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Key takeaways from the EPO's study "Standards and the European patent system"

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On 14 May, the EPO published the study [Standards and the European patent system](#). The study seeks to improve transparency in the relationship between standards and patents in Europe, by providing insights from an EPO dataset linking patents and standards. The study also provides early observations into SEP litigation under the UPC. I will very briefly highlight the most interesting aspects of the first part of the study before I will focus on the UPC SEP litigation part.

Linking European patents and standards

The EPO has an prior art collection of over 5.5 million documents from standard development organizations (SDOs). Examiner citations to these documents create a link between European patents and standards. The EPO used this to create a new dataset: the EPO Cited SDO Documents dataset, which is available for download [here](#).

The study inter alia shows that 17.4% of patents citing SDO documents are declared SEPs (Figure 3.3.1). According to the EPO, the positive correlation between citations of SDO documents and SEP declarations suggests that the link between patents and SDO documents as made in the dataset could serve as a useful indicator for assessing essentiality. The top 50 authors of standard documents cited in patent applications are shown in Figure 3.1.3. The top five are Huawei, Ericsson, Qualcomm, Nokia and Samsung. The study further shows that there is large variety between SEP holders' practice in citing SDO documents in their declared SEPs. Vivo and Sun Patent Trust rank at the top, citing SDO documents in close to 70% of its declared SEPs, while others cite SDO documents in (way) less than 5% of their declared SEPs (Figure 3.3.2). The study also notes that the data suggests that well-known SEP holders such as Qualcomm, Ericsson, Nokia and Huawei take a selective approach to declaring patents SEPs, possibly declaring only patents they regard as truly essential (p. 48).

Key takeaways from the statistics on UPC SEP litigation

The chapter on UPC SEP litigation provides some interesting statistics as well. The study looked at SEP-related commercial disputes (not individual proceedings) between 2015 and 2025. A total of 101 SEP related disputes were identified, the majority (59) relating to mobile telecommunications. Since its opening, the UPC has been involved in 23 SEP related disputes. These 23 SEP related disputes make up 12% of the total 194 disputes (again: not proceedings) at the UPC. Because oftentimes multiple infringement actions are filed in a single SEP dispute, declared SEPs make up

27% of the UPC's infringement actions. The data also evidences to some degree the complex nature and associated need for active case management in SEP cases. The 23 SEP related disputes gave rise to 123 orders and decisions, which is an average of 5.35 orders/decisions per SEP-related dispute. The average for non SEP related disputes is 4.51 orders/decisions.

The data shows that the UPC has been involved in all recent multi-jurisdictional SEP related disputes, taking the place of the UPC contracting MS' national courts. Over 95% of SEP related orders and decisions are from the German Local Divisions, compared to approximately 50% of non-SEP related ones. This shows that the German LDs are even more popular when it comes to SEP disputes than the general trend already illustrates. This is hardly surprising. German national courts have granted the vast majority of injunction requests in SEP cases since 2018 (as is also noted in the study). It is not strange for SEP holders to assume that the German judges will carry on their tradition with their UPC hat on. Although there have only been three substantive decisions in SEP cases by the UPC, two wherein a FRAND defense was raised (*Panasonic v Oppo*, *Huawei v Netgear*) and one wherein no FRAND defense was raised (*Philips v Belkin*), I would say these SEP holders are not entirely wrong in their assumption.

The study further suggests that the UPC may reduce fragmentation of SEP-related disputes as current disputes are dealt with in only two European venues: the UPC and UK. But the study also acknowledges that it is too early to observe whether the UPC will be leading to a decrease in the number of disputes that result in decisions from different courts in different jurisdictions. In my view, the relevant question is not whether we will see less fragmentation in Europe (very likely: yes), but where the disputes will go. The UPC may get competition from a UPC Contracting MS's national court if that court proves to be willing to impose cross-border injunctions after the recent CJEU's *BSH v Electrolux* decision. Naturally, this also depends on the national courts' approach to assuming jurisdiction vis-à-vis the claims against defendants not domiciled in their jurisdiction based on the close connection of those claims with claims against a home court "anchor" defendant. For foreign EU MS and Lugano Convention based defendants, this approach is harmonized (Art. 8 (1) Brussels I-bis recast Regulation and Art. 6 (1) Lugano Convention) and therefore – at least in theory – claimants cannot really forum shop. As for assuming jurisdiction against other foreign defendants, national jurisdictional rules will generally apply (note that this is different in the UPC, see Art. 71b(2) Brussels I- bis recast Regulation). Some national civil codes, such as the Dutch one, have a national provision that is (almost) identical to Art. 8 Brussels I- bis recast, others, and I understand Germany to be such a jurisdiction, have not.

If national courts prove to be eager to go cross-border post *BSH v Electrolux*, the UPC's appeal may need to be derived from something else than its ability to impose a multi-territorial injunction by means of one decision. This appeal may potentially lie in the UPC's willingness to determine FRAND rates. Until now, no continental European court has set a FRAND rate. Although Dutch and French national courts have assumed jurisdiction to hear FRAND determination claims, these disputes were settled before any substantive decision was rendered (more on the NL case [here](#), and on the FR case [here](#)). Last year, the LD Mannheim ruled that the UPC is competent to hear a FRAND counterclaim (in *Panasonic v Oppo*). At the launch event of the study (recording can be found [here](#)), UPC Court of Appeal judge Rian Kalden stated that she sees two ways to obtain a FRAND determination from the UPC. A SEP holder may request for an injunction conditional on the defendant (implementer) not accepting a court determined FRAND rate (FRAND injunction). An implementer may start a DNI action arguing that it does not infringe, because it will pay the FRAND rate that will be set by the court. It is now waiting for a party to start one of these two types of actions and advance the UPC's case law in doing so.

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