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"Better than yesterday but worse than tomorrow"

- the Unified Patent Court: Pros and cons of specialisation

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Professor, dr.jur., PhD Jens Schovsbo (jens.schovsbo@jur.ku.dk)

The “unitary patent package”

- The “unitary patent package” comprises of four legal instruments:
  - Council Decision of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection (2011/167/EU);
  - Regulation (EU) 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection;
  - Council Regulation (EU) 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements;
  - Agreement on a Unified Patent Court and Statute of 11 January 2013 Doc. 16351/12 (UPA)

- It aims at creating a **EU**ropean patent system which is more transparent, consistent, efficient, and fair than the present one(s)

- To do so it creates:
  - The ”European patents with unitary effect” and
  - **The ”Unitary Patent Court”**

Judges of the Unified Patent Court

- **Legally qualified judges**
  - Shall posess the qualifications required for appointment to judicial offices in a Contracting Member State
  - Shall ensure the highest standards of competence and shall have proven experience in the field of patent litigation
- **Technically qualified judges**
  - Shall have a university degree and proven expertise in a field of technology
  - Shall have proven knowledge of civil law and procedure relevant in patent litigation
- **Panels must always have multinational composition**
  - Cases involving counterclaims for revocation shall comprise a technically qualified judge
- **Appointment procedure**
  - Advisory Committee (patent experts) establish a list of most suitable candidates
  - Administrative Committee appoint the judges ”acting by common accord”
  - Appointed for a term of **6 years** (this term is renewable)

The UPC *in action*: Its biases

- The UPC is by design
  - highly specialized (patent judges)
  - multi(de)national (panels with judges from different jurisdictions // create uniform body of case law)
- Because of this the UPC will be ***biased towards technology based values***
- There is nothing inherently good or bad in this
  - and it remains to be seen how it will play out
- BUT it makes the UPC stand out when compared to a national court
  - and may have unforeseen (or even unwanted) effects on the way the UPC will decide its cases when compared to traditional courts
  - Some examples:
    1. Competition law
    2. Ordre public and morality
    3. Scope of protection

The UPC and competition law

1. When could the UPC use competition law rules (competition law interests)?
   1. Infringements actions

      UPA Article 32: The Court shall have exclusive competence in respect of: (a) actions for actual or threatened infringements of patents and supplementary protection certificates and related defences, including counterclaims concerning licences;

   2. Actions for preliminary injunctions

      UPA Article 62: (1) The Court may, by way of order, grant injunctions against an alleged infringer … . (2) **The Court shall have the discretion to weigh up the interests of the parties** and in particular to take into account the potential harm for either of the parties resulting from the granting or the refusal of the injunction.

- Conclusion (Petersen/Riis/Schovsbo (NIR 2014)):

  "… even though the UPC will not have competence to hear separate actions or decide on counterclaims concerning the grant of a compulsory license, **the UPC will be able to apply competition law and national rules on compulsory licensing as balancing instruments in actions for patent infringement and in actions for preliminary injunctions** (provided that the defendant presents a relevant defense in this regard)."

Competition law as a "defence" against injunctions in SEP-cases

- The starting point:
  - Patent exclusivity = property rule = injunction
- BUT
  - for "willing licensees":
  - CJEU 16.7.2015 Case C-170/13, Huawei Technologies Co. Ltd v ZTE Corp., ZTE Deutschland Gmb:
  - 1. Article 102 TFEU must be interpreted as meaning that the proprietor of a patent essential to a standard established by a standardisation body, which has given an irrevocable undertaking to that body to grant a licence to third parties on fair, reasonable and non-discriminatory ('FRAND') terms, does not abuse its dominant position, within the meaning of that article, by bringing an action for infringement seeking an injunction prohibiting the infringement of its patent or seeking the recall of products for the manufacture of which that patent has been used, as long as:
    - prior to bringing that action, the proprietor has, first, alerted the alleged infringer of the infringement complained about by designating that patent and specifying the way in which it has been infringed, and, secondly, after the alleged infringer has expressed its willingness to conclude a licensing agreement on FRAND terms, presented to that infringer a specific, written offer for a licence on such terms, specifying, in particular, the royalty and the way in which it is to be calculated, and
    - where the alleged infringer continues to use the patent in question, the alleged infringer has not diligently responded to that offer, in accordance with recognised commercial practices in the field and in good faith, this being a matter which must be established on the basis of objective factors and which implies, in particular, that there are no delaying tactics.

Conclusion – the problem

- Specialization and the mandate to create a uniform body of case law will most likely enable the UPC to enhance the European patent system
  - transparency, consistency, efficiency, and fairness
- But specialization comes with costs and the design of the UPC also has indirect effects:
  - biased towards certain policy aims which may
    - lead to “doctrinal isolation”
    - imply underuse/-development of mechanisms (values) which have traditionally been considered as important
    - make it difficult to overcome the “democratic deficit” of the court (Ullrich IIC 2015.1)
  - discredit past experiences
    - *ex nihilo nihil fit*

Conclusion – the solution

- To maintain traditional balances the UPC should acknowledge its biases and systematically seek to cover its blind spots by seeking to include non-technical values and varying opinions.
- Concretely by e.g.
    - training judges in non-technical areas,
    - appointing court experts and inviting persons concerned by the outcome of the dispute to intervene (*amicus curiae*),
    - dissenting opinions (cf. UPA Art. 78 (only in “exceptional circumstances”)), and
    - seeing itself as part of a European tradition based on diversity

Read more

- Clement Salung Petersen, Thomas Riis, and Jens Schovsbo:
  - The Unified Patent Court: Pros and Cons of Specialization – Is There a Light at the End of the Tunnel (Vision)?, IIC 2015 271-274.
  - "The Unified Patent Court (UPC) in Action - How Will the Design of the UPC Affect Patent Law? (June 16, 2014) in Ballardini et al; (ed.) "Transitions in European Patent Law – Influences of the Unitary Patent Package" (Kluwer (2015)) (available at //ssrn.com/abstract=2450945)
  - "The Unified Patent Court (UPC), Compulsory Licensing and Competition Law", Nordiskt Immateriellt Rättskydd (NIR), 2014 324 (available at http://ssrn.com/abstract=2489006)
- Federica Baldan and Esther van Zimmeren: The future role of the Unified Patnet Court in safeguarding coherence in the European patent system, C.M.L.Rev. 51; 1529-1578, 2015