The Case for a European Union Intellectual Property Court

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Content

I. Introduction

The value of intellectual property (IP) has enormously increased in the past decades, and with it the number of disputes involving IP. IP Disputes are often technically complex and require experts to evaluate the factual situation. Therefore several jurisdictions have decided to set up specialized IP courts with expert judges.[1] The EU has tried but not yet succeeded in following this trend.[2]

In the EU there exists a long history of failed proposals to have a EU patent court. The latest proposal, in which the member states of the European Patent Convention including the EU Member States were planning to set up a European patent court by international agreement, was quashed by the Court of Justice of the European Union (CJEU) last year in March.[3] The main reason given by the Court for declaring the proposal contrary to EU law was the wide-ranging jurisdiction of the new patent court, which would have put the autonomy of EU law at risk.[4] This is an unfortunate situation. On the one hand there already exist a EU trademark and a EU design right; the Community patent is "in the legislative oven" so to speak. On the other hand there is the political will to have a supranational specialized patent court, but the CJEU decided that this patent litigation system *outside* the EU Treaty framework violated EU law. So why not having a specialized IP court *within* the Treaty framework? Article 257 TFEU, which allows for the establishment of specialized courts, would in principle provide the appropriate legal basis for such a project.

This paper attempts to give an answer to this question by looking at the project from two perspectives. Whether a specialized IP Union court would be a good idea will be assessed firstly, from the perspective of private interests, i.e. the desirability of such a court from the perspective of private IP litigants. Secondly, the desirability of such a

[1] Examples are the US Court of Appeals for the Federal Circuit (semi-specialized) or the Japanese High Court for Intellectual Property (fully specialized).

[2] The first calls for a European patent judiciary were already raised during the first efforts to create a Community patent right by convention in the 1980s (Ullrich (2010) p. 30-32)

[3] Opinion 1/09 of 8 March 2011

[4] *Ibid* paragraphs 76-78

project will be discussed from a public perspective, i.e. which advantages such a court would yield to government and the public as a whole. This double perspective will be pursued throughout all parts of this paper.

The different parts of this paper place the project of a Euopean IP court in a wider context and are structured by going from the general to the specific. Section II will discuss the costs and benefits of specialized adjudication generally, not just in the case of IP. Section III will then apply the theory of Section II to specialized adjudication in the field of IP. Section IV will subsequently assess the arguments in favor and against specialized adjudication in the field of IP in the political environment of the European Union.

II. The case for specialized adjudication

The aim of this section is to reveal which reasons, in general terms, exist for establishing a specialized court within a federal judicial system. Both benefits and costs of specialized adjudication will be discussed. Following each point of discussion, a proposition will be presented, highlighting under which circumstances arguments in favor of specialization are strongest. The result will be the deduction of a number of propositions, which will later serve as a non-exhaustive list of indicators to help determining whether specialized adjudication in the field of IP is recommendable (Section III) and whether it would be a good idea to have specialized adjudication in IP matters within the judicial structure of the EU (Section IV). These propositions come with the disclaimer of being purely abstract and speculative in nature. Their purpose is to structure and highlight different features of specialization, which might be determinative to the question of whether it is sensible to set up a specialized court. In order to acquire a real and actual guiding function, these propositions would have to be subjected to empirical testing.[5]

Before engaging in this exercise, it seems appropriate to define in a first step the terms (1) *specialized court* and (2) *federal judicial system* as used in the following analysis.

[5] Oldfather (2011) places a lot of emphasis on the point that the case for judicial specialization is highly complex and still needs to undergo a lot of theoretical and empirical research.

1. *Specialized court*. Court specialization can come at varying degrees. If court specialization is imagined in the form of a continuum, at one end there would be non-specialized or generalist courts and at the other end fully specialized courts. A generalist court would be understood as a court, which hears cases in all fields of law, in which all issues are addressed in parallel by other courts within the federal judicial system, and which is staffed by generalist judges. A generalist judge is understood as an expert in law and in the exercise of decision-making, without however possessing expert knowledge in a single area of the law.[6]

For the purposes of this work, a fully specialized court would be a judicial body which adjudicates disputes falling within only one subject matter, i.e. the scope of its jurisdiction *ratione materiae* would be limited to a specific field of law.[7] Furthermore such a specialized court would hear all cases in which issues of its subject matter jurisdiction arose. Its subject matter jurisdiction would therefore be exclusive, i.e. no other court in the federal judicial system would decide these types of cases parallel to the specialized court.[8] Lastly, a fully specialized court would be staffed by judges who are specialists in the subject matter in which the court enjoys limited and exclusive jurisdiction. The main three features of a fully specialized court would therefore be (1) exclusive, (2) subject matter specific jurisdiction, and a (3) specialized bench. Along the continuum there could be courts with only some of these three features, e.g. limited to a subject matter but having concurrent jurisdiction to generalist courts in disputes falling within that subject matter.[9]

The advantages and disadvantages of specialization will be discussed in Section II. A. under three headings, according to these three features of a fully specialized court. Depending on the location of a specialized court on the specialization continuum, i.e.

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[6] Posner (1) (1983) p. 778 f. Cognitive psychologists seem to disagree with this point however, as they consider that there does not exist a generalized expertise neither in the field of problem solving nor in the discipline of analogy use, which seem to be the main tasks in the exercise of decision-making or judging (Spellman (2009) p. 19)

[7] This definition is adopted from Revesz' definition of specialized courts with limited, exclusive jurisdiction in Revesz (1990) p. 1125 ff.

[8] *ibid.*

[9] An example for a specialized court with limited, non-exclusive jurisdiction would be the US Tax Court (Revesz (1990) p. 1138).

depending on the features implemented in the specialized court, the expected advantages or disadvantages would or would not be applicable.

2. *Federal judicial system.* For the purposes of this work, a federal judicial system is understood as the entire court system of a federal political entity composed of both, the courts of each of the subunits of the federation and the federal courts. In such a system, federal law will usually take precedence over subunit law.

The judicial or court system of a federation can be either dual or integrated. In dual systems each sphere of governance, at subunit and federal level, has its own court system, operated separately, with parallel court hierarchies. There will be a clear split between federal and subunit jurisdiction. Federal courts will apply federal law produced by the federal legislative and subunit courts will apply subunit law produced by the subunit legislatives. In integrated system the different spheres of governance share one court system within one hierarchical order, authority over which is usually shared by the different levels of governance. The courts within an integrated system will possess both, jurisdiction over cases arising under federal as well as subunit law.[10]

For the following analysis, a certain degree of integration of the federal and subunit court systems will be assumed, in which at least an appeal from subunit to federal courts is possible to check the consistency of subunit law with federal law, which is necessary if federal law is assumed to 'trump' subunit law.

With these definitions serving as a basis, section II.A. will discuss in how far a specialized court might enhance judicial efficiency within a judicial system. It will focus particularly on the advantages from a more efficient judicial system to private litigants. Section II.B. will discuss how the federal government might benefit from a specialized court. These benefits should be understood in as far as the establishment of a specialized court may lead to a more effective implementation of policy. These benefits should not be understood in the negative sense of how a specialized court might be used as an instrument by the executive to enhance its own powers to the detriment of the other branches of government.

[10] Saunders (2006) p. 365

A. Judicial economy

All arguments for having specialized courts in a federal judicial system for reason of judicial economy depend on one simple fact: there needs to be a problem in the existing court system in the first place. In order to justify the establishment of a specialized court, certain inefficiencies need to exist in the current design and functioning of the federal court system, which are detrimental to litigants and which specialization reasonably promises to remedy.[11]

Several examples of such inefficiencies can be given. One example is delayed delivery of judgments, because judges are slow in deciding cases. This can be due to the burden of an excessive caseload, which requires queuing new cases, or because the factual and legal situation of a certain type of cases is so complex, that it will require more research and reflection and therefore more judge-hours to resolve the case. Another example are unnecessary, excessive costs with which litigants are burdened, for example because they need to enforce their rights in several different *fora* with parallel jurisdiction to receive protection across the entire federation. A third example would be a court system in which litigants are subject to opportunistic litigation, in which an opponent takes advantage of the differences between the parallel jurisdictions (forum shopping). As a result, litigants are faced with legal uncertainty and inadequate protection of their rights. Apart from creating unfair results for individual cases in general, these effects would be particularly damaging in areas of the law which are relevant to economic actors because of the uncertainty generated for future business decisions. Future business decisions would become less predictable and thus riskier, which in turn might reduce the incentives of investing in future profitable projects that might have been beneficial to the federation's economic welfare situation as a whole.

A specialized court in an inefficient court system of generalist courts might therefore yield efficiency gains by leading to a faster, cheaper, and qualitatively higher adjudication of disputes within a specific field of law. These efficiency gains would presumably be generated by the three features of a specialized court: (1) its exclusive jurisdiction (2) its monopoly over interpreting one particular statutory scheme

[11] Dreyfuss argues for example that the benefits to patent law generated by the US Court of Appeals for the Federal Circuit accrued because there were many deficiencies in the preceding system (Dreyfuss (1) (1989) p. 66)

resulting from its limited subject-matter jurisdiction, and (3) the subject-matter expertise of the judges. Each of these features with its advantages and disadvantages will be discussed separately in the subsequent sections.

1. Exclusive jurisdiction

A specialized federal court with exclusive jurisdiction would be the one single instance within the federal judicial system hearing all cases of a certain type. Parallel jurisdictions in the field of specialization and consequently also disagreement and contradicting case law between courts possessing parallel jurisdiction would cease to exist. A specialized court would be expected to produce one single coherent body of decisions.

The first and most obvious advantage of a specialized court's exclusive jurisdiction would be the elimination of forum shopping, because parties would not have a choice anymore as to the forum in which to litigate. There would be no opportunistic litigation, which normally lives from diverging approaches of courts with parallel jurisdiction, possible anymore. This would make the system fairer, because horizontal equity could be better ensured.[12] Additionally, litigants would have a one-stop-shop in form of the specialized court to enforce their rights, in case enforcement of particular rights was previously split among parallel jurisdictions. For these reasons the system would become cheaper for litigants, because they would not need to file several parallel actions anymore.

⇒ *Proposition 1: The more undesirable (supply induced) forum shopping can be observed in cases of a specific area of the law, the stronger the case for specialized adjudication.*

A second advantage would be the reduction of the number of cases heard by generalist courts, because the fraction of cases which fell within the field of specialization of the specialized court would disappear from the generalists' courts dockets. Thereby the number of cases decided by a generalist judge would decrease, and he could devote more time to the cases he is left with, which might lead to faster

[12] Dreyfuss (1) (1989) p. 2

decisions of higher quality of the generalist courts. This would be particularly an advantage if an excessive workload for generalist courts caused problems before.

⇒ *Proposition 2: The greater generalist courts suffer from a case backlog, the stronger the case for specialized adjudication in the field in which accounts for a significant share of the generalist courts' docket.*

A third advantage of exclusive jurisdiction would be the fact that a specialized court would hear all cases arising in a certain field. The court would, for quantitative reasons, quickly acquire more experience in the field than a generalist court only hearing a fraction of all cases arising in the federation. As the court would decide in a shorter time upon a greater variety of issues within the field of specialization than a generalist court, it would likely produce more precedent and therefore make the law clearer and more predictable for litigants. Furthermore a repetition of cases of the same type might lead to the development of a certain routine which might speed up the decision process, thereby reducing judge-hours of the specialist judge invested in each case. At the same time, this would lead to a faster delivery of judgments for litigants.

Next to the advantages of exclusive jurisdiction there might however also be certain drawbacks attached to it. One of the greatest potential disadvantages would materialize in cases of complex lawsuits that raise several connected issues in different fields of law. Finding a jurisdictional rule that determines when the specialized court will hear those complex cases, in which only one of several connected issues falls within its subject matter, is difficult. A clear rule delimitating the jurisdiction of the specialized court over these cases would however be necessary to avoid confusion for litigants.[13] One option would be to give the specialized court an "entire-case" jurisdiction, i.e. the power to decide the case as a whole as long as one of the issues falls within its subject matter. This might however lead to frivolous litigation, because an artificial issue might be construed by a party to bring the entire case under the jurisdiction of the specialized court. It could also reopen the door to forum shopping and bring back strategic litigation, as the specialized court would

[13] Dreyfuss (1) (1989) p. 34

exercise a parallel jurisdiction to other courts in the issues not generally falling within its subject matter. Another option would be to give the specialized court an "issue-jurisdiction", i.e. the power to decide separately the issue of the complex case, which falls within its subject-matter. This would however require litigants to split their lawsuits and litigate different aspects one case in several courts. Needless to say, that this would burden litigants again with additional costs and would make litigation more complex.[14]

⇒ *Proposition 3: The easier a field of law is separable from other fields of law, the stronger the case for specialization.*

A second disadvantage of having a single court for all cases of a certain type is that the court will probably be located in a large city of the federation. Geographical access might become a problem, because litigants might be required to travel and incur the costs for traveling.[15] The same is true for evidence other than documentary evidence, such as the hearing of witnesses or inspection of the location where damage took place. It might be a very costly affair to carry witnesses to the specialized court or to have staff of the court come to the place where the harmful event occurred.

