

Kluwer Patent Blog

Palace intrigue: Oxviews 9th Intellectual Property and Competition Forum

Adam Lacy (Hoffmann Eitle) · Thursday, June 20th, 2024

Following up on Thorsten's [blog](#) post yesterday, I report on the second day of the Oxviews 9th Intellectual Property and Competition Forum, which took place in the Justizpalast in Munich on 19 June. This impressive building deserves the name Palast (in English "Palace"), and was a fitting venue for this meeting of thought leaders in the IP world.



1) Transparency in Litigation Finance

The original source of litigation funding is not something most attorneys give much thought to. This session threw a spotlight on this increasingly important issue.

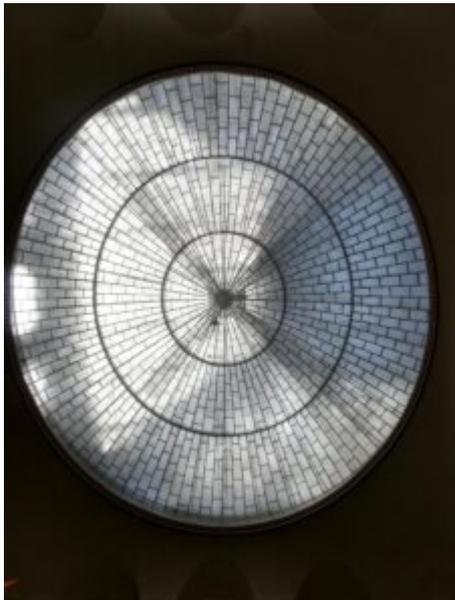
Susan Wilson, Director Intellectual Property Policy at Intel accepted that third party litigation funding (TPFL) can have benefits. She is though concerned that it is increasingly used by third parties as nothing more than an investment vehicle, reducing the litigation to a "casino" in which innovative companies stand to lose out. Such TPFL may allow parties to bet against innovators, potentially draining their resources. She identified this as a worrying trend in the US, which largely "takes place in the shadows".

Ralf Urich, Head of European Patent Litigation, Google has similar concerns for Europe. According to the EU Commission, 2009-2019 saw a 40% increase in TPFL, which attract investors by offering returns of up to 19%. Despite the potential disadvantageous impacts on investment in innovation in Europe, TPLF is unlike other investment schemes in that it remains largely unregulated in Europe. He is pleased that the EU Parliament has called upon the Commission to provide rules on this [topic](#). It remains unclear though whether there will be sufficient political motivation to regulate this area to strike a balance between supporting genuinely innovative companies while allowing access investment where they have a legitimate need to fund litigation.

One only has to look at the damage caused by the 2009 financial crash to appreciate the dangers of lax regulation of investment vehicles on the wider economy. If you are interested in this topic and want to influence developments in Europe, see this [survey](#).

2) AI

No IP conference would be complete without a discussion of one of the defining issues of our time: Artificial Intelligence. Vik Khurana, Partner, Bristows lead an interesting discussion on this topic.



Malte Firlus, Head of EU AI Policy, Amazon generally welcomed the proposed EU AI Act's objective. The now starting specification of the law should ensure a balance between supporting innovation and inter alia maintaining safety. That said, he noted that questions remain concerning issues such as apportioning responsibilities for AI products based on developments by multiple companies.

Concerning the Act, Dr Thomas Buchholz, Digital Technologies, BSH Hausgeräte made the interesting point that for inventors, the obligation in the Act to provide “*explainable AI*” will make

it critical to file a patent application before product launch. As the Act paves the way for standardization of AI, obtaining patents covering future AI standards might become a key goal for innovators in this area, similar to in telecommunications.

3) UPC

This is another topic which no self-respecting IP conference could overlook this year.

Laura Ramsay, Partner, Dehns chaired a well-structure discussion, and registered her disappointment that UPC mediation is not up and running yet. Rien Broekstra, Partner, Vossius Brinkhof was impressed by his experiences with the new system. He encouraged users to depart from national mindsets and use all options provided by the court. The lack of discovery doesn't mean you are empty handed: provisions to preserve evidence should be considered.

Dr Vittorio Cerulli Irelli, Partner Trevisan Cuonzo took up this theme. For him, the fact that the UPC local divisions have tended to follow processes common in their respective countries (e.g. preliminary injunctions in Germany, and orders to preserve evidence in France, Belgium and Italy) suggested that litigators needed to make more of the options now available to them at the UPC. He also made the point that the very short timeframes are particularly attractive to investors who work at similar pace – something which loops back to the debate about TPFL above.

