

Dawn Of EU Unified Patent Court Set To Shake Up Litigation

By Ryan Davis

Law360 (May 5, 2023, 6:44 PM EDT) -- After years of delays, the European Union's Unified Patent Court will open next month, and attorneys say that the new court's speedy timelines and experienced judges appear poised to make it a popular venue for patent owners and a challenging one for defendants.

The court will allow patent disputes to be litigated across 17 EU nations through one proceeding, rather than on a country-by-country basis, as has been the case in Europe. With decades of legislative wrangling and legal disputes over it now in the past, the UPC is scheduled to begin hearing cases on June 1.

The court's ability to issue decisions and injunctions that apply in much of the European market, its goal of rapidly resolving cases in 12 months, and its hiring of respected patent judges all give it the potential to reshape litigation in ways that can be compared to the beginning of America Invents Act patent challenges in the U.S., attorneys say.

"What I think is about to happen is clearly the most significant development in global intellectual property since the AIA went live in 2012," said Robert Greene Sterne of Sterne Kessler Goldstein & Fox PLLC in Washington. "It will literally have as much impact as we saw with the U.S., because the U.S. is no longer the center of the universe."

While the entirely new and untested court has caused uncertainty about how it will decide cases that makes some companies apprehensive about being the first to try it, the way the UPC is set up has positive signs for patent owners, who have been warming to the idea of litigating there, attorneys say.

"There's been a slight change in attitude I've noticed in the last six months about this court, as it's become clear that it is going to happen after many years of doubts. Patentees are seriously considering using it," said Paul England of Taylor Wessing in London. "I think the court will get off the ground quite quickly, actually, and it could surprise people how active it is."

Appeal for Patent Owners

Many observers expect that the Unified Patent Court's decisions in infringement cases will tend to favor patent owners, because it was created as a way to enforce patents more efficiently, and the court and its judges will necessarily have an interest in attracting suits.

"This new system is set up to protect patent owners, and if it starts doing that, utilization is going to go up," said Charles Larsen of McDermott Will & Emery LLP in Boston.

He added, "If they go first shot out of the box and start knocking patents out, finding no infringement or not giving injunctions, you can guarantee what's gonna happen: Nobody will ever use that court."

Wim Maas of Taylor Wessing in Amsterdam said the UPC judges seem to have the same mindset as many attorneys, that it is better for there to be one system for patent litigation in Europe than to have it fragmented in different countries, and they will be eager to make it work.

"If this system should be successful, then I think you have to accommodate patent litigation from the patentee side," he said. "That doesn't mean that these courts will not invalidate rubbish patents. I have no doubt that they will, but I think in general it will be patentee-friendly."

Given all the potential appeal of the UPC for patent owners, American companies that have not previously considered the possibility that they could face a patent infringement suit in Europe could find themselves unexpectedly in the crosshairs at the new court, Sterne said.

"Most U.S. companies are not ready to be sued, and they don't think they have any real threat to be sued," he said. "With the injunction capabilities that this court has, and the speed at which the court operates, I think there's a much higher risk for mid-sized companies to possibly be sued by their European competitors to push them out of Europe. That could be what happens in the next six months."

Sterne said U.S. companies should start doing due diligence about the patent portfolios of the businesses they compete with in Europe and working with attorneys on both sides of the Atlantic to craft a plan for if they are sued, which could involve filing countersuits or patent challenges in the U.S., Europe or both.

"If the company gets sued, and the chief IP person has not assessed this risk at all, they're going to look totally unprepared," Sterne said.

Being proactive is especially important, because "the defense side is really at a disadvantage" with the UPC's 12-month timetable, he said, as the plaintiff has months to prepare a suit, and the accused infringer has only weeks to start mounting a defense.

A Look at the Judges

The UPC has hired dozens of judges to hear cases in multiple local divisions across Europe, two central division courts in Munich and Paris, and a court of appeals in Luxembourg. The selections have been praised by attorneys, who said the reputations and experience of the judges have bolstered confidence in the court.

To the extent anyone was concerned the UPC might hire judges due to political or family connections rather than patent expertise, the selections made clear that "these are seasoned judges, and they all thrive on doing a good job," said Ulrich Blumenröder of the Munich-based law firm Grünecker.

The president of the UPC Court of Appeal, Judge Klaus Grabinski, is among the best-known of the judges, having served for almost 30 years as a patent judge in Germany, currently as vice chairman of the patent senate of the country's Federal Court of Justice.

Judge Grabinski has long been an advocate of establishing the UPC, which has given him a high profile in other countries and will likely mean he will have a key role in shaping the new court with appeal decisions, said Jan Phillip Rektorschek of Taylor Wessing in Munich.

"He knows how patent law in Germany works but, and this is a very important point, he also knows how it internationally works," he said, adding that, "I think his guidance, so to say, will really be an advantage of the UPC system as such in the beginning years."

Blumenröder noted that Judge Grabinski was on the committee that drafted the rules of procedure for the UPC, "so he's the man with the highest influence."

The seven judges on the Court of Appeal also include two judges from the Hague Court of Appeal in the Netherlands, Judges Rian Kalden and Peter Blok, who each have extensive experience in patent cases.

Maas said among Dutch litigators, Judge Kalden is seen as leaning more toward being patentee-friendly than some of her colleagues, and is also known for paying close attention in her rulings to patent decisions in other countries like Germany and the U.K.

"I think that's good; that is exactly the attitude you need to make the UPC into a success," he said.

Judge Blok is an intellectual property law professor at Utrecht University in addition to being an appeals court judge, so "on a scientific level, he is well-equipped," Maas said, and he is also known for bringing a collegial atmosphere to the court.

The UPC has also hired well-known patent judges to hear cases in the courts of first instance. For example, in the Munich local division, Judges Tobias Pichlmaier and Matthias Zigann are familiar to German litigators from their time on the Munich Regional Court and seen as being likely to uphold patents and grant injunction requests, Blumenröder said.

"They're very much into preliminary injunctions, so if you want to have a preliminary injunction granted, go there," he said.

Looking Ahead

Though many of the judges are known by reputation on their home courts, how they might act on a new court remains to be seen. Peter Thorniley of Venner Shipley LLP in London said that "most speculation you get is kind of how much will they bring in their own national traditions into their understanding of the provisions of the UPC."

For instance, judges in some countries are more likely than others to grant injunctions when infringement is found, and most European countries consider infringement and invalidity together, while German courts bifurcate those issues.

There is a tendency to think that UPC judges will do what they're used to, but Thorniley said, "I think you'd have to be a little bit cautious assuming that any judge from a particular national tradition will think, 'This is my opportunity to stick to what I know,' rather than, 'This is my opportunity to improve upon what I know and find a different way forward.'"

Another unknown quantity is the court's technically trained judges, who have expertise in certain fields of technology and will sit on UPC panels alongside the legally trained judges with judicial experience. The technical judges will be on the UPC part time and work as attorneys at law firms or companies, which has spurred questions about how conflicts will be managed.

The months to come will shed more light on how the court will operate with respect to those issues and others, and attorneys expect the judges will have no shortage of cases to work on, since, as Sterne put it, "This is a game-changer."

"There's going to be suits right out of the box," he said. "There's going to be bragging rights for the firm that files the very first UPC case, the second one and the third one."

Rektorschek of Taylor Wessing described the court as "a fantastic opportunity for patentees to have another tool for their enforcement campaigns."

"My assumption is that not all will run into this new system, but all important patentees with big portfolios will use it, in addition to the already known national systems," he said.

--Editing by Robert Rudinger.