Kluwer Patent Blog

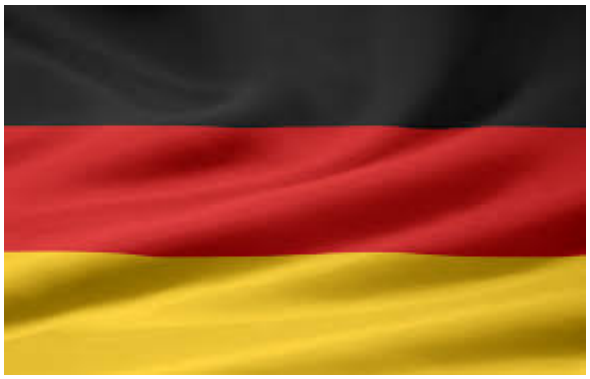
FFII preparing constitutional complaint against Unified Patent Court Agreement

Kluwer Patent blogger · Friday, October 23rd, 2020

In Germany the re-ratification process of the Unified Patent Court Agreement – which is necessary after the Federal Constitutional Court (FCC) partially upheld a complaint last March and declared the first ratification procedure invalid – is progressing rapidly. The decisive reading in the Bundestag, which will make clear whether the UPCA gets support from the required 2/3 majority of parliamentarians, is expected late October or early November. German ratification means the UPCA can probably enter into force next year, unless this is delayed by a new complaint before the FCC. A likely candidate to file such complaint is the Foundation for a Free Information Infrastructure (FFII). Kluwer IP Law interviewed FFII president Benjamin Henrion.

You sent an open letter to the Bundesrat to warn the UPCA violates three international treaties and the German Constitution. What has been the reaction?
"We were a bit late to send our open letter to the Bundesrat, as it was delivered the day before the vote in the Bundesrat, and no member of parliament raised any objections. We also have informed all the members of the Bundestag. We were told that the real political debate in Germany happens there."

Is there much support for your point of view?
"The members of parliament we contacted seem to be receptive, some of them already know the issues that we have raised. I have the impression that the key political group to convince will be the liberals of FDP. That is the opposition party whose support is needed to get the required 2/3 majority for ratification of the UPCA."



In your objections to the speedy ratification procedure in Germany, you have pointed at the importance of four EPO cases pending before the Federal Constitutional Court. Could you explain why the outcome of these cases is relevant?
"The EPO decisions to administer the Unitary Patent cannot be brought to court. This is in direct violation of the rule of law principle, which is enshrined in Art 2 TFEU and in most national constitutions. This principle is heavily debated at EU level at the moment because of two problematic countries (Poland and Hungary).

For patent applicants, it means they cannot sue the EPO for a refusal to grant. There were amendments in 2012 by a member of the Green party of the European Parliament to make the EPO responsible for acts concerning the UPC, but those amendments were not adopted.

For others, it means there is no possibility to bring the EPO to court for maladministration. When FFII Spain opposed the Amazon One Click Gift patent back in 2012, our Spanish representative was refused a live translation in Spanish, the EPO only providing a choice between three languages. We looked at bringing the EPO to court for language discrimination, but came to the conclusion that the EPO had diplomatic immunity, and cannot be brought to court for maladministration.

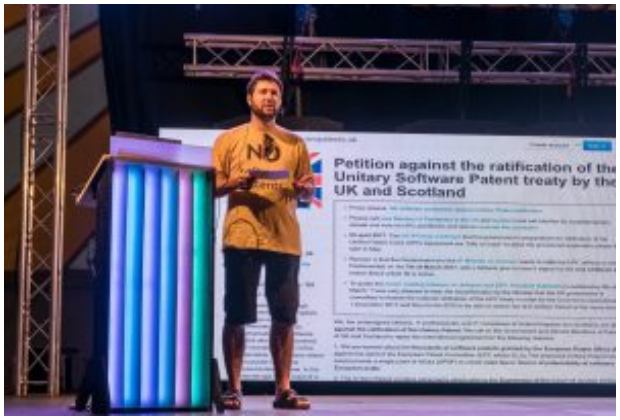
The judgment in the four EPO complaints is still on the agenda of the FCC for this year, and we recommend the members of the Bundestag to wait for the decision before proceeding with the ratification of the UPCA."