⇒ *Proposition 4: The wealthier the standard group of litigants in a certain field of law, the stronger the case for specialization, because geographical access is a minor problem for economically strong litigants.*

A wealthy standard group of litigants, e.g. multinational companies, could of course also choose to resort to alternative dispute resolution mechanisms such as arbitration that would be specially tailored to the circumstances their case. This would eliminate the need for a specialized court from the perspective of these parties. Nonetheless, private dispute settlement will be only a desirable alternative to adjudication through

[14] Dreyfuss (2) (1990) p. 413 f; Posner (1) (1983) p. 787

[15] Dreyfuss (2) (1990) p. 421 f.

the public court system if it leaves public interest unaffected.[16] Issues that are of public interest should not be settled by an arbitration body chosen according to the interests of the parties to the dispute, whose procedure to reach a settlement will most likely be kept secret, but whose decision will affect third parties or the public at large.[17] Even though the standard group might be wealthy there may still be an economically weaker group of potential litigants which may profit from the law developed and decisions rendered by the specialized court. An arbitration panel will not yield these positive externalities because it will not produce binding legal rules for third parties in its arbitral awards and will give little reasons about how it reached the decision.[18]

A third disadvantage is that exclusive jurisdiction might eliminate desirable divergences between parallel jurisdictions. It is possible that cases which are decided differently by two courts are hard cases; cases which involve a difficult legal question with several possible answers. Disagreement between two courts might firstly have an indicating function: to make practitioners, scholars and legislators aware of the fact that there exists a hard case. Secondly, judges might be forced to provide better and more thorough reasoning in their decisions if faced with a potential diverging opinion from another judge on the same issue. This is due to the pressure exerted by peers and by the public that might engage in a critical comparison of the two decisions. A beneficial competitive pressure between courts might therefore disappear, if all cases of a certain type are channeled to a single court.[19]

A fourth possible disadvantage is that a specialized court will not have any possibility of adapting to fluctuations in the number of cases filed. Depending on the subject matter of specialization there might be peaks in the caseload and periods in which only few cases are filed, especially if the court has done a very good job in clarifying

[16] This is a position adopted in certain jurisdictions that do not allow the question of validity of a patent to be arbitrated for *ordre public* reasons, e.g. France and Italy (Janicke (2002) p. 699)

[17] Dreyfuss (3) (2008) p. 17

[18] Janicke (2002) p. 726

[19] Revesz (1990) p. 1155 ff.

the law and less disputes arise as a consequence.[20] In periods of reduced caseload, fewer judges might be needed. Superfluous judges who as public servants could not be fired, would have to be kept and paid despite lack of work to give them. This would amount to a waste public resources and could lead to personal dissatisfaction, making the job as judge in a specialized court rather unattractive. These problems would not arise in a generalist court, which would have other types of cases filling the gaps left by a reduced number of cases in a specific field of law.[21]

2. Uniform interpretation of a single field of law

The effects resulting from exclusive jurisdiction are closely connected to those resulting from limited subject-matter jurisdiction, which will provide the specialized court with a monopoly over interpreting the law within a specific field. Whereas the former is concerned with the effects of one court deciding all cases within one field, the latter is concerned with one single court being in charge of interpreting a statutory scheme. One is a monopoly over adjudicating all disputes arising within particular subject-matter, which results a uniform body of decisions and aims at remedying contradicting rules previously generated by parallel decisions of different courts. The other is a monopoly over interpreting a particular field of law, which results in a coherent and uniform development of a field of law or statutory scheme (which of course will in turn yield a uniform body of decisions as logical consequence).[22]

One of the main advantages of one single forum administering a body of law is that this forum will be capable of monitoring the development of the law and it will be in the position of ensuring that the development takes place in a coherent manner. Generalist courts that work with all different kinds of statutory schemes might not have the opportunity to acquire deep and thorough knowledge of the structure of a single statute so as to avoid contradicting interpretations.[23] This in turn makes the law less predictable for the parties. A specialized court could be expected to decide cases

[20] Dreyfuss (1) (1989) p. 23

[21] Posner (1) (1983) p. 788 f.

[22] Revesz (1990) p. 1117

[23] Revesz (1990) p. 1170

within one statutory scheme in a unitary manner and with a unitary vision, providing stable and predictable case law on a uniform doctrinal basis, which would enhance legal certainty and thus be advantageous to litigants.

⇒ *Proposition 5: The greater the need for uniformity within a field of law, the stronger the case for specialization.*

Another advantage related to ensuring the coherence of a statutory scheme, is that a specialized court would be capable of enunciating clear and precise legal principles. This function might be especially valuable for statutory schemes which contain vague substantive terms and rules and therefore leave a great margin of interpretation to the judge.[24] A specialized court would be in a better position than several parallel generalist courts, to provide clearer guidelines to parties, thereby again providing more precision, predictability and legal certainty.[25]

⇒ *Proposition 6: The greater the vagueness of the statutory terms within a field of law, the greater the need for case law providing precision, the stronger the case for specialized adjudication.*

As with any monopoly, there are however also certain disadvantages attached to one single forum being responsible for the interpretation and application of a statutory scheme. Whereas the internal coherence of that statutory scheme might be insured, external coherence of the body of federal law as a whole might be jeopardized. Many basic concepts of law, e.g. the concept of "bad faith", can be found simultaneously in many different areas of the law. Whereas a generalist court would deal with cases from all different fields of law, and could achieve developing a consistent approach to such basic legal principles that span across the entire system, or could at least critically assess why it would be (un)reasonable to give to one concept different

[24] Petersen & Schovsbo argue in favor of a specialized patent court *inter alia* because the central components and rules of patent law are very imprecise, which give a court greater interpretative leeway but also require a greater shaping function of the court (Petersen & Schovsbo (2011) p. 5).

[25] Dreyfuss (1) (1989) p. 8

meanings depending on the field of law in which it is applied, a specialized court would lack the broad picture to test this type of coherence due to its limited jurisdiction.[26] Furthermore the specialized court would suffer efficiency losses from not being able to make use of already developed concepts from other fields of law.[27]
As a consequence federal law as a whole might become more incoherent, and procedures before the specialized court more idiosyncratic. This might lead to a fragmentation of the federal legal system, making it more complex and therefore less user-friendly for litigants.

⇒ *Proposition 7: The less important the coherence of federal law as a whole* vis-à-vis *the importance of the coherence within a field of federal law, the stronger the case for specialized adjudication.*

Furthermore the likely emergence of a distinct procedure and legal practice before the specialized court might fuel the emergence of a specialized bar.[28] Between specialist judges and specialized attorneys could emerge a separate technical (for outsiders impenetrable) language and procedure, which would drive the specialized court into isolation. This would be akin to the rise of a separate legal system around the specialized court within the federal judicial system.[29] The specialized judges and specialized bar might even actively push for such a development to create their own niche. An isolated position of specialization might facilitate escaping accountability and might help to justify it own existence without fearing too much scrutiny.[30] Understanding the law produced by the specialized court would become a challenge for lawyers outside the field of specialization. Coordination between the specialized court and the generalist courts of the federal system would thus become more difficult. This would especially pose a problem when appeals from the specialized

[26] Revesz (1990) p. 1162 ff.

[27] Posner (1) (1983) p. 787

[28] Oldfather (2011) p. 6

[29] Dreyfuss compares this to the re-establishment of the writ system (Dreyfuss (1) (1989) p. 68)

[30] also described as „internal capture“ by Garoupa, Dari-Mattiaci and Gómez-Pomar (2010) p. 807

court are possible to a higher generalist court. If the judges of the higher court are not entirely familiar with language and procedure of the specialized court they might be softer in their review due to lack of understanding and might be more reluctant to reverse judgments from the specialized court. If the higher court is prevented from exercising effective supervision, mistakes made by the specialized court might not be corrected.[31]

A third disadvantage can emerge from a feature that has been described as advantage above, namely the development of a piece of legislation through a unitary vision of the specialized court. This feature might work as an advantage, as long as the specialized court's unitary vision is backed by public consensus as to the policy goal pursued. If the public is split about the purpose and goal of a certain piece of legislation, a specialized court might be caught in that conflict, having to deal with accusations of being partisan with one of the camps. Neutrality is however one of the defining characteristics of a court, and an absolute precondition for it to survive in the long term.[32] A generalist court would not face this kind of existential problem, because of the heterogeneity of its docket. As it would only now and then produce a controversial decision, the public would not call the institution as a whole into question, but limit its critique to single decisions of the generalist court.[33]

⇒ *Proposition 8: The greater public consensus about the goal of a federal statutory scheme, the stronger the case for specialized adjudication.*

3. Expertise

Apart from having exclusive and limited jurisdiction, a specialized court would be staffed by specialist judges.[34] These judges would only sit in the specialized court and would have expert knowledge in a certain field of law.[35] Such specialist judges could

[31] Garoupa, Dari-Mattiacci & Gómez-Pomar (2010) p. 808

[32] Shapiro (1981) p. 17

[33] Dreyfuss (2) (1990), p. 415

[34] This is only an assumption for the purposes of this work and not a general *conditio sine qua non*. A specialized court could also be staffed by generalist judges, as discussed in Revesz (1990), p. 1130 ff.

[35] Revesz (1990) p. 1130

even be qualified in an academic or scientific discipline other than law, relating to the subject matter which is covered by the courts' field of specialization.[36] An example would be economists sitting in a court specialized in antitrust law, psychologists specialized in childhood development in family courts or engineers in patent courts.

An obvious advantage of an expert bench would be the ability of the judges to grasp and analyze complex issues of law and fact more quickly and more accurately than generalist judges. The more complex a statutory scheme, and the more a decision under that scheme depends on facts which require expert knowledge for their evaluation, the higher the expected value of the judges' expertise.[37] A specialized court would be expected to take less time to decide these complex cases than a generalist court. Furthermore the expertise of the judges should ensure the correctness of the results.[38] Consequently, litigants would face shorter decision periods and would receive decisions of a higher quality. Additionally, generalist courts would be released from these complex and time-consuming cases. Their caseload would not only quantitatively but also qualitatively reduced.

⇒ *Proposition 9: The more complex and technical the factual and/or legal situation of a field of law, the higher the value of expert judges, the stronger the case for specialized adjudication.*

A second advantage derived from specialist judges is that parties might not need to invest as heavily in specialized attorneys and expert witnesses, because specialist judges could compensate with their subject matter knowledge for these extra costs. Litigating would therefore become cheaper for the parties.[39]

There are however also disadvantages attached to staffing a court with expert judges. A first problem might be that a specialized bench is more likely to be captured by

[36] Dreyfuss (1) (1989) p. 2

[37] Dreyfuss (1) (1989) p. 67

[38] Dreyfuss (2) (1990) p. 409

[39] Dreyfuss (2) (1990) p. 421; a greater involvement of the judge might however be seen as a disadvantage in adversarial systems.

interest groups than a bench composed of generalists. The group of persons eligible for the office of expert judge consists of a very narrow segment of specialists compared to the group of professionals from which generalist judges are chosen.[40] It would be therefore easier for interest groups to capture the nomination process of a specialist bench. Furthermore it might yield greater benefits to interest groups to exert influence over a specialized bench, because the bench might decide exclusively cases which are relevant to the interest group. A generalist court will have such a broad range of cases that cases of interest for the interest group will only appear irregularly before it.[41] A biased specialized bench will be of course disadvantageous to the parties before it. The resulting lack of trust in the specialized judges by the parties litigating before it and the public in general might reduce the lifetime of the specialized court significantly.[42]

A second disadvantage could materialize when there exists a lack of professional consensus among experts as to the fundamental questions of the courts' field of specialization, which could adversely affect the decisions it produces. The more submerged a professional is in a certain field of law, the more he will be aware of different ideologies within the field and the more likely he will be a follower of one of these ideologies. A judge who takes decisions on the basis of an ideology will be however less objective. Additionally, there might be an ideological division between the specialist judges, which might lead to polar-opposite decisions. Instead of producing a stable, predictable case law, a specialist court might produce case law vacillating between two extremes.[43] The goal of a specialized court bringing uniformity and predictability to the law would be therefore jeopardized.

[40] Revesz (1990) p. 1148 f.

[41] Revesz (1990) p. 1149 ff.

[42] The history of the US Commerce Court (1910 – 1913), which only survived for three years is an example supporting this thesis (Dreyfuss (2) (1990), p. 391 ff.)

