CEIPI Colloque 2010

European Patent Attorneys in Patent Litigation Proceedings in Europe

Ladies and Gentlemen,

In the following minutes I will as a practitioner focus on the competence of European Patent Attorneys in the context of litigation proceedings concerning European and future Community patents, in particular before the hopefully upcoming European Union Patent Court, the draft statutes of which foresee a certain involvement of our profession in the conduct of litigation.

We have learned from Professor Ullrich that this court system will be a self contained, very specialized body, mainly dealing with patent litigation, and only on a few other legal issues such as licensing, however not on ownership issues, for example. This makes sense, as the patent world is becoming technically more complex. If the court is an entirely new entity why should we not try a new representation scheme also?

The draft Court Statutes of the European Patent Litigation Agreement (EPLA) already opened the possibility that certain persons other than lawyers, inter alia patent attorneys, could represent parties. Obviously these persons would have to evidence sufficient legal knowledge to be accepted by the courts. Moreover, according to the EPLA a Right of Audience was accorded to Patent Attorneys. i will come back to this important special right in a few minutes.

Currently about 9600 European Patent Attorneys are registered as professional representatives before the European Patent Office. They are active in industry and in the free profession. European Patent Attorneys up to now form the only harmonised pan-European fully academic profession organised according to international law, with a pan-European training and qualification. The special attributes and thus the common competence of patent attorneys is

their scientific/technical background as well as legal training, which enables them to encompass a technical and legal mode of thinking.

It goes without saying that most European Patent Attorneys also act as national patent attorneys in the 36 (soon 37) Member States of the European Patent Organisation which has always been a forerunner of European integration.

As you all know, European Patent Attorneys not only represent in examination and grant proceedings before the EPO, but also in opposition and appeal proceedings relating to the validity of granted patent before the Opposition Divisions and the Boards of Appeal of the EPO.

It must be stressed that within the European Patent Organisation the Boards of Appeal are an autonomous authority, comprising a Presidium (a Vice President of the EPO acts as chairman) and various Chambers hearing the individual cases. These Chambers when dealing with appeals from a decision of an Opposition Division have a variable composition of – depending on the nature of the case - two or three technically qualified members and one or two legally qualified members which is appropriate, as normally technical aspects of the case play the more dominant role.

Thus, already today European Patent Attorneys are considered competent to represent parties before an European authority whose Chambers act according to common Rules of Procedure, hear witnesses and experts, like any other civil court, and conduct the proceedings in any of the three official languages. The Boards of Appeal moreover have an international composition from a pool of independent judges, also technical judges that cannot be removed from office; thus, they form a unique court-like pan-European institution, a sort of first instance Unified European Patent Court, when it comes to ruling on the validity of European and future Community patents.

In a number of Member States of the European Union and of the Convention (European) patent attorneys have traditionally and by law been able to represent on their own not only in invalidity proceedings, but for example also in actions for declarations of non-infringement, before national courts or court like authorities. To mention a few examples: in Germany patent attorneys can act before the German Federal Patent Court and in Austria before the

Patent Office and the Supreme Patents and Trademarks Senate which is accepted as a court by the Court of Justice. Representation rights also exist in other countries, such as Hungary, Poland and the Netherlands, to name a few.

Representation in litigation proceedings is another matter. In litigation before the national civil courts representation by an attorney at law is up to now mandatory, for historical reasons related to the basics of national civil law. In practice, however, patent attorneys play a major role in these proceedings, in particular in those countries where they enjoy a Right of Audience. This right means that patent attorneys can act as assistants to their party, who accompany an attorney at law during the whole proceedings, from the drafting of an opinion on the alleged infringement, via the procuring of evidence, the preparation of the writ, the participation in oral court hearings, and so forth; what is more important is that they can address the court if their party so demands. In the Austrian patent attorney's act this is a statutory right. In some countries, patent attorneys enjoy further going rights, like in the UK for example, where patent attorneys are allowed to represent on their own in infringement proceedings before the Patents County Court, or in Poland before Administrative Courts.

Apart from that, patent attorneys can act as a court appointed experts, in some countries also as technical judges in the court panel, as for example in Austria, where a system of lay judges allows that patent attorneys with a certain number of years of practice become appointed to panels of the centralised Austrian patent court for up to 12 years in total. They act as technical judges in a panel of three and enjoy the same rights as the two legally trained judges which means that they also have a vote.

The European profession therefore looks for adequate representation rights in any proceedings before the new pan-European courts. This is the more relevant, because it is envisaged that before these courts infringement and validity issues, also in the form of invalidity counter-claims, will be taken together, in order to expedite the proceedings.

The court involvement of patent attorneys guarantees that all technical aspects of the case, of which patent attorneys have an intimate knowledge, can fully be taken into account, which last but not least is reflected in the technical definition of the infringement or the wording of

the claims that need to be enforced or defended. After all, any legal argument must be based on the underlying technical facts of the case.

Quite evidently, representation by patent attorneys from all over Europe before a unified European patent court - beyond mere invalidity procedures - will require an additional legal training, mainly as concerns civil and procedural laws, especially as we have learned that a unitary EU civil law as such does not exist.