In your letter to the two chambers of the German parliament you write about the FFII's objections to the UPCA, ending with: "If those points are not seriously addressed and the UPCA sent back for renegotiation, we will consider asking the German Constitutional Court to look again at those issues in a second Constitutional Complaint." Is not yet certain you will file a complaint?
"It's more and more likely that we will. In 2017, we were already looking at filing a complaint, but we did not have any resources at the time. We filed a complaint with the Belgian Constitutional Court back in 2015 with our sister organisation Esoma. I personally took two weeks off my job to work on the complaint when I heard from the secretariat that we could file one without a lawyer. But we filed it too late (6 months for a normal law vs 6 weeks for an international treaty) and the points we raised were unfortunately not discussed.

We are currently in contact with several law firms who have experience with constitutional complaints, and we are asking companies that have supported us in the past to donate for this project."

The FFII defends 'the right to free and competitive software creation'. Does this mean you are against any form of patent protection?

"No, we are not against patent protection, the exceptions to patentability in the EPC are well designed (algorithms, presentation for information (GUIs), programs for computers) but they are bypassed with the 'as such' and 'technical effect' loopholes (see here and here). That's what we are afraid of with the installation of the UPC; these loopholes were also mentioned by the European Commission in their 2012 UPC memo.



What we are afraid of with the UPC is the validation of software patents with the jurisprudence of such a court, with an increasing number of patent trolls trying to extract money from our companies. We think the UPC will be a big boost to patent trolls, using the reservoir of EPO software patents and favoured by a pro-patent judiciary.

During the software patent debate, we have proposed criteria to limit patentability based on 'controllable forces of nature', which comes from German jurisprudence. This criteria should allow patents on computer aided systems, like the Advanced Braking System (ABS), but not patents on mere software that does not control external forces outside the computer.

The 'technical effect' has been widely criticized as being a 'restatement of the same problem'. In the recent discussions about gene patents, the same 'technical effect' loophole has been used to justify patents on modified genes.

Software is a written work made by authors, which is protected by copyright. By 'competitive software creation', we mean that there is healthy competition of different implementations among different players. It is an insult to the profession to ask developers to check a patent database before they can write any line of code. Some American academics in the US even pointed at the conflict with the freedom of expression.

The EU software patents directive was rejected in July 2005 at the request of software and electronics multinationals, which feared a vote against software patents; they decided to drop the directive and push for a central patent court instead. Six months later, the European Commission restarted a public consultation on the Community Patent, then in
2007 the European Patent Litigation Agreement (EPLA), then the UPLS (2009), then the Unitary Patent (2012).

A key moment in the history of the UPC is a shortcut taken in 2011, when the IPO (Intellectual Property Owners association) complained it would take too much time for the EU to join the EPC, so they proposed a model without it. Under the current UPCA, the CJEU does not have any say on patent law, except for the biotech directive."

You say the UPC will be a pro-patent judiciary, why?
"Just have a look at the US experience with specialized patent courts. Those courts were responsible for extending patents to software, business methods and other fields, or lowering the threshold to give injunctions. The US Supreme Court did not bother to look at the practice of those specialized patent courts until 20 years ago, when they started to go against the doctrines developed by the patent courts. Now the match between the two institutions is a scathing 22-7; the patent courts were corrected 15 times.

The biggest danger with the UPC is that it will be a specialized patent court living on its own planet, without any generalist court above it that can balance patent rights with other rights. Specialized patent courts tend to have a tunnel view, which promotes patent maximalism and patent inflation. In a way, they participate to the 'Global Warming of Patents', which has potential negative consequences for society, such as job losses or fund diversion from R&D (Research and Development) to P&L (Patents and Litigation)."

What other issues do you see with the UPCA?
"Another problem is that there is no elected lawmaker behind it, the European Parliament is not the

legislator of patent law.

And if there is one thing that has to be changed about the UPC, it is to reinstate the competence of the European Court of Justice (CJEU) to review patent law and its doctrine. It is unconceivable that we are building Europe in such a way that the CJEU has a say over any
piece of EU legislation, except for patent law, which is not EU law, and which is probably a field of law which needs a lot of attention. Now that the UK has left, the deal that the German chancellor Angela Merkel bowed to in 2012 needs to be reopened.