[43] Posner (1) (1983), p. 780 ff.; This seems to be supported by an empirical study describing the emergence of two radically opposing methods (procedural vs. holistic) of construing patent claims in the US Federal Circuit (Polk Wagner & Petherbridge (2004) p. 1151)

As a third disadvantage it might be difficult to attract highly qualified personnel to a specialized court. The prospect of the monotonous work of deciding the same type of cases and of not having any variation in the legal questions posed to the specialized court might deter bright minds to serve in it.[44] The reputation and the efficiency gains, especially in form of the quality of decisions, generated by a court might however very much depend upon the judges who sit in it.[45] Less qualified judges will produce decision of a lower quality, which will be detrimental to the parties litigating before the specialized court.

Lastly, there is considerable doubt in literature about whether a judge possessing expertise, i.e. substantive knowledge within a certain field, necessarily also possesses better decision-making skills than a generalist judge when resolving concrete disputes within his field of expertise.[46] The quality of the decision in terms of correctness of the result might therefore not improve if decisions are taken by experts in the specialized court.

B. Supporting instrument of federal policy

Achieving an efficient federal judicial system might very well be a desirable policy goal from the perspective of a federal government. The main potential benefits of the establishment of a specialized court for reasons of judicial economy will however be accrued by litigants which were previously dissatisfied by an inefficient generalist court system. The previous section on judicial economy thus highlighted principally benefits and costs of specialized adjudication for private parties. This section is concerned rather with benefits and potential costs of specialized adjudication at federal level for the federal government. It will analyze in how far a specialized court might be a useful tool to implement federal policy (in policy fields unrelated to the efficient functioning of the federal judicial system).

[44] Posner (1) (1983) p. 779

[45] Dreyfuss (2) (1990), p. 425

[46] Oldfather (2011) p. 22

1. Internal policy goals

Whenever there are divergences between the laws of the subunits within a federation, which are in some way detrimental to the common ends of the federation, the federal government might, depending on the constitutional design of the federation, possess the competence to enact federal legislation harmonizing the conflicting laws across the subunits.[47] Whenever harmonized regional legislation were enforced in regional courts, the harmonizing effects of federal legislation would possibly not fully 'bite' however, due to divergences between the approaches of regional courts. The appropriate tool to ensure a uniform implementation of federal legislation with a harmonizing function in a specific area might be a specialized court with sole power of administering that harmonizing legislative instrument.

The same is true for federal law, which is not concerned with harmonizing regional laws but is directly imposed from the federal level upon the regional subunits.[48] If the federal judicial system is integrated and regional courts therefore apply and interpret also federal law, divergences between these courts' approaches might render federal legislation ineffective. Alternatively cooperation between regional courts could be encouraged, which is however less promising in bringing about uniformity across a field of law than a federal specialized court.[49]

⇒ *Proposition 10: The more decisive the uniform judicial interpretation of a piece of federal legislation for achieving the goal of a certain policy, the stronger the case for establishing a specialized federal court.*

Again however, there might be also disadvantages attached to the institution of a federal specialized court viewed from the perspective of the federal government. The fact that a piece of legislation is interpreted in a uniform way does not mean that the uniform interpretation by the specialized court will correspond with the underlying

[47] In the EU context Directives would be considered to be such legislative instruments.

[48] In the EU context Regulations would be considered to be such legislative instruments. This attempted separation is derived from a discussion about harmonization versus federalization of laws in Bermann (1996) p. 39

[49] Halberstam & Reimann (2010) p.18

legislative will. Since the specialist judges will posses expertise, they might be inclined to interpret statutory rules in a very broad way. Their in-depth knowledge of the subject-matter might lead them to supplementing the legislative text with additional tests or rules to reach a more equitable or accurate result in concrete cases. Where a generalist judge might be cautious, an expert judge might be more (or even over-) confident in going beyond the statutory text.[50] In short, specialist judges could be expected to engage more in judicial activism than generalist judges.[51] The federal government would therefore have to take into account that a specialized court might be more likely to depart from the legislative will and might therefore not further as effectively the policy goals of the federal government as envisaged.

Another potential disadvantage the federal government might have to take into consideration is the risk of capture of the specialized court by interest groups as described in Section II.3. (Expertise).

A last and very important issue of concern for the federal government with setting up a specialized federal court is the resistance such a project could face within the subunits of the federation.[52] The setting up of a federal court affects the balance of powers distributed between the federal sphere of governance and the subunits. If the specialized court possesses exclusive jurisdiction its establishment will entail a transfer of competences from sub-unit courts to the specialized federal court. Even if it were not a court of exclusive jurisdiction, it would still inflict a potentially unwanted competitive pressure on the subunits courts. Especially in the case that subunits already have themselves specialized courts, the federal specialized court would have to represent an improvement in terms of quality and efficiency to be an accepted solution by those subunits which already have specialized courts.[53]

[50] Oldfather (2011) p. 24 f.

[51] As expressed by Landes & Posner : "a specialized court is more likely to have a 'mission' orientation that a generalist court" (Landes & Posner (2003) p. 418)

[52] Many thanks to Dominik Hanf (College of Europe, Bruges) for making me aware of this point.

[53] An argument advanced by Smits & Bull against the Unified Patent Court proposal for the EU is the existence of e.g. the German district court in Düsseldorf (*Landgericht Düsseldorf*) as a national court that is de facto specialized in patent cases and has a broad base of case law

2. External policy goals

Divergences between regional courts when applying federal law might not only be damaging to the functioning of a federation internally, but might also have negative external effects. In areas of law which are relevant for foreign direct investment (FDI) in the federation for example, divergences between regional courts' interpretation of federal law might act as a disincentive for foreign economic players to invest, because they will not have a guarantee that their investment will be protected in a uniform and predictable manner throughout the federation. A federal specialized court might increase the credibility and reliability of the federation in this respect, because it would be in the position to ensure that foreign investors' rights are uniformly protected within the federation. As a specialized court might therefore be an supporting instrument of a policy encouraging FDI, such a judicial institution might improve the international competitive position of the federation.

The same is true for obligations arising under international law, which bind the federation as a whole and not every single of its subunits separately. A specialized court that would ensure that obligations arising under a certain international treaty are honored by and within the federation might increase a federations' trustworthiness on the international plane and might make it a more attractive partner for the conclusion of international agreements.

⇒ *Proposition 11: Whenever a federation has engaged on international level in a project aiming the unification of laws, the stronger the case for specialized federal adjudication to comply with international obligations arising from such a project.*

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and experience to draw from in comparison to a new European patent court (Smits & Bull (2012) p. 15).

III. The case for specialized adjudication in the field of intellectual property

A. The nature of IP Litigation

With the rise of the information society the value of IP and the number of existing IP rights has experienced a steep increase.[54] Consequently, the number of IP disputes has also been rising in the past decades and most likely will continue to rise.[55] IP disputes fall within the general class of private law cases. Unless they concern a dispute between a private party and an IP right granting government authority, such as a patent office, the litigants in an IP case will both be private parties. IP disputes will arise around one of the general types of recognized IP rights such as patent and design, copyright, trade marks and trade secrets. Most IP cases will require the court hearing the case to decide upon two main issues, namely (1) the validity of the IP right on which the action is based and (2) whether the applicant's IP right has been infringed by the defendant (which is akin to determining the scope of protection granted by the IP right). In the case of IP rights subject to registration, patents and registered trade marks being the most prominent examples,[56] the question of validity will usually involve an indirect review of the administrative agency's decision granting the IP right on which the action is based. The court hearing the IP dispute will therefore act as control instance for decisions of the IP office. In some jurisdictions, such as Germany, generalist courts do not have the competence to decide upon the validity of registered IP rights. IP disputes raising the issue of validity

[54] E.g. in the period of 1985-2010 world wide patent and trademark applications have doubled (source WIPO statistics http://www.wipo.int/ipstats/en/ [last visited October 14, 2012])

[55] E.g. in the US the number of patent law suits filed in the federal district courts has tripled since 1980 (source: http://www.ipwatchdog.com/2011/08/02/patent-litigation-statistics-1980-2010/id=17995/ [last visited October 14, 2012])

[56] Other registrable IP rights are e.g. plant varieties

need to be stayed and a specialized judicial body[57] will decide upon the validity. Once the issue of validity is decided the generalist court will continue the proceedings.

1. IP law

a. The nature of IP rights

IP law is a system establishing temporary rights over creations of the human intellect in many of its forms such as inventions, pieces of art, literature, music, signs used in the course of trade to designate the origin of a product etc. These rights can either arise automatically, such as copyright, or their coming into existence can be subject to registration, such as patent and trademark. They give the owner of a piece of intellectual property the right to exclude others from using, copying, adapting, distributing or otherwise interfering with the use and exploitation of their intellectual product. They also entitle the IP owner to transfer his IP right to someone else. The exclusionary nature *erga omnes* and the transferability of rights in IP make IP rights akin to rights in physical property.[58]

Traditionally, IP rights are said to have two main functions. The first function is to protect the moral right of an author or inventor of an intellectual work to be designated as such and his right to integrity of his work. The underlying rationale is that a person should be entitled to the fruit of his labor.[59] The second function, which is by now the more prominent function of IP protection, is of an economic nature. The prospects of receiving an exclusionary right to exploit a piece of intellectual work on the market, thus the possibility to reap monopoly profits from ones intellectual work, should act as an incentive to produce IP.[60] To maximize the production of IP is thus seen as a benefit to society. It represents a tradeoff between the temporary social costs of granting a monopoly position to an IP producer on the market against the social

[57] For Germany this court is the Federal German Patent Court (*Bundespatentgericht*) located in Munich, which has jurisdiction over issues of validity in patent and trademark cases, as well as an appellate jurisdiction to hear appeals from the German Patent and Trademark Office (*Deutsches Patent- und Markenamt*)

[58] Landes & Posner (2003) p. 12

[59] Dinwoodie (2001) p. 513

[60] *Ibid*

gains of having a higher rate of innovation thanks to a higher production of IP and, once the IP rights expire, to have more works freely available in the public domain.

b. The enforcement of IP rights

An important feature of IP rights when it comes to their enforcement is their territorial nature. Even though the market for IP products is global, all the more so with the rise of the Internet age, IP rights are restricted to the jurisdiction in which they are protected by law. The geographical scope of protection of IP rights is therefore limited to the national territory and the material scope of protection is determined by the applicable national law providing protection.[61] For registered IP rights this means that they are only valid in the territory for which the granting agency has the power to issue IP rights. If an inventor wants to receive protection for his intelligent vacuum cleaner with integrated mp3-player function in Spain, New Zealand and Jamaica, he will have to apply for a patent in each of these jurisdictions separately. For all types of IP rights this means, that they can only be enforced territorially. If a copyright is for example infringed in three different places, let us say Germany, Mexico and Japan, the copyright owner will have to go to the courts of each of these states separately and claim the protection of his right against the local infringer. Dispute resolution in IP cases which span across multiple jurisdictions is thus complex by nature.

c. Vagueness of IP law

A last noteworthy feature of IP law is that it hardly has strict and clear core rules to determine the scope of protection of individual IP rights. Uncertainty about the boundaries of IP means that there is equal uncertainty to determine whether infringement has taken place.[62] To ascertain whether a patent has been validly issued for example, a court needs to determine whether an invention truly represented an 'inventive step' or was 'non-obvious to a person skilled in the art'.[63] These vague

[61] Dinwoodie (2001) p. 28

[62] Meurer (2002) p. 4 f.

[63] e.g. Article 27 TRIPS Agreement, which uses the term "inventive step" to describe the "non-obviousness"-requirement: "An 'inventive step' must go beyond techniques which any

terms allow for an array of different interpretations. And even if the court finds the patent valid, there might still be uncertainty about the exact scope of the patent protection pursuant the language of the patent claim.[64] The same applies to copyright, e.g. when determining whether a painting for which a copyright is claimed fulfills the requirement of being 'original' in order for a copyright to have come into existence in the first place. To give one last example from the area of trademark law, a trademark is liable for infringing an earlier mark if it is 'similar' to the earlier mark, is claimed for 'similar' goods and services, and is likely to cause 'consumer confusion'.[65] No further guidelines on which basis a similarity should be established are provided in the law. The vagueness generally found in IP law poses an additional challenge for the enforcement of IP rights, next to the territorial nature of IP rights in a world with a global market for IP.

d. IP and other areas of the law

Issues of IP law can frequently arise in connection with issues from other areas of the law, in particular competition law, contract law and fundamental rights law.

