

Kluwer Patent Blog

Kluwer UPC Blog Opinion Piece

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Access to documents: How far should we be able to peek behind the curtain?

As we move past the first six months of operation of the UPC, those trying to keep track of its jurisprudence – and the judges themselves – are starting to have a busier time of things. We wrote last month as to the interesting national pre-conceptions that might be coming to the fore in the UPC divisions as seen in the divergent opinions on access to case documents requests coming from the Munich and Nordic-Baltic divisions. Historically, in national systems, it appears that there has been something of a division between the Anglo-Saxon/Scandinavian traditions of open justice and the more mainland continental viewpoint that a person's legal filings are their own business and no-one else's. We understand the permissive Order from the pen of Stefan Johansson of the Nordic-Baltic division is to be appealed, and it will be very interesting to see where the Court of Appeal judges' sentiments lie – and whether or not they ultimately refer back to the precepts that have underpinned the approach of national systems or base their reasoning *ab initio* on what approach is most apt for the new system. For this author, the latter approach is to be preferred not least because in contrast to the existing national systems, which have to deal with a wide range of legal disputes and parties, the UPC is only concerned with patents. Patents are a powerful state monopoly the validity and extent of which are inherently of legitimate interest to those engaged in developing and exploiting technical innovations. It would be detrimental both to the development of the UPC as a respected international forum for patent litigation, and arguably to the aspirations more widely of Europe to become a greater force in the world for technical innovation, if the Court ultimately takes a restrictive view as to the transparency of its proceedings.

Infringement and validity: So are we chopping the baby in half or not...?

One aspect of the new Court's jurisdiction that seems to be proving popular is its power to revoke patents. As at the first week of this month, it appeared (in so far as one can reliably tell from interrogating the CMS...) that there had been 55 infringement actions started – in respect of which 42 have so far subsequently acquired revocation counterclaims – and 23 revocation actions started in the central division chambers. Interestingly, it would appear that as yet no infringement counterclaims have been filed in response to the standalone revocation actions (not in the central division at least, although under A.33(5) the patentee may choose to respond in a local or regional division, and courtesy of the CMS such a counter-action is much harder to track). This could be good news for those who were attracted to the Court's ability to attack European patents on a supra-national basis beyond the 9 month post-grant window of the EPO, but were afraid such challenges would inevitably invite a wider infringement battle.

In terms of how the new Court manages disputes where both infringement and validity have been put in play, the perceived wisdom prior to launch was that whilst bifurcation of those issues was possible under the rules, in most cases the court would consider both at the same time and in the same venue. That certainly seemed to be the thinking of the Düsseldorf division where it chose to retain both aspects of the dispute in the *MyStromer* case on the basis that was both more efficient, and most likely to result in a consistent approach to construction for both validity and infringement considerations.

We have, though, seen some more complex proceedings play out in this respect. Firstly, in the *Amgen v Sanofi* case, the well-publicized woes of the CMS on day one saw the parties competing for who could get their hard copy filing before the Court first. Ultimately it was held that Sanofi's central division revocation action won the day, having been filed by hand some 19 minutes before Amgen's infringement action arrived at the Munich local division. So far, so as contemplated by the rules. The plot gets more interesting, however, in that it now appears that in the local division action co-defendants Sanofi and Regeneron have filed a common defence, but only Regeneron has filed a revocation counterclaim meaning – entirely coincidentally I'm sure – there is no identity of parties and issues as between the local and central divisions, leaving the possibility that both cases can run in parallel. Further, the defendants have apparently asked the local division to stay its infringement consideration, citing a number of bases including the pending parallel central revocation action. What the court does with that request will of course be very closely watched.

A further set of complications as between validity and infringement arose in *Edwards v Meril*, this time not courtesy of the CMS. There, having been sued by Meril in the Munich local division, Meril chose to counter with a revocation action in the central division but filed through a different group entity. Edwards sought to challenge the central division action on the basis that in substance it involved the same parties, and on that basis the case should be returned in its entirety to their choice of the Munich local division. The central division disagreed and found on a number of grounds that the parties were not in fact the same, so that the parallel considerations could be allowed to run before both fora.

From a strategic perspective, therefore, much remains to be revealed. Only time will tell how the UPC divisions will ultimately manage the internally parallel deliberations it seems happy to allow, and to whose advantage they play out. Back in the days before 0 BC (before UPC commencement), we thought the battle might be between patentees wanting to bifurcate to give them greater freedom on construction issues, and defendants wanting to keep them honest (and judges wanting to make the system more efficient and coherent). It looks though that while that battle may still play out, defendants are themselves exploring the strategic possibilities of bifurcation for their own benefit. Let the games commence...

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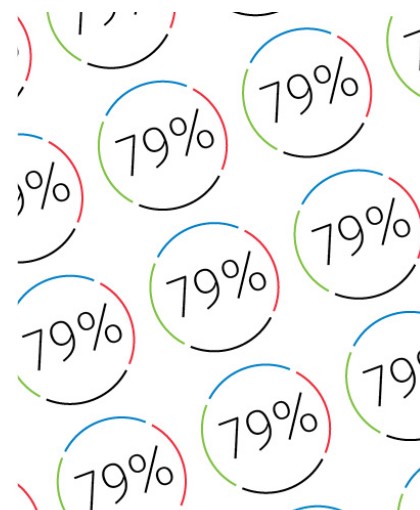
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