David Cameron, at the time prime minister of the UK, managed to convince Germany and France to drop the articles 6 to 8 of the UPCA, which would have given competence to the CJEU to review patent cases on points of law, but those articles were removed and dissolved in other articles. Mr Cameron's move was inspired by the big pharma lobby and the British patent industry (Judge Robin Jacob).

For us it is still unclear whether the CJEU would be able to decide on the issue of software patents under the current UPCA, as the experts are split on this question. Some read the UPCA as having the exclusive competence on patent law, others say that the whole project is based on Art 118 of the Treaty on the Functioning of the European Union (TFEU), and the fact that the EU has not signed the EPC does not matter, since the Unitary Patent is an EU intellectual property title. The CJEU has auto-extended its competence in other fields of law in the past, so maybe it is possible. But one thing is sure: the UPC will try to prevent any appeal to the CJEU.

And there are other issues: in June of this year, the German Ministry of Justice said participation of the UK was a 'requirement' for the UPC to enter into force. Now that the UK has de-ratified the UPCA, it is strange to see that this 'requirement' is no longer there.

I guess we are dealing with people who are dedicated to turning this treaty into a reality at any cost, and who will push the 'ignore' button whenever they face a problem. I wonder what kind of legal trick they will pull out of their hat to declare the UPCA 'in force', despite the UK still being hardcoded in the treaty. Probably something like 'since the UK left, Italy automatically takes its place'."

On your website the FFII calls for "urgent donations to crowdfund a Constitutional Complaint against the third attempt to impose software patents in Europe, via the Unified Patent Court (UPC)". Is filing a complaint that costly and difficult?
"Although we have a draft in progress, we want to have a lawyer to table our complaint. The required budget is around 30.000 euros. Although we have filed a complaint in Belgium before without a lawyer, we would prefer to have a lawyer who has experience with such a procedure before the German FCC.

One of the requirements is also that a complaint has to come from a 'concerned' party. We will include some German software companies as being parties in the complaint."

Could you describe how the procedure works in practice?
"I have a rough idea on how it works, having followed closely what happened with the first complaint. What I have not understood is the FCC's private consultation of associations (GRUR, DAV, EPO, etc…) in the first round. We requested the FCC to be able to submit comments back in 2017, when the court consulted the EPO, DAV, etc…, but we were denied access."

Will filing a complaint automatically lead to suspension of the ratification procedure in Germany, as happened after the first constitutional challenge was filed in 2017?
"I guess this is done at the request of the Constitutional Court, after weighing the arguments put forward by the complainants."

Have you been in contact with Dr Stjerna, who filed the first complaint in 2017, about your plan to file a complaint before the FCC?
"No, but we obviously have read his papers with great attention, especially the one about court fees and the lack of consultation of SMEs."

The German government, the European Commission and business organizations such as Eurochambres and Business Europe would like to see the UPC start functioning as soon as possible. Why are they wrong?
"If those organisations would care about small companies, they would reject outright any system that triples the costs of litigation for a simple case. We warned about the risk of increasing costs for a simple dispute back in 2007 already, during our analysis of the EPLA. Ninety percent of the simple cases are before courts in one country only. The creation of the UPC is meant to solve the problem of cross border litigation, which represents only a minority of 10 percent of the cases (now even less – 7 percent – with the departure of the UK).

In fact they should also reject the concept of a self-financed court, which is financially dependent on the number of court cases it judges.

There is some resistance from several members of Business Europe, mostly from eastern European countries, which probably see the UPC as a more expensive system for their SMEs.

The fact that the court fees and the rules of procedure have not been the fruit of parliamentary discussions is also pretty abnormal, and is probably not legal in most of our western democracies, but to know if that's really the case, we need a Constitutional Court to say it.

There is also a substantial risk that the UPC will explode at the first case, if the defendant requests for compliance with article 6 of the ECHR, requiring a 'tribunal established by law'. The UPCA needs to be renegotiated, the role of the CJEU restored. A renegotiation is necessary anyway to deal with the departure of the UK. Trying to launch the Unitary Patent system without doing this will only create more chaos."

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