As IP rights confer a monopoly on the market to the right holder, they appear to be in automatic conflict with the rules of competition law, which aim at ensuring free competition among competitors in a market.[66] In practice such conflicts do not arise very often however. Restrictions in time and scope of IP make sure that the existence of IP rights does not strangle competition to an unacceptable degree. Issues of IP and competition law can however arise together and be subject of a dispute, e.g. when a dominant market player is using his IP right to stifle competition on the market. Whereas an ordinary IP holder might not be in the position of influencing prices, inhibiting competitors from entering the market or engaging in other anti-competitive behavior, a powerful market player might be able to do so with the help of an IP right.

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expert can immediately interfere from accessible knowledge. Inventions, in order to be new, must go beyond the available state of the art" (Dreier, Thomas & Véron (2008) p. 85 f.

[64] Meurer (2002) p. 5.

[65] E.g. Article 16 TRIPS Agreement or Article 8 (1) (b) Community Trademark Regulation (Council Regulation No. 207/2009)

[66] This concern has been raised for a long time e.g. Gadow (1930) p.14

Issues of IP and contract law are arising more and more frequently because disputes arise around licensing agreements. The rights to copy, reproduce or otherwise exploit a protected intellectual work are frequently transferred by contract to another party. When the license contract is subject to litigation, issues of IP law in relation to the IP right which is the subject of the contract such as validity or fair use, can arise.

Sometimes intellectual property rights can conflict with fundamental rights. Most IP rights are subject to public order exceptions, which prevent an otherwise valid IP right from coming into existence. An example is the non-patentability of biotechnology which has been developed by using human embryonic material.[67] In some jurisdictions such inventions are not patentable because they interfere with public morals and are considered offensive to human dignity. Another example stemming from the area of copyright is the interference of copyright with freedom of expression. Even though there are fair use exceptions which allow e.g. to cite a copyrighted work for the purposes of critique or satire, in other circumstances a copyright might still impinge upon the freedom of expression of another person.[68]

2. The parties

a. A standard group of litigants?

IP rights cover a wide range of different endeavors of the human mind, which results in a very heterogeneous group of IP creators and owners. There is thus a different potential standard group of litigants firstly, according to the type of IP involved in the dispute. Secondly, even for each type of IP right taken separately the group of litigants can be quite diverse. In the case of patents for example, patent holders are often very large firms in R&D intensive industries. At the same time there are also smaller firms, independent inventors, universities and non-profit organizations holding patents and engaging in patent litigation.[69] Often the nature of the litigants will depend on the market sector of inventive activity and the costs of innovation within that market.[70]

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[67] see e.g. Case C-34/10 *Oliver Brüstle v Greenpeace e.V.* [2011] paragraph 34

[68] Smith (2010) p. 89

[69] Bessen & Meurer (1) (2005) p. 8 ff.

[70] For pharmaceuticals market e.g., costs of innovation are generally very high; therefore patent litigants in this sector will usually be large multinationals.

Common to most IP owners is that they are actors of innovative and creative industries. What is also common to them is that outcomes of previous litigation will influence future decisions and therefore affect the general rate of innovation within an economy.[71]

b. Use of IP rights in strategic litigation

IP rights make an ideal object of strategic litigation for two reasons: firstly, the procedural setting for enforcing IP rights encourages forum shopping and secondly, the inherent vagueness of substantive IP law as it currently stands facilitates the possibility of filing successful anti-competitive and opportunistic lawsuits.

As already mentioned, IP practice is international in terms of development, licensing and marketing of IP. The enforcement of IP rights remains however territorial and is thus in the hand of national courts. As national IP laws are not harmonized, especially when it comes to remedies for infringement, and private international law rules relating to IP are rather undeveloped,[72] the same case might yield very different judgments depending on the court deciding the case. Parties to an IP suit might thus not only succeed in lawsuits due to the objective merit of their case, but depending on the forum in which they choose to litigate. It is not by accident, to give a European example, that 60 % of all patent infringement cases in Europe are litigated before the district court of Düsseldorf in Germany.[73] German law offers particularly severe preliminary injunctions to patent plaintiffs, which allow them to stop alleged infringers from placing potentially infringing products on the market. Other jurisdictions will only allow for preliminary injunctions in the form of damage payments. In other jurisdictions, harsh measures such as the removal of infringing products from the market will only be imposed on the defendant once actual infringement has been established. Patent plaintiffs will therefore not simply sue in German courts because they want to have a dispute involving their patent adjudicated (a legitimate reason to use a court system), but because they might achieve a

[71] Dreyfuss (1) p. 67

[72] Dreyfuss (3) p. 3 f.

[73] German news magazine DER SPIEGEL 16/2012, p. 111

temporary prohibition of the sale of goods of a competitor in the German market, irrespective of the final outcome of the case (an abusive use of the court system).

Next to the opportunities for strategic litigation offered by the territorial nature of IP enforcement, IP law itself, irrespective of which national court is applying it, is prone to being used in defensive, anti-competitive and opportunistic litigation tactics.[74] This is due to the difficulties for a court to establish unambiguously the validity and scope of IP rights which in turn is due to the vague language of the legal provisions constituting IP rights.

Large IP holders have engaged in building defensive IP portfolios to protect themselves against the growing hazard of being a defendant in an IP suit. This has been observed especially in the case of patents, where large patent portfolios are used to ward off lawsuits by competitors and co-innovators with the threat of credible counterclaims. Defensive IP portfolios serve at the same time as a 'weapon' in negotiation, offering a better bargaining position to trade in IP rights. This is particularly the case for companies in industries which heavily rely on building on previous IP and where cross-licensing is common, such as the semiconductor industry.[75]

Additionally, plaintiffs might base their suits on weak IP rights, i.e. on rights whose validity might be successfully challenged, or they might file weak cases in which, despite the validity of the IP, chances of successfully proving infringement are low.[76] Plaintiffs might choose to go to court with such cases to either damage a competitor in a shared market, to drive a competitor out or to prevent the entry of a competitor to the market. Market players engage in IP litigation in these cases to extract a maximum value of the exclusionary rights of their IP by damaging competitors. Their goal is to broaden the scope of their temporary monopoly as much as possible. These suits are therefore termed anti-competitive. Alternatively, plaintiffs might engage in such tactics to extract license payments from the defendant, which they might otherwise not be able to extract. These IP suits are therefore termed opportunistic.[77]

[74] These three tactics are described for patents in Bessen & Meurer (1) (2005) p.14

[75] *Ibid* p. 15

[76] Meurer (2002) p. 3

[77] *Ibid.*

One might ask why an innocent defendant would feel threatened by lawsuits that eventually lead to a ruling against the plaintiff anyway. The main reason for weak IP cases being credible is the inherent vagueness of validity and scope of IP rights, which is determined purely on the facts of the case; these facts might however not be readily accessible to the defendant and a court might easily err about them. As it has been put, the boundaries of intellectual property, unlike those for real property, where "the boundaries of a plot of land and the validity of a title usually can be verified at little cost and with little uncertainty"[78], are difficult to determine. A weak IP right or suit might therefore be difficult to distinguish from an ordinary IP suit and the chances for a non-infringing defendant to incur liability are significant. Furthermore economically powerful plaintiffs might file weak IP suits because weaker defendants might simply not survive the suit due to overburdening costs for mounting a defense imposed upon them.[79]

3. The bench

As discussed under Section III.A.1., the most important task of a judge hearing an IP case is to determine whether something qualifies for IP protection and in case it does, how far the scope of protection for this IP right reaches. This is not an easy task because the law offers little guidance and the factual situation of IP cases is often highly complex.[80] Additionally, the jargon used by specialized lawyers obfuscates an IP case for a judge even further.[81] The problem with jargon in patent cases was described US Supreme Court Justice Oliver Wendell Holmes already in 1925 when he wrote:

> "Ideas rarely are difficult to grasp. The difficulties come from the language ...

[78] Bessen & Meurer (2) (2005) p. 1

[79] "According to a 2009 American Intellectual Property Law Association (AIPLA) report, the median cost of taking a major patent case to trial is $5.5 million per side in attorney's fees." (Lemley (2011) p. 385; Meurer (2002) p. 6)

[80] Quoting the Canadian IP lawyer G. F. Henderson: "by and large [IP law is] the most technical [area] both in terms of the factual subject matter and the law itself even when compared to tax, constitutional and competition law" (Henderson (1991) p. 17)

[81] Vaver (2006) p. 4

> To this day I am troubled as I hear arguments in patents [...] cases, by the slang of the specialty. The thoughts behind the words rarely require a colossus."[82]

It appears therefore, that the ideal bench hearing IP cases should have a knowledge going beyond IP statutes and IP legal doctrine, which would enable the judges to base their decisions on their knowledge of the nature of IP itself and the rationales for IP protection, as well as IP policies underlying IP legislation. In order to confidently determine the scope of protection of an IP right and to reach subsequently equitable outcomes in IP cases, judges would need to truly understand arguments of specialized lawyers and should be able to confidently grasp the factual background of each case. Some examples of different types of IP can illustrate this point.

In a patent infringement case, the first exercise a judge needs to undertake is to interpret the language of the patent claim to determine which type of products are covered by the patent right. This is ordinarily termed claim construction.[83] The patent owner will logically push for the broadest possible interpretation of the claim, to cover as many products as possible. The alleged infringer will usually argue firstly, that the patent is invalid and alternatively, for a very narrow interpretation of the claim.[84] The judge is required to construe the patent claim from the perspective of a 'person skilled in the art', i.e. from the perspective of a scientist within the field of the patent in question a the time the patent was issued. Consider for example a patent covering artificially produced hormones, which stimulate the production of red blood cells (erythropoietin). Subsequently, another company produces the same hormones on the basis of a different process.[85] How can a judge confidently determine whether the former patent covers the later activity on the basis of whether a biochemist at the moment of patenting could have foreseen the subsequent different manufacturing process of the hormones and intended to cover it with his patent? This is what the law requires him to do however. For a judge without a technical background to position himself in the shoes of a scientist seems to be a virtually impossible requirement to

[82] Posner (2) (ed.) (1997) p. 52

[83] Schwartz (2009) p. 1705

[84] *Ibid* p. 1708

[85] facts taken from *Kirin-Amgen Inc and others v Hoechst Marion Russel Ltd and others* [2005] 1 All ER 667 (Judgment from the UK House of Lords (since 2009 Supreme Court of the United Kingdom))

fulfill. A judge with technical training would be better suited to decide these questions. Additionally to the benefits of a patent judge with technical expertise, it has been claimed that patent judges should also have experience with the business aspects of technology, to give full and accurate effect to patent laws.[86]

In cases related to copyright a judge would be equally required to base his decision on law which offers little guidance in individual cases. In a copyright case, a judge will usually have to decide whether an expression or artistic work is 'original' in order to receive copyright protection. To determine 'originality' of a piece of literature or art, especially in derivative works, will however usually entail some sort of (often hidden) assessment of the artistic value of the object for which copyright is claimed.[87] Could a painting that copies exactly a film scene from the movie the Wizard of Oz claim copyright protection?[88] Is it still an original work? The plain language 'originality'-standard does not provide a clear answer to this question. A judge might have to engage in making some aesthetic assessment about the artistic quality of the work to determine whether it is worthy of copyright protection.[89] Otherwise he might have to search for other methods of evaluation why such a derivative work might or might not qualify as 'original'. If each court faced with such a case chooses a different theoretical background to base its decision upon, the standard of 'originality' in copyright law remains vague and unpredictable to the detriment of producers of artistic works.

One last example of vague IP law terms posing a challenge to a judge in the field of trademark law is the requirement of a 'likelihood of consumer confusion' for trademark infringement. Consider a trademark owner of an earlier mark "Lloyd" for shoes who sues a competitor distributing shoes with the label "Loint's".[90] Are the word signs sufficiently similar to confuse the public when buying shoes? The law does not offer any further guidelines to the judge on which factors are important to

[86] Sung (2008) p. 29

[87] Haight Farley (2005) p. 834

[88] In the US, according to Judge Posner it could not because it lacks originality (facts drawn from *Gracen v Bradford Exchange* 698 F.d2 300 (7th Circuit 1983)). This opinion seems to be a minority opinion among practitioners and scholars however.

[89] Haight Farley (2005) p. 834

[90] Facts drawn from Case C-342/92 *Lloyd v Klijsen Handel* [1999] (Judgment from the Court of Justice of the European Union)

determine similarity. How could an accurate judgment be made in this case however without knowing the competitive structure of the shoe market and how the purchasing pattern of consumers looks like in this market? It would be of advantage if a judge deciding such a case could rely on prior knowledge about business and economics to ensure an equitable outcome of the case, based on solid reasoning.

