

Kluwer Patent Blog

Unified Patent Court: 465.247 opt-outs in the sunrise period

Kluwer Patent blogger · Wednesday, June 7th, 2023

Since the opening of the Unified Patent Court last Thursday, it has received eighteen cases, a spokesperson told Kluwer IP Law. According to [a report](#) by patent attorney Joeri Beetz of Keltie LLP, the first European patent to be challenged appears to be EP3666797B1, a ‘very recently granted divisional of an Amgen patent application originally filed in 2008’.



On LinkedIn, Beetz pointed out the patent is classified in class A and should have been dealt with in the London section of the central division (In reaction others pointed out that the first IPC class is C 07 K – originally also destined for London). ‘Will Amgen (...) accept the competence of the Court? Or will they start with challenging the legality of the Presidium’s decision? Or maybe even the legality of the opening of the Court without the originally required UK ratification of the Agreement? Interesting times ahead.’

The judges of the Court of Appeal of the Unified Patent Court took their oath last Monday at the court room in Luxembourg. For the judges of the Court of First Instance, both legally and technically qualified, the oath taking ceremony took place on the court’s opening day last Thursday, at the courtroom of the 1st Civil Chamber of the Palais de Justice de Paris.

Opt-outs

Although the general feeling is that the quality of the new UPC judges is absolutely fine, this doesn’t apparently mean overall enthusiasm about the court prevails. The UPC informed this blog that at 09:30 PM on 30 May, just before the CMS was closed for planned maintenance, the number of opt-outs was 465.247. As of 6 June 2:00 PM, this number had risen to approximately 499.000.

In a [LinkedIn report](#) last week, German and European patent attorney Florian Henke had published a similar number. After some calculation and explanation he concluded: ‘Under the assumption that only EP-patents in force have been opted out (no applications, no lapsed EP-patents), the present opt-out ratio can be estimated to be 61%. If pending EP-applications are taken into account, the opt-out ratio could still be higher than 45%.’

The number of opt-outs is much higher than the court counted on. Its budget committee based the expected costs of the opt-out fee reimbursement (2.3.7.), which ‘represent the fee payable to Netservice for each opt-out lodged during the last three months of the PAP (the so-called “sunrise period”)’ on an estimated number of 50.000 opt-outs.

The high number is probably part of the explanation why the CMS of the UPC seemed at the verge of a breakdown over the last weeks. Luckily, the doom scenario of having to lodge documents in hard copy to opt out from the UPC’s competences, which at some point seemed realistic, didn’t materialize. The worst problems are over, according to the court in a report published the first of June. ‘During the



morning, due to a high number of users accessing the system at the same time, the UPC Case Management System was occasionally slow and even though it did not cease to function, it was at times difficult to access all the functionalities of the system. The CMS has now been technically reconfigured to better cope with the number of users currently seeking the Courts services. The reconfiguration has been successful and the CMS is now running with an improved performance. (...) This means that pleadings and other documents shall be lodged with the Court in electronic form (...).’

In another LinkedIn report about the UPC, patent attorney Ahsan Shaikh of US law firm McDermott Will & Emery, writes: ‘As we await the reports of its initial cases, we note companies have begun bringing invalidity actions in EU national courts against European patents of their competitors that were previously opted “out” of the UPC. The purpose of those attacks is to prevent the patents from being brought back into the UPC for enforcement, on the assumption that the UPC will be more favorable than national courts for patent owners.’ It would be interesting to hear if others have noticed these kind of actions as well.

Language regime UPC

In the meantime, the court published more information about the language regime. Although for a moment it seemed that his wouldn’t be the case, the UPC local divisions in Germany, France and Italy will also offer English as language of proceedings.

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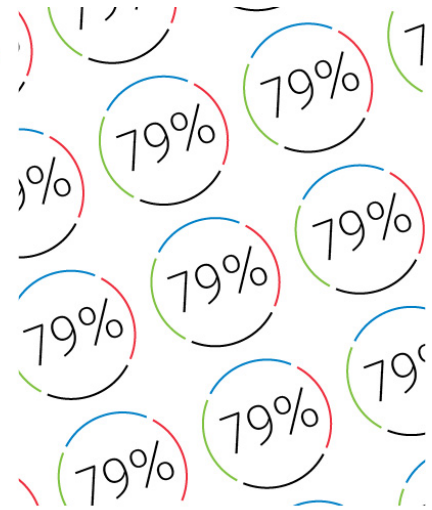
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