4) FRAND and SEPs

The lion's share of the day was given over to FRAND and SEPs, with a focus on royalty rate determination. Justice Richard Meade and Judge Edger F. Brinkman kicked off by discussing their experiences with this tricky issue.

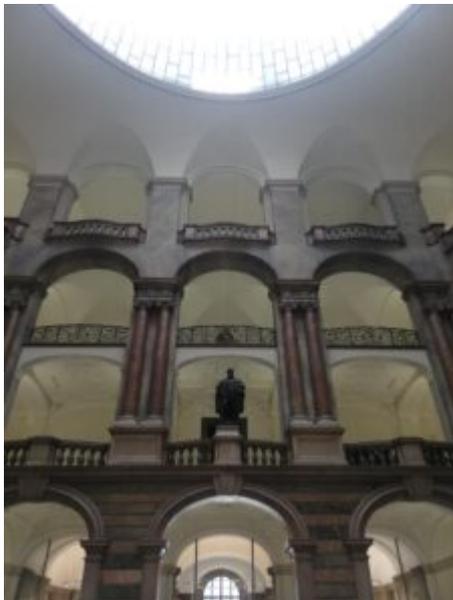
A recent trend in the UK is a move towards FRAND first before validity and infringement proceedings for individual patents. This is based on the pragmatic assumption that at least some of the patents in a portfolio as a whole will be valid and infringed, reducing the relevance of discussing the validity of any individual patent. There has also been a move towards the UK courts being asked to determine the FRAND royalty rate for a worldwide license, something that relatively few jurisdictions can cater for. Although disputes are normally about the rate, there is a growing realisation that the period of any settlement is also critical.

Turning to continental Europe, the first UPC FRAND cases are still pending and there is great interest in their outcomes. While the courts in the Netherlands have considered cases in the past, none are active at present. Comparing these continental systems with the UK, it was noted that FRAND cases include a large amount of evidence. This may play to the strength of UK

proceedings which can cover a lot of material with hearings taking two or three weeks. Questions remain about how cases will be handled at the UPC, where hearings so far have been shorter.

In later sessions, FRAND in Germany was also discussed. Dr Henrik Lehment, Partner, Hogan Lovells received a spontaneous round of applause after criticizing the German courts, under which potential licensees have struggled to demonstrate “willingness” in numerous decisions issued over the last seven years. This is something Dr Oliver Schoen, Presiding Judge, Munich I Regional Court, responded to in a later session. He cautioned that any review of German decisions in this field suffers from a selection bias, as patentees tend to settle instead of having a decision issued against them. He appreciated that the confidential nature of many aspects of the decisions makes the reasoning difficult to follow, but was confident that the German system delivered fair outcomes. While these arguments carry some force, several delegates expressed a preference for UK proceedings for potential licensees suggesting at least that the German courts are perceived as being rather too patentee friendly.

John Sideris, Principal Licensing Counsel, Philips spoke eloquently in favour of the patent pools which underpin a large number of licenses in this field. He emphasised that the cases that are litigated are due to a small minority of parties who don’t want to join these pools. While the patent pool and sharing IP at a reasonable rate is no doubt of great value, many delegates were strongly of the view that litigation is unavoidable where potential licensees can’t accept the terms patentees offer.



Conclusion

Many excellent contributions were made by other speakers which are too numerous to mention here. But if the ideas above interest you, I can only recommend attending next time this conference is held. The final word goes to Prof. Roya Ghafele, who convened the conference and closed the first session by calling for “more international exchange so we can talk and not fight!”. The conference was a great illustration of just such an international exchange between speakers and delegates from at least three continents.

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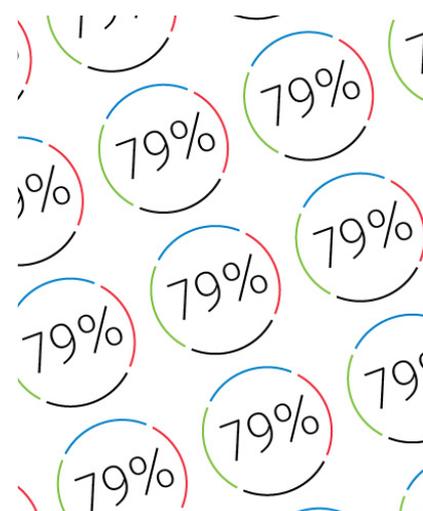
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