4. Conclusion on the desirability of specialized IP adjudication in light of the propositions – A private perspective

When tested against the propositions of Section I.A. several features of IP law and IP litigation would serve as arguments in favor of establishing a specialized IP court. Firstly, the current structure of IP law, which is restricted to national territories, and the cross-border constellation in which IP disputes frequently arise nowadays, together with underdeveloped jurisdictional conflict rules in the field of IP, give rise to substantial forum shopping (*Propsition 1*). A specialized IP court with exclusive jurisdiction would reduce the potential of forum shopping by pooling the jurisdiction previously shared by several parallel courts. Even if the specialized court had a non-exclusive jurisdiction, it would at least provide the possibility to a plaintiff, which would otherwise have to file a number of parallel actions to enforce his IP rights, to file only one single action in the specialized court. IP litigation would therefore become more transparent and possibly cheaper.

Secondly, geographical access (*Proposition 2*) would not pose a high barrier to litigants, because most litigants in IP disputes are undertakings. Potentially geographical access could be a problem for small and medium-sized enterprises. A solution would be the setting up of a specialized court with a central division and several regional division.[91]

Thirdly, decisions in IP cases have repercussions on future innovative activity. As substantive IP law is very vague, uniform and clear case law is necessary to provide the required legal guidelines to undertakings and private persons pursuing innovative

[91] See e.g. Article 5 of the Draft Agreement on a Unified Patent Court, available at http://register.consilium.europa.eu/pdf/en/12/st14/st14268.en12.pdf [last visited October 15, 2012]

activities (*Propositions 4 and 5)*. A specialized IP court would have the expertise and experience to provide such guiding case law.

Lastly, technical expertise is clearly an asset in IP cases. Especially in patent cases (*Proposition 9*), where knowledge in sciences is necessary to accurately interpret patent claims.[92] But in principle the vagueness of IP law rules requires in all areas of IP a (non-legal) background knowledge upon which to base a decision in a dispute. A court staffed with experts would probably lead to a higher quality of IP case law and to more satisfactory results for IP litigants.

Other features of IP law will offer arguments against the specialization of adjudication. Firstly, issues of IP law frequently arise in connection with disputes in other fields of law, especially competition, contract and fundamental rights law (*Proposition 3*). To set up clear rules delineating the jurisdiction of the specialized IP court might be difficult. Furthermore there is a strong ideological divide as to the goals of IP law and policy present both in the public as well as in the circles of IP practitioners (*Proposition 6)*. The two well-known camps are those of the 'pro-rights' stance, pleading for a strong and broad protection of IP rights, and the 'anti-rights' stance, placing a stronger emphasis on a narrower scope of IP rights protection and the importance of the public domain.[93] A specialized court might easily be caught in this cross-fire, thereby jeopardizing its reputation of impartiality, which is essential for any court.

B. Implementation of federal IP policy

1. Internal IP policy

a. IP and internal trade policy

In case one of the goals of a federation is the encouragement of trade between the federation's subunits and the creation of a common market, the territorial nature of IP rights can become an impediment to such a project, if their scope is restricted to the

[92] The German patent court as well as the IP High Court of Japan for example have technical experts assisting the bench (Kley (2011) p. 29; Takenaka (2009) p. 387)

[93] Granstrand (1999) p. 36

subunit's territory. The creation of a common market presupposes the possibility for all factors of production (goods, services, persons and capital), to move freely across the federation's subunits. The free movement of goods can however be impaired if an IP owner enforces his IP right within one subunit against imported products from other subunits which infringe his IP right. The efforts of the federal government to abolish obstacles to trade at the subunits' frontiers could therefore be frustrated by private parties who could partition the common market on the basis of enforcing their territorial IP rights.[94] In respect of unregistered IP rights, harmonization of the subunits' substantive IP laws would be sufficient to eliminate market obstacles. In case of copyright for example, the rules on counterfeiting might diverge between the subunits.[95] Whereas a court in a subunit with strict counterfeiting rules might more readily prohibit the import of allegedly copyright infringing works from another subunit, the circulation of those works might not be hindered in subunits with less stringent counterfeiting rules. This would lead to the potentially infringing works being available in one part of the federation (subunits with less stringent counterfeiting rules) whereas the marketing of the very same works in other parts (those units with strict counterfeiting rules) would be banned. The pan-federal market would therefore be split between subunits with lenient counterfeiting rules on the one hand and those with strict counterfeiting rules on the other hand. If the rules of all subunits were the same, there would thus be no partitioning of the market.

In case of registered rights, the creation of federation-wide rights would be necessary however to overcome partitioning of the market due to the territorial nature of the grant.[96] If an inventor, I, were to be granted a patent in subunit A, this would not impede anyone to reproduce and sell I's patented technology in all other subunits except A. In A however, I could file a lawsuit to stop the sale of infringing goods imported from other subunits. Similarly, I could get a patent in each subunit, thereby obtaining a monopoly for his invention in each subunit separately. He could then charge in subunit A 15 Euros for his invention and, because the inhabitants of subunit

[94] MacQueen (2008) p. 801

[95] Example drawn from Weiler, Joseph H. H. and Kocjan, Martina, "NYU The Law of the European Union Teaching Material, Unit 12, The Internal Market: Intellectual Property" (2004), p. 1

[96] Dinwoodie (2001) p. 54

B are poorer than those in A, charge 3 Euros in B. On the basis of his patent rights he could inhibit parallel importers from buying I's invention in B and reselling it in A, thereby taking advantage of the price differentials.[97] These market-partitioning exercises of IP rights could only be fully avoided if registered IP rights were granted for the federal territory as a whole. The alternative of having free market rules overriding territorial IP protection would not seem to be viable, because it could empty IP rights to such an extent, that their incentive function would be lost.[98]

b. IP and economic growth

Another goal of federal IP policy could be to increase the value of national IP rights in order to improve the competitive position of the domestic IP producing industry. As with any property right, the prospects of effective enforcement of IP rights through the domestic court system should increase the value of obtaining and holding these rights. The production and acquisition of IP rights should therefore increase if the judicial enforcement of IP rights became more reliable.[99] Additionally, IP owners might reduce their own expenditures on protection mechanisms for their IP if they can rely on the court system to protect their rights.[100] Thereby IP owners would free resources, which in turn could be used for additional investment in research and development or other projects improving their competitive position. As result one could expect a boost on innovation and technological development with its positive impact on overall economic welfare.

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[97] MacQueen (2008) p. 801

[98] Reindl (1996) p. 831

[99] With the establishment of the US Court of Appeals for the Federal Circuit patent protection in the US shifted in favor of patentees. Patent owners were thus more readily able to enforce their patents. As a result the value of US patents has increased significantly (Wagner & Petherbridge (2004) p. 1116)

[100] This conclusion is drawn from the classic discussion about the optimum level of protection of conventional physical objects of property (Landes & Posner (2003) p. 18 f., 22 f.)

2. External IP policy

a. IP and international organizations

The international organization dealing with the global protection of IP rights is the World Intellectual Property Organization (WIPO). This UN agency administers a range of international treaties in the field of IP. A very relevant part of these treaties for international IP practice consist of those conventions centralizing the process for filing applications for registration of trademarks (Madrid System), patents (Patent Cooperation System), designs (Hague System) and appellations of origin (Lisbon System) of the signatory states. Even though these treaties do not create substantive international IP rights, they facilitate the process of receiving protection in several different jurisdictions simultaneously. WIPO is also a international forum of discussion, research and development of IP law with the aim of enhancing international economic, social and cultural development.[101] A state participating in WIPO's projects that has a specialized IP court could more readily forward new developments of the international IP scene to the realities of domestic IP litigation via a specialized court. At the same time domestic developments in IP litigation might be more easily observed when there exists one specialized court, which may in turn provide important information to WIPO about IP practice in the signatory states.

Relatively recently the World Trade Organization (WTO) has joined WIPO as previously sole player in the landscape of international organizations dealing with IP matters. After the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights including Trade in Counterfeited Goods (TRIPS) at the GATT Uruguay Round, the WTO is now in charge with the administration of this international IP treaty.[102] As global trade in IP protected products has dramatically increased over the last two decades,[103] IP now also has a priority in states' international trade policy.

b. IP and international trade

[101] Self-proclaimed WIPO goal, available at http://www.wipo.int/about-wipo/en/ [last visited September 23, 2012]

[102] MacQueen (2008) p. 560

[103] Dreyfuss (3), p. 1 f.

The protection of IP rights is not only desirable for stimulating the production of IP within an economy and thereby stimulating economic growth internally. By now, IP has also become a major component of international commerce.[104] External IP policy is therefore an important part of a political entity's external trade policy. The most important current international agreement on intellectual property, the TRIPS agreement, was concluded within the WTO framework, indicating the relevance of IP for international trade.

In WTO negotiation rounds, several issues related to trade are negotiated simultaneously, IP only being one topic among several others on the agenda.[105] Each negotiating member will pursue its own trade interest during such rounds and the result of the round will be a tradeoff between different competing interests. Especially if a country is an IP net exporter, the government will be interested that the domestic industries IP rights are protected abroad.[106] A specialized IP court could be considered as a sign that a WTO member is taking its obligation of domestic as well as foreign IP protection very seriously. This may firstly have an exemplary function and encourage or compel other WTO members to follow suit and establish an IP court within their own judicial system. Thereby overall international IP protection might increase, leading to an increased stability for IP trade and encouraging international business in IP. Alternatively, in case other members cannot or do not want to establish an IP judiciary in their domestic system, a member with a specialized IP court might still have a stronger bargaining position in negotiation rounds. As a member with an IP court shows commitment to IP protection in trade, it might be easier for such a member to obtain concessions in other negotiation areas related to trade, e.g. in the field of investment or tariffs.[107]

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[104] Dinwoodie (2001) p.42

[105] Dinwoodie,(2001) p. 59

[106] "As a practical matter, willingness to adhere to the multilateral intellectual property treaties has often been determined by balance of trade considerations." (Dinwoodie (2001) p. 43)

[107] This was for example the case when TRIPS was negotiated: developing countries had no interest in increasing IP protection because it yielded no benefit to them. They became signatories to TRIPS nonetheless, because developed countries offered agricultural tariff concessions in return. (Guzman (2000) p. 22)

3. Conclusion on the desirability of specialized IP adjudication in light of the propositions – A public perspective

From an IP policy perspective, the setting up of a specialized IP court might be beneficial to internal and external trade as well as for economic growth. Firstly, a uniform interpretation of federal legislation harmonizing or unifying IP law is important to ensure that the obstacles to trade previously caused by diverging national IP laws are in fact abolished (*Proposition 10*). Otherwise obstacles to internal trade might continue to exist due to diverging interpretations of the federal harmonizing legislation by the sub-unit courts. A single specialized federal court might bring the necessary uniform interpretation to give full effect to federal IP legislation. The prospect of having IP disputes adjudicated by a specialized courts might furthermore increase the value of IP and thereby boost the national economy.[108]

Furthermore all WTO Members have signed an international IP treaty, namely the TRIPS (*Proposition 11*). A specialized IP court might facilitate for a WTO Member to honor its obligations under the agreement and might have a positive effect on external trade.[109]

IV. The case for specialized European adjudication in the field of intellectual property

A. The current situation of IP protection in the EU

The current situation of intellectual property protection within the European Union is governed by both, the laws of the Member States and European Union law. In the case of patents it is additionally governed by the rules of the European Patent Convention. The type of interplay between these jurisdictional levels, be it in respect of the administrative application and registration procedures or in respect of judicial

[108] The setting up of the IP High Court of Japan is named as one of the factors which pulled Japan out of the 1990s crisis by increasing the value of Japanese IP rights and thereby creating economic growth (Takenaka (2009) p. 397)

[109] The Thai Central Intellectual Property Court and International Trade Court was set up to better comply with the obligations imposed by TRIPS and as restructuring policy to spur economic growth (Antons (2005) p. 289)

enforcement, is different depending on the type of intellectual property. Harmonizing or unifying European legislation in the field of IP has only been adopted by the Union legislator where it was deemed to be necessary to further the achievement of the internal market.[110] The legal landscape of IP protection in Europe is therefore not a harmonious, uniform picture but highly scattered and complex. The best attempt to give an overview is therefore to proceed by addressing each type of IP on its own.[111]

1. Copyright

Copyright protection in the European Union is still governed for the most part by national copyright statutes.[112] European Directives harmonizing national copyright laws have been enacted mainly for different types of works in the field of new technologies separately, to ensure an increased level of copyright protection. This legislative action was deemed necessary in view of the rise of the Internet age, where perfect copies infringing IP protected works could suddenly be produced instantaneously in unlimited quantities at no cost and distributed with the same ease around the globe.[113] Whereas the purported reason for the enactment of these directives was the furthering of the internal market, their main purpose seems to be a protection of the competitiveness of the European IT industry against the threat of piracy.[114] The enforcement of copyrights lies therefore in the hands of Member State courts. The Court of Justice of the European Union will only exercise jurisdiction in the field of copyright if a national court refers a preliminary question to it on the basis of Article 267 TFEU.[115]

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[110] The legal basis for the Trade Mark and Designs Directive was Article 114 TFEU (ex-Article 95 TEC) and for the Community Trade Mark and Designs Regulations Article 352 TFEU (ex-Article 308 TEC) (albeit this is a general legislative competence, the preambles in both Regulations refer to the political aim of furthering the internal market by the creation of Union wide rights).