We therefore welcome the initiative taken by the drafters of the European Union Patent Courts Statutes to include in Article 28 as an alternative to the representation by lawyers those of European Patent Attorneys, provided certain conditions are met.

According to Article 28 parties may be represented by European Patent Attorneys who have appropriate qualifications, such as a European Union Patent Litigator's Certificate. The requirement for the qualification shall be established by a Mixed Committee on the basis of proposals from the Commission of the European Communities. A list of qualified European Patent Attorneys shall be kept by the Registrar.

So far so good, but how do we go about this in practice? First of all, I should mention that Litigator Certificates for non-lawyers are not new; such Certificates already exist for patent attorneys, for example in the UK, where the scheme has been introduced for so called CIPA Fellows, i.e. full members of CIPA, who take the appropriate examination.

Evidently, not each and every European Patent Attorney will wish to appear before courts, but only those who are interested in obtaining an additional qualification.

Such a qualification in the form of a European Union Patent Litigator's Certificate will undoubtedly have to encompass knowledge of all relevant European and international laws governing patent infringement and especially a thorough knowledge of European Procedural Laws.

As this development was foreseen already some time ago, in fact since the discussion about the EPLA in the Working Party on Litigation, the CEIPI and the representative body of all European Patent Attorneys, the epi, have begun organising a Diploma Course on Patent

Litigation in Europe which now is in its 7th year and has so far trained more than 250 of our colleagues; The aim of the course is to acquaint Patent Attorneys on the list before the EPO with all aspects of patent litigation procedures in Europe and of the future centralised proceedings, as well as with the related civil laws and rules of procedure. This for example also enables patent attorneys to take tricky infringement issues, such as equivalents, into account when prosecuting applications before the EPO.

The Course which at present comprises seven modules of training at the CEIPI in Strasbourg ends with a Diploma of the University of Strasbourg after a Control of the knowledge acquired. It could be considered the basic training for obtaining a European Patent Litigator's Certificate. The Curriculum of the Course includes knowledge of the fundamental principles of EU law and EU Harmonisation, such as the analysis of various Directives and Regulations, the Relations between national IP rights and EU Law, the structure and working of the European Court of Justice, EU Law on Enforcement, the draft European Union Patent Court Statute and its draft Rules of Procedure, the principles of Continental Law and Common Law, and practical procedures across Europe, to name just a few of the topics, which are lectured by a group of international experts from lawyers, judges and patent attorneys.

In addition to the foregoing other topics could in the future be included, such as EU Principles on applicable laws, case law analysis regarding the free movement of goods, competition law, laws on counterfeiting, the European Human Rights Convention as well as case law of the European Court of Human Rights in Strasbourg, Rules concerning Professional Rights of Litigators / Representatives on EU level as well as concrete case law relating to existing Patent Litigation in Europe.

The CEIPI has passed on the general scheme of the present Litigation Course to the European Commission and has indicated that it would be in a position to draft and provide the appropriate Curriculum for a European Union Patent Litigator's Certificate. It could also organize relevant courses and seminars to obtain the Certificate. It goes without saying that the former participants of the Litigation Course expect that the Mixed Committee will take into account their Diploma when establishing the bar for the European Union Certificate. Undoubtedly, the Mixed Committee will also take into account competence acquired elsewhere.

Apart from that, the CEIPI due to the fact that it also does university level research would in my view be ideally suited to establish a Patent Litigation Centre for the study of patent litigation in Europe, in particular the setting up of a central data bank of national decision and case law which has been developed over many years in many countries. Data banks on decisions today exist generally following private initiatives only, such as in Italy. Naturally, other training providers that exist or will come into existence would profit from the CEIPI initiative.

Most importantly, the current draft of the European Union Patent Court system also comprises the aforementioned Right of Audience which will allow that patent attorneys become active in patent disputes by assisting the party's representatives, who may be an attorney at law or a European Patent Attorney Litigator, and speak in hearings of the court. After all, the party should be free to decide on the nature of its representation.

Personally I have no problem with a tandem representation by an attorney at law and a patent attorney, as long as I can choose the attorney at law for my party when infringement threatens, because in that case I will choose among the best. I am at loss on the other hand, if my party for some reason or other imposes an attorney on me who has never had to do with patents. There are always two sides to the coin. Specialists in patent matters come in limited numbers.

The right of audience provision which already exists in a number of Member States, such as Germany and Austria, will have beneficial results in view of the fact that the future international court panels will avail themselves of technical judges who are considered the counterpart to the patent attorneys in the hearings. How much a patent attorney can contribute to the technical and legal aspects evidently depends on the case, however, it is quite common that also so called mixed technical/legal questions, such as equivalence, are dealt with by patent attorneys.

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The contribution of patent attorneys to infringement proceedings due to their competence, intimate relationship with clients and thorough knowledge of the patent particularities guarantee a more in-depth evaluation of the technical merits of the cases. This in turn increases legal certainty and shortens proceedings which in turn reduces costs, an important

argument in favour of granting adequate representation rights to European Patent Attorneys before the future centralised European courts.

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