Unified Patent Court’

Kluwer Patent blogger · Monday, April 25th, 2016

European patent attorneys should make a joint effort and gather data to assess the impact of procedural issues on opposition procedures at the European Patent Office and, in the future, on decisions of the Unified Patent Court. Michael Wallinger, partner of law firm WRST, proposed this at the [annual meeting of the European Patent Litigators Association EPLIT](#), 11 April 2016 in Amsterdam.

According to Wallinger, the statistical data are a very important tool for EPAs to decide on their litigation strategies. He thinks they will also lead to questions about the functioning of the Boards of Appeal of the EPO. At the EPLIT meeting he referred to a statistical analysis ([epi information 1/15](#)), showing that nearly fifty percent of the cases at the BoAs resulting in the revocation of the opposed patent were decided on formal aspects.

This is a suspiciously high number, he thinks. ‘The EPO has 28 technical Boards of Appeal and they are handling about 2000 opposition cases a year, which is about 70 cases per board. That is a very heavy workload. There are opposition cases in which you have ten or even more opponents, and thousands of pages which have to be read by the board members. So I have the feeling that what the BoAs are trying to do is finding formal holes and deciding on formal points. And that is not okay. But only if we have the real figures, it is possible to show whether the system is not working well and the Office must do something to improve it.’

A similar thing occurred in Germany in the fifties of the last century, Wallinger pointed out in a conversation with Kluwer IP Law. ‘In that period, the German Constitutional Court was obliged to accept all constitutional complaints and used formal restrictions to get rid of them, without deciding on the substantial law. Around 1955 however, a legal change was introduced and a committee of three judges was installed, who had



Michael Wallinger

to decide whether a case would be admitted. The quality of the Constitutional Court's work improved due to this and today the court is very highly respected by all social groups in Germany. At the moment we have a similar situation at the EPO. I don't say we should introduce the same mechanism with the Boards of Appeal. Rather, I think we should have more Boards, which are really independent from the Office, so we can have less formal and more substantial decisions.'

Wallinger is critical of the official EPO data. [A table about the results of opposition proceedings in 2015](#), for instance, creates the impression that 31 percent of all patents which are opposed are upheld without amendments. However, this concerns only the first instance. 'That is wrong and misleading', according to Wallinger. 'I have compared the first and second instance, and then you see that the outcome is much worse. Probably only 10 to 15 percent of patents remain unchanged in opposition proceedings.'



Wallinger thinks it would help the work of EPAs if they provided information on a regular basis for a database on opposition procedures and the upcoming Unified Patent Court. 'The database should not just tell if an activity was in essence correct, but encompass all procedural issues as well. Which were the procedural steps? Were late requests admitted, were they rejected?' This would enable us to assess the impact of procedural law on the final decision.' He thinks that EPLIT could play a role in this. It could provide standardized questionnaires for this, or EPLIT members could analyse the BoA – and later on the UPC – decisions.

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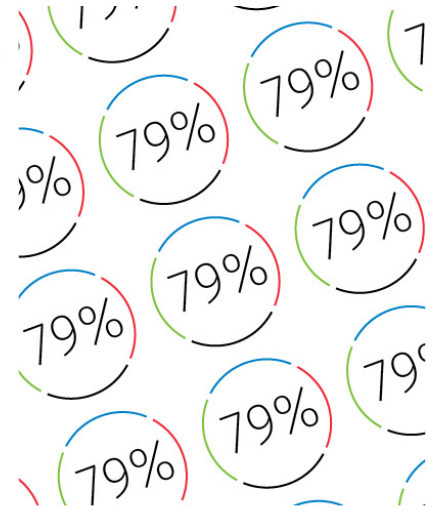
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This entry was posted on Monday, April 25th, 2016 at 5:00 pm and is filed under [EPC](#), [EPO](#), [European Union](#), [Opposition](#), [UPC](#)

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