[111] Ullrich (2010) p. 10

[112] Ullrich (2010) p. 10

[113] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

[114] Ullrich (2010) p. 11

[115] *Ibid* p. 13

2. Trademarks and Designs

a. Substantive law

The system of European trademark protection has a parallel structure. On the one hand there exist trademark systems separately in each Member State, each with its national trademark laws and trademark offices registering trademark rights, which are restricted to the Member State's territory.[116] Substantive national trademark laws have however been harmonized by a European Trademark Directive.[117] At the same time the Community Trademark System *qua* European law has been created, making available a trademark right with validity in the territory of the entire European Union.[118] The Registry for Community Trademarks is administered by the Office for Harmonization in the Internal Market (OHIM), located in Alicante, Spain.

The system of European design protection is a mirror image of the system for trademark protection. The former was adopted on the basis of the success of the latter.[119] There exist thus national territorial design rights, governed by national design laws which have been harmonized by a European Directive.[120] At the same time there exists a unitary European-wide design right, created by European Regulation in 2002.[121] The registry for Community designs is also administered by OHIM.

b. Judicial enforcement in the two-level system of IP protection

For harmonized national trademark and design rights, disputes relating to their acquisition, registration, exploitation, infringement and validity are adjudicated by

[116] With the exception of Belgium, the Netherlands and Luxemburg that already pooled their national systems in a Benelux system in the 1960s.

[117] Council Directive (EC) No. 89/104/ of 21 December 1988

[118] Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community Trade Mark, as amended by Council Regulation (EC) No. 207/2009 of 26 February 2009 (hereinafter referred to as 'CTMR')

[119] Ullrich (2010) p.19

[120] Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs

[121] Council Regulation (EC) No. 6/2002 of 12 December 2001 on Community Designs

specialized administrative agencies (e.g. appellate bodies within the national trademark offices), specialized courts and generalist national courts, depending on the design of the national systems. As with copyright, issues of national trademark and design rights will reach the Union judicature only via a preliminary reference procedure. Therefore the interpretation of the harmonized national trademark and design laws will primarily lie in the hands of national courts.[122]

Disputes relating to Community trademarks and designs have two different paths of judicial procedure depending on whether the dispute relates to an administrative issue (application, registration and revocation procedure before OHIM) or an issue of private law (exploitation, infringement, validity) of the rights.
In the realm of administrative issues relating to the grant of a Community trademark or design right, there are two adjudicative instances within OHIM. The three first instance divisions where administrative decisions can be appealed are the Examination, Opposition and Cancellation Divisions. The Examination Division is responsible for reexamining rejections of applications by the Offices' examiners. The Opposition Division deals with *inter partes* proceedings where an earlier right owner can challenge a new application. The Cancellation division is responsible for revocation and invalidity proceedings against registered Community trademarks. Decisions from the three first instances can be reviewed by the Boards of Appeal, a quasi-judicial independent appellate body within the Office. The decisions of the Boards of Appeal can be appealed in turn to the General Court.[123] The last instance to appeal to will be the CJEU. The administrative procedural safeguards for Community trademark and design rights are therefore provided at EU level by both OHIM and the European courts.

[122] Nonetheless, national courts may be influenced by the CJEU's case law on the Community trademark and design rights, since many provision of the respective Directives and Regulation are the same (Ullrich (2010) p. 24)

[123] note that the party constellation changes before the General Court. If an inter partes procedure before the OHIM Boards of Appeal was processed as *X v Z* and party Z loses and appeals to the General Court, the case before the General Court will be processed as *Z v OHIM* (X being only an interested third party to the case).

Civil protection of Community trademark and design rights against infringement is provided for by a system of Community trademark and design courts, in which each Member State has nominated a limited number of national first and second instance courts which will exclusively deal with matters of Community trademark and design rights. These courts will have jurisdiction to decide infringement claims as well as counterclaims relating to the validity of Community rights.[124] Case law on issues of infringement and validity is therefore developed by national courts, albeit by a limited number of designated courts. Again, the CJEU will only provide guidelines in the area of civil protection of Community rights if so requested by national courts via Article 267 TFEU.[125]

3. Patent

If European IP protection for trademark and design rights looked complex, it really gets messy once it comes to European patent protection. As with the other IP rights subject to registration, there exist firstly national patent systems, i.e. territorial patent rights and national patent laws in each Member State. Not all Member States possessed patent offices in the past however.[126] A centralized European patent and application and registration process and an administrative agency were therefore set up by intergovernmental convention in 1973. All European Union Member States as well as other third states constitute the group of a total of currently 38 signatories to the European Patent Convention (EPC).[127] The European Patent Office (EPO), which

[124] Ullrich (2010) p. 24

[125] Maybe a matrix helps to keep track:

	Administrative protection	Civil protection
National TM and design rights	**National** (administrative agencies, IP courts and generalist courts)	**National** (IP and generalist courts)
CTM and CDR	**European** (OHIM, GC, CJEU)	**National** (national Community trademark and design courts)

[126] Ullrich (2010) p. 26

[127] The signatories are all EU Member States as well as Albania, Switzerland, Croatia, Iceland, Liechtenstein, Monaco, Macedonia, Norway, Serbia, San Marino and Turkey

is located in Munich, administers the register of European Patents. A European Patent is, despite the name, not a unitary substantive right valid throughout the territory of all parties to the EPC however. It is rather a procedural tool, to receive simultaneously a bundle separate territorial patents valid in each of the signatory states designated by the applicant. European patent protection comes therefore *à la carte*. [128] The applicant can pick and choose for which national territories he wants protection. There is little European Union law on patents, mainly because the existence of the EPC and the harmonizing effects on national law the EPC has had, have inhibited Union action in this field.[129]

All issues regarding protection of national patent rights granted by national agencies are in the hands of the national administration and judiciary. When it comes to European Patents there is again a pre-grant/post-grant split. As the application procedure is unified and administered by the EPO, a dispute resolution mechanism relating to refusals of patent applications, oppositions to applications, registration and revocation i.e. administrative protection, is provided for within the EPO.[130] Post-grant civil protection against infringement is split however along national borders, each national court system having jurisdiction over civil litigation in patent cases only in respect of the own national patent right, which forms part of the European Patent bundle of rights.[131] Administrative protection relating to European Patents it is thus in the hands of an international organization encompassing a larger number of states than the Member States of the European Union. Civil enforcement of European Patents is however split between the national courts of those states listed in the individual European Patent grant.

B. Inefficiencies in European IP litigation

The current system of European IP protection still adheres mainly to the principle of national-territorial legal protection of IP. As the free flow of goods, the transfer of technology and the enhancement of e-commerce is furthered within the EU internal

[128] Ullrich (2010) p. 26

[129] *Ibid* p. 29

[130] *Ibid*

[131] *Ibid*

market, and the dissemination of copyrighted materials over the internet has exploded, the potential for cross-border infringement and the number of cross-border IP disputes have increased rapidly over the last decades. Due to the territorial limitation of IP protection in a world where the operation of IP is increasingly international, the litigation of cross-border IP disputes in the EU has become costly, complex and entails a lot of uncertainty for the litigants.[132]

1. IP litigation under the Brussels I Regulation

In an ideal European IP litigation system, an IP owner who wants to bring a court action to contain EU cross-border infringement of his right by several undertakings against infringing actions committed in several Member States, would be able to do so by bringing one single action in one court covering all defendants and all infringing conduct.[133] The only currently existing legislative instrument with the potential of enabling such an efficient form of IP litigation would be the Brussels I Regulation,[134] which implements a uniform set of international private law rules for all EU Member States determining the appropriate forum litigens for disputes relating to civil and commercial matters. The default jurisdictional rule of the Brussels I Regulation is based on the '*actor sequitur forum rei*' principle, according to which civil actions are to be filed at the courts of the defendant's domicile, no matter where infringement took place.[135] An IP owner would thus have to bring an action in the Member State where the alleged infringer is domiciled. If there were several alleged infringers, Article 6 (1) of the Regulation would potentially allow the plaintiff to consolidate his claims in one action against all infringers.[136] The plaintiff could bring the action in the domicile of any of the defendants, "provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable

[132] MacQueen (2008) p. 921

[133] Nuyts (2008) p. 9

[134] Council Regulation (EC) 44/2001 of 22 December 2000 Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[135] Article 2 Brussels I Regulation; Nuyts (2008) p. 6

[136] *Forum connexitatis* rule; Nuyts (2008) p. 8

judgments resulting from separate proceedings".[137] Arguably, one could imagine that if a plaintiff has protected his IP across the EU with several parallel rights, prime example being a European patent, and a group of economically linked defendants engages in identical infringing actions in different Member States, there would be such a "sufficiently close connection" to file a consolidated action. The CJEU was of a different opinion however, and held in the *Roche* case that, in the case of a European patent, as it breaks down into separate national patents, the legal and factual situation was different and would not lead to irreconcilable judgments.[138] Article 6 (1) of the Regulation as interpreted by the CJEU does therefore not enable an IP owner holding a number of parallel national IP rights to enforce them in a uniform way against parallel infringements.[139] He will have to file several lawsuits in each of the defendants' *fora* separately.

In contrast to IP infringement actions, which follow the general rule of the Brussels I regulation, the Regulation has a special jurisdictional rule in the case of disputes involving issues of administrative nature in relation to registered IP, such as the registration, revocation and validity of the IP right. Article 22 (4) of the regulation sets out that the courts of the Member State in which the IP right has been registered have exclusive jurisdiction in these cases. In case an IP owner sues a defendant for infringing several of his parallel IP rights by the defendants' cross-border conduct, the defendant will often plead that the parallel rights are invalid in response. The validity of each right will then have to be checked separately by the courts of the state where the right has been registered.[140] As a result, it can happen that a court in one Member State finds a national IP right which is part of a net of multiple parallel rights valid, whereas a court in another Member State finds the mirror image of the same right invalid. An IP holder who was aiming at a pan-European protection for his invention by patenting it in the same fashion in different jurisdictions, will be faced with a 'Swiss-cheese'-type of protection, depending on the interpretation of the national

[137] Article 6 (1) Brussels I Regulation

[138] Case C-539/03 *Roche v Primus* paragraph 31

[139] Nuyts (2008) p. 33

[140] Case C-4/03 *Gesellschaft für Antriebstechnik (GAT) mbH & Co. KG v Lamellen und Kupplungsbau (LuK) Beteiligungs KG* paragraph 31

courts.[141] The piecemeal approach imposed by the Brussels I Regulation on IP right holders is thus far from an ideal, efficient system of cross-border European IP litigation.

Additionally, defendants in cross-border IP disputes have found their own methods of using and abusing the Brussels I framework to serve their interests. The mirror image of an IP infringement action by an IP holder is an action requiring a negative declaration by the defendant, i.e. a declaration of non-infringement.[142] When faced with the threat of an infringement action by an IP holder in a cross-border situation, IP defendants can file an action for declaration of non-infringement before the IP holder has filed his infringement action. Through the *lis pendens* rule of the Brussels I Regulation[143], the court before which the IP holder subsequently files his infringement action will have to stay its proceedings until the court seized with the negative action of the alleged infringer has decided upon the case. If the alleged infringer files his action within a jurisdiction with particularly slow courts, he may frustrate any even legitimate infringement claim by the IP holder.[144] Such abusive forum shopping by potential defendants in cross-border IP disputes weakens the position of European right holders in cross-border litigation even further.

[141] "For a recent example of this, see the judgment of 17 November 2009 from the High Court of Justice, Court of Appeal (Civil Division), in *Leo Pharma A/S and Leo Laboratories Ltd. v. Sandoz Ltd.*, [2009] EWCA Civ 1118, where a British patent for calcipotriol monohydrate was upheld as valid. In the judgment, Lord Justice Jacob noted: 'We have reached the same result as that in Holland at first instance (where the argument was in part different). The Bundespatentgericht has gone the other way – but working on different prior art, prior art which Sandoz in this country abandoned. Different results in different countries based on different cases is, of course explicable. It is an unfortunate state of affairs, curable only by a single European Patent Court.'" (Petersen & Schovsbo (2011) p. 8)

[142] Nuyts (2008) p. 21

[143] Article 27 Brussels I Regulation

[144] This is how the expression of the 'Italian torpedo' to denominate these practices was born. Italian and Belgian courts are the most popular to file these actions. (Nuyts (2008) p. 21 f.)

