

## How The EU Patent Court Will Protect Against Trolls

*Law360, New York (March 11, 2013, 11:20 AM ET)* -- Many commentators in Europe have worried that the Unified Patent Court (UPC) will support campaigns of meritless patent litigation comparable to those high-tech companies have seen in the United States. However, a closer look at the proposed UPC agreement reveals that significant procedural and structural safeguards have been built into the court system to prevent this type of abuse. With such safeguards, the UPC seems well positioned to prevent abusive nonpracticing entities, or patent trolls, from engaging in meritless patent litigation.

### Unified Patent Court

The structure and procedures of the UPC are defined in the UPC agreement<sup>[2]</sup>. As of Feb. 19, 2013, 24 European Union member states have signed the UPC agreement, which will take effect when ratified by 13 member states, including France, Germany and the United Kingdom. While the UPC agreement, the regulation regarding the EU unitary patent, and the regulation regarding translation of EU unitary patents (collectively referred to as the “package”) could come into force as early as January 2014, expectations are that ratification may not occur until later in 2014.

The UPC provides an EU-wide jurisdictional structure for patent right protection, with jurisdiction over European patents with or without unitary effect. During an initial transitional period of seven years, a patent proprietor can opt out from the jurisdiction of the UPC.

The UPC includes a court of first instance and a court of appeal. This two-tiered court structure is similar to the U.S. federal court system, which includes district courts and a U.S. Court of Appeals for the Federal Circuit. The court of appeal will reside in Luxembourg; the court of first instance will be organized into local, regional and central divisions. Local divisions may be established in participating EU member states, with a maximum of four per country. Regional divisions may be established by two or more participating EU member states when local divisions for those states are not established. The central division will be chaired in Paris, with sections in Munich and London.

Cases before the central division will be distributed according to subject matter, as defined by the International Patent Classification scheme. London will preside over life sciences inventions, including pharmaceuticals, biotechnology, and medical devices. Munich will preside over auto and mechanical inventions, and Paris will preside over the remaining categories, including computer-implemented inventions and information and telecommunication technologies.

## **Patent Trolls**

A “patent troll” is a nonpracticing entity that does not manufacture or use a patented invention, and is primarily in the business of patent litigation. These NPEs often acquire patents with claims having broad or vague scope and questionable validity, and then send cease-and-desist letters to target companies to elicit a license for their patents. Companies will carefully weigh the cost of fighting a potential infringement suit versus the cost of paying the licensing fee; given the relatively high cost of patent litigation in the United States, many companies will take a license rather than go through a protracted and expensive patent infringement action to invalidate a questionable patent or obtain a noninfringement verdict.

## **Procedural Safeguards**

The UPC agreement includes procedural safeguards that will discourage NPEs from practicing within the UPC. Procedural safeguards include: (1) the mandate that the losing party must pay attorney fees, (2) limitations on the joining of multiple defendants, (3) discretionary injunctions, (4) limited discovery, and (5) a rule of proportionality and fairness.

### ***Losing Party Pays Attorney Fees***

Under Article 69 of the UPC agreement, legal costs shall “be borne by the unsuccessful party.” The risk of bearing the cost of litigation provides a significant deterrent against lawsuits based on questionable claims. In the U.S. patent system, each party normally pays its own legal fees, with limited exceptions. Hence, there has been minimal disincentive or financial risk for an NPE having a litigation firm acting on contingency to pursue patent litigation based on questionable patent claims. In August 2012, the Shield Act[2] was introduced before the U.S. Congress; it would require an NPE to pay a defendant’s legal costs if a court determines that the lawsuit did not have a reasonable likelihood of success. While the Shield Act remains under consideration in the United States, Article 69 of the UPC agreement poses a substantial deterrent and financial risk to any patent proprietor considering an action under the UPC.

### ***Limitations on the Joining of Multiple Defendants***

Under Article 33 of the UPC agreement, an “action may be brought against multiple defendants only where the defendants have a commercial relationship and where the action relates to the same alleged infringement.” Such a restriction prevents an NPE from joining multiple parties from various geographic locations of the EU into a single action at a particular court of first instance unless the parties are sufficiently related by commercial relationship and infringing activity.

In the United States, NPEs have preferred to sue multiple defendants in one venue because such an approach reduces the cost of litigation and makes it harder for defendants to transfer a case to a more convenient venue, because each defendant may have its place of business in a different venue. Because no one venue is considered more convenient than another, U.S. courts have been inclined not to transfer cases to another venue. The recently enacted America Invents Act, however, prevents joinder of unrelated defendants primarily as a deterrent to abusive NPEs. Article 33 of the UPC agreement should achieve the same goal within the UPC.

