

EU Unified Patent Court Spurs Delight And Fear For Experts

By Ryan Davis

Law360 (March 31, 2022, 8:23 PM EDT) -- The impending arrival of the European Union's Unified Patent Court drew varied reactions at a conference Thursday, with some experts calling it a golden opportunity for companies to enforce their patents and others warning the court's impact is uncertain and includes potential pitfalls.

After years of false starts, the court is expected to be up and running in the coming months, creating a system that, for the first time, will allow patent disputes to be litigated across numerous EU member states through one proceeding, rather than on a country-by-country basis.

At a virtual conference organized by a group of intellectual property experts called the Global Team of Teams that delved into the ramifications of the new system, one of the most enthusiastic participants was former Federal Circuit Chief Judge Paul Michel, who said the UPC is likely to be embraced by patent owners, especially those from the U.S.

He said that while it is very difficult for patent owners to secure injunctions in American courts, he expects them to be almost routine in the UPC, giving patentees an important remedy when infringement is found in EU cases and a tool to incentive settlements.

"I would not be surprised if an enormous number of U.S.-based companies shift the focus of their enforcement to Europe, and particularly to the new court," Judge Michel said. "If I were in the company or in the law firm advising the company, I'd be pretty enthusiastic about the new court."

In addition to the possibility of injunctions, the UPC is also attractive to patentees because all the judges will be patent specialists, he said, whereas in the U.S., only a handful of judges are experienced in patent law, and trials are decided by lay juries that are not required to explain their rationale.

"I feel envious. I feel enormously impressed, I feel that I have to salute the leaders of the European movement that created this new forum," Judge Michel said.

Other participants sought to temper expectations for the UPC, instead highlighting complications it could create for patent owners and accused infringers.

David Rose of Mishcon de Reya LLP's London office noted that the UPC is an entirely new forum, and judges have not even been hired, much less issued decisions, so it is too soon to know what litigation and outcomes at the court will look like.

"I think it's worth just pausing and thinking that we do have this bundle of unknowns," he said. "These things could all come to pass: It could be cheap, efficient, patent-friendly, very willing to grant injunctions, all things that litigants in the United States dream of. But we simply do not know."

On paper, it appears the UPC could move very quickly and reach its decisions within a year, but there's a chance that clever litigants could find ways to game the system and prolong cases, Rose said. It also appears that UPC litigation will likely be considerably more expensive than litigating in individual EU countries, which companies will have to take into account, he noted.

The flip side of being able to bring infringement claims across the EU in one case is that accused infringers can mount invalidity challenges that can result in the patent being revoked across all EU countries.

Later this year or early next year, a "sunrise" period will begin in which companies can opt out of the UPC's jurisdiction for their current patents. Many participants at the conference said it is likely to be a common and advisable choice.

Whether to opt out is "the billion-dollar question that everybody has to grapple with," said Koen Bijvank of Brinkhof NV in Amsterdam. "It's not an easy question to answer. I don't think there is a clear-cut answer that applies across the board."

Considerations will be different for each company depending on their patent goals and strategies, but it is important to realize that the sunrise period is fast approaching, so, "if you are concerned about a central revocation action and you don't want your patents to be in this system, you need to take action, and you need to register that opt out," Bijvank said.

York Eggleston IV, co-founder of the patent licensing company Slingshot Technologies, said he is excited about the new system because it is a disruption that "represents opportunity for those who can navigate it well." However, he said the risk of patents being invalidated across the countries participating in the UPC "concerns me greatly."

Eggleston said that his perspective at this point is "heavily skewed to opting out immediately." If in-house counsel does nothing, the patents stay in the UPC system, and if they start getting revoked across the EU, the corporate board "would have a problem with me for failing to recognize that my first responsibility is to preserve value," he said.

Despite the uncertainty about the new court, the fact remains that in the current environment, where patent cases have to be litigated in individual European countries, "we have a fragmented system with a high risk of conflicting decisions," said Elisabetta Papa of Societa Italiana Brevetti SpA in Rome.

"There is no company that can benefit from a system that is fragmented, so this is why I would say we embrace the UPC," she said. "Having more legal certainty and a harmonized system also fosters innovation."

Regardless of whether companies are excited or wary of the new court, participants agreed that the UPC's arrival would keep companies and lawyers busy considering their options before the court opens for business and monitoring rulings and devising strategies afterward.

Aside from whether the UPC is more favorable to patent owners versus accused infringers, "everybody is going to have a lot more work to do with evolving, ever-changing risks and opportunities of many different sorts," Judge Michel said.

"It's going to be enormously disruptive from a resource standpoint, as well as the strategy and tactics standpoint," he said. "I think that if U.S. companies, as I'm guessing, are a little slow to get on top of the game, they will likely suffer some bad consequences as a result of that."

The bottom line is that "if you like it or not, the UPC is now definitely coming," said Philipp Rastemborski of Meissner Bolte in Munich. With only months to go before the system starts, companies need to look at their portfolios and identify litigation opportunities and risks as potential defendants, he said.

"It's good advice to make this homework for every business now and don't wait for the system to start, because then it might be too late," he said.

--Editing by Vaqas Asghar.