2. Litigation in the Community trademark and design courts

As the problems of European cross-border IP litigation arise mainly from the territoriality principle governing IP rights in the Member States, one might expect a friendlier picture on litigation in the case of unitary substantive Community IP rights covering the Union's territory as a whole. According to the Community Trademark Regulation, Community Trademark Courts, i.e. a limited number of designated specialized national courts, have exclusive jurisdiction over infringement and validity actions involving a Community trademark.[145] The same is true for the system of Community design courts.[146]

When it comes to litigating the infringement of a Community trademark (CTM) or design right (CD), the CTMR and CDR follow the scheme of the Brussels I regulation.[147] The CTM or CD owner has to file an action for infringement or invalidity at the place where the defendant is domiciled. Community trademark and design courts have explicit jurisdiction over all infringing acts occurring anywhere in the territory of the European Union.[148] Nevertheless, a CTM or CD owner might be denied uniform enforcement protection of his right in cross-border infringement cases, because the remedies are, with the exception of injunctive relief, to be determined according to the international private law rules of the forum. Now, according to the Rome II Regulation which provides for the applicable substantive law in cross-border IP infringement cases, remedies for infringement of CTMs or CDs are determined according to the law of the place where the damage took place, as long as there are no provisions in the CTMR or CDR.[149] As the remedies are determined by the laws of the place where the infringement occurred, a CTM or CD owner might therefore be accorded different degrees and types of protective measures, depending in which Member State infringement took place.[150] The bottom line is that even in the

[145] Article 97 CTMR

[146] Article 81 CDR

[147] Article 94 CTMR, Article 79 CDR

[148] Article 98 CTMR, Article 83 CDR

[149] Article 8 (2) Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation)

[150] Max Planck Institute for Intellectual Property and Competition Law Munich - Study on the Overall Functioning of the European Trade Mark System (February 15, 2011) available at:

case of unitary Union rights, enforcement will not be uniform but will yield a patchwork protection along national borders.

C. European IP policy

1. Free trade and competition in the Internal Market

The creation of a highly competitive internal market akin to a national market, in which the free movement of factors of production is guaranteed, has always been one of the most important political aims of the European Union.[151] The existence of IP rights which are restricted to the territories and laws of the Member States of the EU present however obstacles to the free movement of goods and services and are therefore a hindrance for the completion of the internal market.[152] Accordingly, legislative instruments which harmonized national IP laws and created Union-wide IP rights were enacted for reasons of removing obstacles to the free movement of goods and services.[153] Since the entry into force of the Lisbon Treaty and Article 118 TFEU thereof, there is now also a specific legal basis empowering the Union to create Union-wide IP rights "in the context of the establishment and functioning of the internal market".

Also in the area of competition law and policy, IP rights are increasingly becoming an issue, as evidenced by the case law of the European Courts relating to abuse of a dominant market position under Article 102 TFEU. The CJEU has developed in the

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http://ec.europa.eu/internal_market/indprop/docs/tm/20110308_allensbach-study_en.pdf [last visited October 14, 2012] p. 160

[151] This political aim is currently set out in Article 1 (3) TEU

[152] See section III.B.1.a.

[153] The legal basis for the Trade Mark and Designs Directive was Article 114 TFEU (ex-Article 95 TEC) and for the Community Trade Mark and Designs Regulations Article 352 TFEU (ex-Article 308 TEC) (albeit this is a general legislative competence, the preambles in both Regulations refer to the political aim of furthering the internal market by the creation of Union wide rights)

last two decades a test to determine whether a refusal to license IP can be classified as an anticompetitive behavior caught under the provisions of EU competition rules.[154]
The current situation of IP protection in the EU is therefore a potential impediment to the functioning of the internal market and can work to the detriment of competition in the internal market. Furthermore, if the necessary political will existed, there would be the possibility, in the form of enabling legal bases in the Treaties (Article 118 TFEU), for the EU legislator to remedy the market fractioning situation of IP rights protection given at the moment.

2. International trade and international organizations

The EU is a member to the WTO since 1995 and accordingly also a signatory to the TRIPS agreement. Additionally, with the entry into force of the Lisbon Treaty the Union's competences in the field of the common commercial policy have been extend explicitly to cover the commercial aspects of intellectual property.[155] IP is therefore an important item on the EU's external trade agenda.
It is not only in the context of the WTO that the Union has taken external action in relation to IP protection. The EU is also an active participant in other international organizations dealing with international IP policy, most notably in the World Intellectual Property Organization.[156]

D. Previous proposals for European IP courts

[154] The following test was developed: (1) the requested IP had to be 'indispensable' to compete, (2) it had to prevent the emergence of a new product, (3) had to be of such a nature as to exclude 'any' competition on a secondary market and (4) the refusal could not be objectively justified. Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* [1995]; Case C-418/01 *IMS Health GmbH v NDC Health* [2004]; applied by the GC in Case T-201/04 *Microsoft Corp v. Commission of the European Communities* [2007]

[155] Article 207 TFEU

[156] Nuyts (2008) p. 2

1. Rise and fall (and resurrection?) of the European and European Union Patent Court proposal

Considering the difficulty of uniform judicial enforcement of European patents across several jurisdictions, the community of European patent holders has persistently pushed for the establishment of a European patent judiciary.[157] The latest proposal of establishing a European Patent judiciary was tabled in the Council of the European Union in 2009 together with a legislative proposal for the creation of a uniform Community patent right.[158] The envisaged European and European Union Patent Court (EEUPC) was to be set up as a supranational court by international agreement between the Member States of the European Union and the remaining states that are members to the EPC. The EEUPC would have had a first instance court consisting of one central division and several decentralized divisions, as well as an appeals instance. The appeal court would have been at the same time the final instance of the European patent judiciary. The EEUPC would have had exclusive jurisdiction over all *inter partes* infringement and validity cases involving European patents and the Community patent to-be. It would have absorbed and replaced the jurisdiction of national courts in this area.[159] In cases involving EU law, the agreement would have provided for the possibility to refer preliminary references to the CJEU.[160]

When the proposal for the EEUPC was submitted to the CJEU for an opinion on the compatibility of the international agreement with EU law, the Court found it to be incompatible with the European Treaties.[161] The main objection the Court had to the proposed EEUPC was its exclusive jurisdiction in the field of patent law, which entailed depriving the national courts of the EU Member States of their jurisdiction to adjudicate European patent disputes between private parties.[162] With the same token, national courts would have been deprived to apply and enforce EU law to issues

[157] Ullrich (2010) p. 32

[158] Visscher (2012) p. 14

[159] Ullrich (2010) p. 36

[160] in the 2012 working document the relevant provision is Article 14 b, available at: http://register.consilium.europa.eu/pdf/en/12/st14/st14268.en12.pdf [last visited October 14, 2012]

[161] Opinion 1/09 of 8 March 2011

[162] Visscher (2012) p. 15 f.

arising in connection with these patent disputes, such as issues of EU competition law, market freedoms or EU fundamental rights. Consequently, national courts would have been deprived of the opportunity to refer preliminary questions in these cases to the CEJU. As a result, the courts of the Member States together with the CJEU, would have be prevented from fulfilling their common function under Article 19 TEU, i.e. they would be prevented to fulfill their obligation to jointly ensure the *effet utile* of European Union law.[163]

The EEUPC proposal has not yet been abandoned, but so far no further amended proposal seems to have found sufficient political consensus to have reached the stage of having been voted upon in the European Parliament.[164, 165]

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[163] "Consequently, the envisaged agreement, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law" (paragraph 89 of Opinion 1/09)

[164] The newest document of a Draft Agreement on a Unified Patent Court and draft Statute has been published by the Council on September 27, 2012 http://register.consilium.europa.eu/pdf/en/12/st14/st14268.en12.pdf [last visited October 14, 2012]

[165] *Addendum* 4 January 2013: On 11 December 2012 the European Parliament approved the "unitary patent package", which contains, next to the rules for the unitary patent right and language regime, an international agreement covering the establishment of a unified patent court (press release of 11 December 2012 of the European Parliament available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20121210IPR04506+0+DOC+XML+V0//EN&language=EN [last visited 4 January 2013]). The unified patent court was however only approved by non-legislative resolution – the date of signature of the agreement is set for 8 February 2013 (see press release of 11 December 2012 of the European Patent Office available at http://www.epo.org/news-issues/news/2012/20121211.html [last visited 4 January 2013]).

2. 'Upgrading' the OHIM Boards of Appeal to a European trade mark court

The Boards of Appeal of OHIM are considered a department within the agency with a special status because its members are independent in their decisions.[166] This independence places the Boards of Appeal somehow between an administrative adjudicative body and a judicial body. It is entrusted with providing legal safeguards in the application and registration process for Community trademarks and design rights. Furthermore its decisions are appealed to the General Court. It does not take a quantum leap in thought[167] to imagine OHIM's Boards of Appeal being transformed into a European Union Trademark Court forming part of the European Union judicial architecture.[168] Additionally, it could act as last instance of the Community trademark and design courts system, thereby uniting at the top of the hierarchy both, administrative as well as civil law protection of Community trademark and design rights.[169] To ensure that the body of case law on the two existing Community IP rights does not develop in isolation from the rest of European Union law, appeals could be allowed in special cases to the General Court or even directly to the CJEU.

E. The case for a European Union Intellectual Property Court

1. Legal basis in the Treaties

In principle there exist no 'legal obstacles' to the creation of a European Union IP Court. The Treaties provide the Union legislator with the competence to set up specialized courts attached to the GC.[170] A first example of such a specialized court is

[166] Article 136 (4) CTMR

[167] In political reality it would take a quantum leap, tough.

[168] e.g. discussed in Micara (2009) p. 222 ff.

[169] The European Trademark Court would then have a position akin to the X Senate in the German Supreme Court, which hears at last instance appeals from generalist courts in infringement cases as well as appeals from the German patent court which acts as control instance for the German patent and trademark office (Meier-Beck (2011) p. 17 ff.)

[170] Article 257 TFEU

the Civil Service Tribunal, which was created in 2005 and with a limited jurisdiction to hear disputes between the European Union and its servants.[171]

Furthermore the Lisbon Treaty provides for a specific IP jurisdictional legal basis, which allows the Union legislator confer upon the CJEU jurisdiction to hear disputes relating to the application of acts adopted on the basis of the Treaties which create European IP rights.[172] This provision was most likely adopted in view of conferring jurisdiction upon the Court of Justice relating to the acquisition and protection of the yet-to-be-created Union Patent. It could also be used to broaden the jurisdictional competence of the Court relating to the Community Trade Mark. All in all the provision was kept vague to avoid anticipating a future Union IP law system still being in its embryonic state.[173] Read in conjunction with Article 257 TFEU, also a specialized Union court could hear cases relating to Union IP rights, if the IP jurisdictional competence is conferred upon the specialized court.

As the creation of a specialized IP court seems to be possible in the framework of the EU Treaties, the decision of whether to establish a European Union IP Court is therefore not one of a technical legal nature, but one of policy choice. The 11 propositions formulated in Section I will therefore serve as guidance to attempt to determine whether the setting up of a specialized European Union IP Court would be a desirable policy goal in the EU.

2. The case for a European Union court specialized in IP: an assessment in light of the propositions

Overall the case for a European Union specialized IP court seems quite strong. Firstly, it would be desirable to have a specialized IP court from a procedural perspective. On Member State level a lot of forum shopping that is detrimental to IP right holders can be observed (*Proposition 1*) and IP litigation is costly and time consuming because actions against several infringers cannot be consolidated and bundles of parallel IP rights have to be enforced separately. On the European level the number of Union IP rights applications is increasing and thereby also the numbers of appeals from OHIM

[171] http://curia.europa.eu/jcms/jcms/T5_5230/ [last visited October 14, 2012]

[172] Article 262 TFEU

[173] Callies & Ruffert (2002) p. 2057 (Comment on Article 229a TEC by Bernhard Wegener)

to the GC is rising. At the moment, IP cases make up 30 per cent of the cases decided by the GC.[174] A specialized Union IP court taking over these cases could significantly unburden the GC (*Proposition 2*). Furthermore access problems for small and medium size enterprises could be remedied establishing next to a central division several regional divisions of the Union IP court (*Proposition 4*).[175]

Secondly, from a substantive perspective a Union IP court would be likely to bring about uniformity and clarity to substantive IP provisions through case law, which could provide greater legal certainty and guidance to IP litigants (*Propositions 5 and 6*). Furthermore the quality of this case law could be improved by staffing the court with expert judges or experts who assist the judges, which would be more apt to deal with the technicalities of IP cases (*Proposition 9*). Overall, a European Union IP court would reasonably bear the promise to make European IP litigation more efficient and equitable.