### ***Discretionary Injunctions***

Under Article 63 of the UPC agreement, a court “may grant an injunction” against an infringer. Many will remember that in 2006 the U.S. Supreme Court clarified that injunctions in patent matters are a matter of equitable discretion and not automatic.[3] This clarification eliminated a major weapon of abusive NPEs. Under Article 63, the UPC implements a defendant-favorable position, rather than earlier U.S. law and current German law, under which injunctions are essentially automatic.

### ***Limited Discovery and Evidence***

Article 53 and Rules 170-191[4] prescribe means for producing documents and evidence. However, such means remain substantially less cumbersome than document and evidence production associated with a U.S. patent litigation. While a defendant may feel confident in its defense in a U.S. patent litigation, the cost of getting to the expected verdict often remains dauntingly high, providing leverage for an NPE to obtain a settlement. In a UPC action, however, a defendant should expect a substantially lower burden and cost associated with discovery and evidence production, significantly reducing an NPE’s leverage to force a settlement based on the transaction cost of litigation.

### ***Rule of Proportionality and Fairness***

Under Article 42 of the UPC Agreement, a court “shall ensure that ... remedies ... are used in a fair and equitable manner and do not distort competition.” Article 42 should empower judges under the UPC to consider principles of equity and fairness with respect to possible abusive litigation or gaming of the system by an NPE.

### ***Structural Safeguards***

The UPC agreement includes numerous structural safeguards that will discourage NPEs from practicing within the UPC. Such safeguards include: (1) nonjury triers of fact, (2) judicial appointments that are limited to a six-year term, (3) judicial appointments controlled by an administrative committee observed by the European Commission, (4) training for judges at the central division, and (5) judicial panels composed of nationals and non-nationals at local divisions.

### ***No Juries***

The UPC does not provide lay juries. Decisions are made by a panel of judges, which can include judges trained in the technology at issue. In the United States, NPEs typically file lawsuits in certain venues where juries favor patent plaintiffs; the exclusion of juries under the UPC reduces an incentive for forum shopping and eliminates possible jury bias.

### ***Six-Year Judicial Appointments***

Under Article 4 of the UPC agreement, judges are appointed to six-year terms that may be renewed. Hence, a judge allowing abusive litigation during a term may not be appointed to a following term.

### ***Judicial Appointments by Administrative Committee Observed by the European Commission***

Under Article 6 of the UPC agreement, the “Administrative Committee shall appoint the judges” of the UPC. Appointments are made by a committee observed by the European Commission, and a reasonable person would presume that a judge allowing abusive litigation during a term would not be appointed by the committee to another term.

### ***Training for Judges at Central Division***

Under Article 19 of the UPC agreement, the UPC establishes a training framework “to ensure a broad geographic distribution of such specific knowledge and experience” and “to ensure the consistency of the Court's case law.” Centralized and continuous training will be provided to judges sitting on the UPC, with a focus on linguistic skills and technical aspects of patent law. Regular meetings will also be organized to facilitate discussions on patent law development and to ensure the consistency of the UPC’s case law. Such uniform training among UPC judges should mitigate variations in court practices that could provide an advantage to a patent troll in a particular court or venue of the UPC.

### ***Judicial Panels Composed of Nationals and Non-Nationals of Local Division***

Article 8 of the UPC agreement ensures a diversity of judges within the court of first instance and court of appeal. A court of first instance will normally include a multinational panel of three judges. In local divisions, the panel must include two judges from a country other than the hosting EU member state if the local division hears less than 50 cases per year on average. For more active local divisions, the panel can include one judge from a state other than the hosting EU member state and two judges from the hosting EU member state.

In a regional division, two of the three judges can be nationals of the participating EU member states, while the third judge will be assigned from a different EU member state. In the central division, two of the legally qualified judges must be nationals of different participating EU member states. Cases before the court of appeals will be presented to a multinational five-judge panel, and three of the legally qualified judges must be selected from different participating EU member states. The diversity of nationality among judicial panels mitigates the potential that a particular UPC court would allow abusive litigation.

### **Conclusion**

It would seem that the authors of the UPC agreement wisely considered lessons learned with respect to issues of the U.S. patent system when crafting safeguards into the UPC. The numerous procedural and structural safeguards of the UPC should prevent patent proprietors from engaging in abusive and meritless patent litigation.

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[1] EU Document 16351/12 of Jan. 11, 2013, the “Agreement on a Unified Patent Court.”

[2] “Saving High-Tech Innovators from Egregious Legal Disputes Act of 2012” (a.k.a the “SHIELD ACT”) H.R. 6245, Aug. 1, 2012.

[3] eBay Inc. v. MercExchange LLC, 547 U.S. 388 (2006)

[4] Preliminary Set of Provisions for the Rules of Procedure of the Unified Patent Court, Nov. 29, 2012.

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