Nonetheless there are also arguments weakening the case for a European IP court. Firstly, as mentioned already in Section III.A.4., issues of IP law cannot always be easily separated from issues arising in other fields of law (*Proposition 3*). Furthermore there is an ideological quarrel between pro-rights and anti-rights supporters, which might politicize the institution of a European Union IP court (*Proposition 8*). Lastly, having a separate European Union IP court might put the coherence and uniformity of EU, the guarantee of which is one of the most important tasks of the CJEU, at risk (*Proposition 7*), because specialized courts tend to create their own legal environment around them with their own procedures, legal jargon and specialized group of practitioners. This could be partly remedied by allowing for appeals to the CJEU. Additionally, as European integration progresses, the uniformity of EU law as a whole might not have an as high priority anymore.[176]

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[174] GC statistics available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-06/ra2011_statistiques_tribunal_en.pdf [last visited October 15, 2012]

[175] Probably the IP Court would not necessarily have to be located in Luxembourg, as the Luxembourg government already waived the claim of the seat of the OHIM Boards of Appeal if they were to become judicial panels within the meaning of Article 257 TFEU (ex-Article 220 TEC) in its Declaration to the Nice Treaty.

[176] According to Grimm, the argument of unity of the law on the domestic level might play a less important role than on the European level, because the domestic court structure is more

From the perspective of the European Union policy maker, a Union specialized IP court would be *prima facie* desirable. Firstly, a uniform and possibly internal market-friendly and competition-friendly interpretation of IP legislation would further the general goals of the EU (*Proposition 10*). Additionally, IP law is more and more becoming a subject of international law especially through TRIPS. Furthermore consolidation of IP law at the international level is also one of the main tasks of WIPO. A Union IP court would have a strong symbolic message in the international community, showing that the EU is taking IP protection very seriously (*Proposition 11*). Nevertheless from the perspective of those Member States (especially Germany) who have a very sophisticated national judicial system for the enforcement of IP rights, a European Union IP court would have to be set up in such a way that it would be able to compete with national judicial systems. Otherwise a Union IP court would lack the necessary political support to be set up.

V. Conclusion

The current framework of European IP law and the realities of European IP litigation are highly complex and costly. They fail to provide IP right holders with adequate protection. But can a unified specialized IP court solve the problem? It appears that at least in comparison with the status quo, a Union IP court might yield efficiency gains to IP holders that need to rely on the judicial system to enforce their IP rights in cross-border situations.

Furthermore previous projects indicate that there exists the political will in favor of establishing a Union IP judiciary. The latest attempt has potentially failed because the Unified Patent Court was to be set up as international court outside the EU Treaty framework. A new attempt within the Treaty framework might finally bring success.

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elaborate and less based on cooperation (Grimm (2006) p. 281). The more akin the European legal system becomes to a national system, the less important the coherence and unity of EU law may become.

VI. Bibliography

A

Antons, Cristoph, "Specialized Intellectual Property Courts in Southeast Asia" in: Kur, Annette et al. (eds.), "*...Und Sie Bewegt Sich Doch!" – Patent Law on the Move*, Carl Heymanns Verlag, Cologne (2005) p. 287 - 300

B

Bermann, George A., "Harmonization and Regulatory Federalism" in: Pernice, Ingolf (ed.), *Harmonization of Legislation in Federal Systems*, Nomos, Baden-Baden (1996), p. 37-46

Bessen (1), James & Meurer, Michal, "Lessons for Patent Policy from Empirical Research on Patent Litigation", Boston University School of Law, Working Paper Series, Law and Economics Working Paper No. 05-22 (2005), electronic copy available at: http://ssrn.com/abstract=851044

Bessen (2), James & Meurer, Michael, "The Patent Litigation Explosion", Boston University School of Law, Working Paper Series, Law and Economics Working Paper No. 05-18 (August 2005), electronic copy available at: http://ssrn.com/abstract=831685

C

Callies, Christian & Ruffert, Matthias (eds.), *Kommentar zu EU-Vertrag und EG-Vertrag*, 2. edition, Luchterhand, Neuwied (2002)

D

Dinwoodie, Graeme B. et al., *International Intellectual Property Law and Policy*, LexisNexis Casebook Series, Newark, NJ (2001)

Dreier, Thomas & Véron, Pierre (eds.), *Concise International and European IP Law : TRIPS, Paris Convention, European Enforcement and Transfer Technology*, Kluwer Law International, Alphen aan den Rijn (2008)

Dreyfuss (1), Rochelle, "The Federal Circuit: A Case Study in Specialized Courts", *New York University Law Review*, Vol. 64, No. 1 (1989) p. 1- 77

Dreyfuss (2), Rochelle, "Specialized Adjudication", *Brigham Young University Law Review*, Vol. 1990, March 1990 (1990) p. 377-441

Dreyfuss (3), Rochelle, "Resolving Patent Disputes in a Global Economy", New York University School of Law, Law & Economics Research Paper Series Working Paper No. 08-48 (November 2008), electronic copy available at http://ssrn.com/abstract=1226562

G

Gadow, Wilhelm, *Der Gewerbliche Rechtsschutz der Deutschen Reichsgesetze und Staatsverträge*, 2nd ed., Verlag von Georg Stilte, Berlin (1930)

Garoupa, Nuno, Dari-Mattiacci, Giuseppe & Gómez-Pomar, Fernando, "State Liability", *European Review of Private Law* 4-2010, Kluwer Law International, Alphen aan den Rijn (2010), p. 773-811

Granstrand, Ove, *The Economcis and Management of Intellectual Property - Towards Intellectual Capitalism*, Edward Elgar, Cheltenham (1999)

Grimm, Dieter, "Constitutional Issues in Substantive Law – Limits of Constitutional Jurisdiction" in: Pernice, Ingolf & International ECLN Colloquium 6, 2005, Berlin (eds.), *The Future of the European Judicial System in a Comparative Perspective*, Nomos, Baden-Baden (2006) p. 277 – 282

Guzman, Andrew T., "International Antitrust and the WTO: the Lessons from Intellectual Property", U.C. Berkeley Law and Economics, Working Paper Series, Working Paper 2000 – 20 (2000), SSRN: electronic copy available at: http://papers.ssrn.com/paper.taf?abstract_id=248317

H

Halberstam, Daniel & Reimann, Mathias, "Federalism and Legal Unification", University of Michigan Public Law and Legal Theory Working Paper Series, Working Paper No. 186 (February 2010 – Revised September 2011), electronic copy available at http://ssrn.com/abstract=1557690 [last visited August 8, 2012]

Haight Farley, Christine, "Judging Art", *Tulane Law Review*, Vol. 79 / No. 4 (March 2005), p. 805-858

Henderson, G.F., *Intellectual Property: Litigation, Legislation & Education: A Study of the Canadian Intellectual Property and Litigation System*, Minister of Supply and Service Canada, Ottawa (1991)

J

Janicke, Paul M., " 'Maybe We Shouldn't Arbitrate': Some Aspects of the Risk/Benefit Calculus of Agreeing to Binding Arbitration of Patent Disputes", 39 *Huston Law Review* 693 (2002) p. 693-724

K

Kley, Karl-Ludwig, "From Patent to Product Innovative Companies and Patent Jurisdiction", Bundespatentgericht Symposium 2011 Conference Volume (2011) p. 29-35

L

Landes, William M. & Posner, Richard A., *The Economic Structure of Intellectual Property Law*, Belknap Press, Cambridge (Mass.) (2003)

Lemley, Mark A., "Can the Patent Office Be Fixed?" in: The Kauffman Task Force on Law, Innovation and Growth (ed.), *Rules For Growth: Promoting Innovation and Growth Through Legal Reform*, Ewing Marion Kauffman Foundation, Kansas City (2011) p. 367-408

M

MacQueen, Hector et al., *Contemporary Intellectual Property Law and Policy*, Oxford University Press, Oxford (2008)

Meurer, Michael, "Controlling Opportunistic and Anti-Competitive Intellectual Property Litigation", Boston University School of Law, Working Paper Series, Law and Economics Working Paper No. 02-24 (December 2002), electronic copy available at: http://ssrn.com/abstract=361760

Meier-Beck, Peter, "The Federal Patent Court and the Federal Court of Justice as European Patent Courts", Bundespatentgericht Symposium 2011 Conference Volume (2011) p.17-24

Micara, Anna Giulia, "Shaping a New EU Judicial Architecture: Judicial Panels on Intellectual Property" in: Snyder, Francis & Maher, Imelda, *The Evolution of the European Courts: Institutional Change and Continuity – Sixth International Workshop for Young Scholars (WISH)*, Bruylant, Brussels (2009) p. 211 – 233

N

Nuyts, Arnaud et al., "Cross-Border Litigation in IP/IT Matters in the European Union: The Transformation of the Jurisdictional Landscape", in: Nuyts, Arnaud (ed.), *International Litigation in Intellectual Property and Information Technology*, Kluwer Law International, Alphen aan den Rijn (2008)

O

Oldfather, Chad M. "Judging, Expertise and the Rule of Law", Marquette University Law School Legal Studies Research Paper Series, Research Paper No. 11-07 (March 2011), SSRN: Electronic copy available at: http://ssrn.com/abstract=1799568

P

Petersen, Clement Salung & Schovsbo, Jens,"On Law and Policy in a European and European Union Patent Court (EEUPC) - What Will It do to Patent Law and What

will Patent Law do to It?" (2011) SSRN: Electronic copy available at: http://ssrn.com/abstract=1572521

Polk Wagner, R & Petherbridge, Lee, "Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance", 152 *University of Pennsylvania Law Review* 1105 (2004) p. 1105- 1179

Posner (1), Richard, "Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function", *Southern California Law Review*, 56 SCALR 761 (1983) p. 761- 790

Posner (2), Richard (ed.), *The Essential Holmes*, The University of Chicago Press, Chicago (1997)

R

Reindl, Andreas, "Intellectual Property and Intra-Community Trade", *Fordham International Law Journal*, Volume 20, Issue 3 (1996) p. 819-865

Revesz, Richard, "Specialized Courts and the Administrative Law Making System", *University of Pennsylvania Law Review*, Vol. 138, No. 4 (1990) p. 1111-1174

S

Saunders, Cheryl, "Legislative, Executive, and Judicial Institutions: A Synthesis" in: Le Roy, Katy and Saunders, Cheryl (eds.), *Legislative, Executive, and Judicial Governance in Federal Countries*, McGill-Queen's University Press, Montreal (2006), p.344-384

Schwartz, David L. "Courting Specialization: An Empirical Study of Claim Construction Comparing Patent Litigation Before Federal District Courts and the International Trade Commission", 50 *William and Mary Law Review* 1699 (2009), p.1699-1737

Shapiro, Martin, *Courts*, University of Chicago Press, Chicago (1981)

Smith, Graham "Copyright and Freedom of Expression in the Online World", *Journal of Intellectual Property Law & Practice* 5 (2) (2010) p. 88-95

Smits, Jan & Bull, William, "European Harmonization of Intellectual Property Law: Towards a Competitive Model and a Critique of the Proposed Unified Patent Court", Maastricht European Private Law Institute Working Paper No. 2012/16 (August 2012), SSRN: electronic copy available at: http://ssrn.com/abstract=2117835

Spellman, Barbara, "Judges, Expertise and Analogy", University of Virginia School of Law, Public Law and Legal Theory Research Paper Series No. 2009-20 (October 2009), SSRN: electronic copy available at: http://ssrn.com/abstract=1473809

Sung, Lawrence M., "Strangers in a Strange Land: Specialized Courts Resolving Patent Disputes", University of Maryland School of Law, Legal Studies Research Paper No. 2008 – 18 (March/April 2008), SSRN: electronic copy available at: http://ssrn.com/abstract=112488

T

Takenaka, Toshiko, "Success or Failure? Japan's National Strategy on Intellectual Property and Evaluation of Its Impact from the Comparative Law Perspective", 8 *Wash. U. Global Stud. L. Rev*. 379 (2009), p. 379-398

U

Ullrich, Hanns, "Die Entwicklung eines Systems des Gewerblichen Rechtsschutzes in der Europäischen Union", Max Plank Institute for Intellectual Property, Competition and Tax Law Research Paper Series No. 10-11 (2010), SSRN: electronic copy available at http://ssrn.com/abstract=1688319

V

Vaver, David, "Does the Public Understand Intellectual Property Law? Do Lawyers?", University of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper No 23/2006 (May 2006), SSRN: electronic copy available at: http://papers.ssrn.com/Abstract=902793

Visscher, Fernand de, “Juridiction Européenne des Brevets (Unified Patent Court): Il Est Urgent d’Examiner une Autre Approche, Plus Realiste et Plus Equitable”, *Propriété Industrielle – Revue Mensuelle LexisNexis JurisClasseur* (April 2012) p. 13-24