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Introduction: A new beginning for the European Patent System?

Until recently, only scant data were publicly available on the subject of patent litigation in EU member states, and as a result it was difficult to accurately examine how prevalent patent litigation was from state to state, how costly it was and how significant the divergences were between the various systems. However, in recent years a number of major studies – based on analysis of carefully gathered empirical patent case data – have been published.[1] These studies have shed new light on the subject of patent litigation in EU member states, particularly in the major jurisdictions of the UK, Germany, France and the Netherlands, where the vast majority of European patent ligation takes place. This leads us to the first rationale for the writing of this book – it is now, for the first time, possible to paint an accurate, detailed picture of the patent litigation system in Europe. The first part of this book aims to paint that picture, setting the scene by analysing and summing up the current state of patent litigation in Europe's major patent jurisdictions.

This brings us to the second rationale for the writing of this book – the need to take account of the seismic shift represented by the coming into force of the EU-driven European patent reform package. On 19 February 2013, the UK and 24 other countries signed an

[1] The most prominent study is K. Cremers, M. Ernicke, D. Harhoff, C. Helmers, G. Licht, L. McDonagh, I. Rudyk, P. Schliessler, C. Schneider & N. van Zeebroeck 'Patent Litigation in Europe,' ZEW Discussion Paper No. 13-07 (2013), 1 (hereafter known as Cremers) - available at http://ftp.zew.de/pub/zew-docs/dp/dp13072.pdf - This study attempts to analyse all patent cases filed in the various jurisdictions during the period 2000-2008 (though cases may have been decided post-2008 since case lengths can span a number of years post-filing). The Cremers data collection took place during 2010-12. The German and UK data are for the most part accurate reflections of cases filed, but the data for the Netherlands and France do not cover all cases filed, and are largely restricted to cases that were adjudicated. Nonetheless, the Cremers paper represents the first authoritative account of patent litigation in these four jurisdictions. See also the following country-specific studies - P. Véron, 'Patent Infringement Litigation in France,' Mitteilungen der deutschen Patentanwälte 93 (2002), 386; C. Helmers and L. McDonagh, 'Patent litigation in the UK: an empirical survey 2000–2008,' Journal of Intellectual Property Law & Practice 8 (2013), 846; T. Bouvet, 'France' in M.C. Elmer & C.G. Gramaenopoulos (eds.), Global Patent Litigation (Virginia: Bloomberg BNA, 2014), 546-589 and the European overview given in N. Van Zeebroeck and S. Graham, 'Comparing Patent Litigation Across Europe: A First Look,' Stanford technology law review 17 (2014), 655.

intergovernmental agreement (the Agreement) to create a Unified Patent Court (UPC), which will be a new specialist patents court common to participating states.[2]

The provision of a new Unitary Patent (UP) – known officially as the 'European Patent with Unitary Effect' – is the other key aspect of the reforms. Overall, the package of measures is designed to establish and enforce unitary patent protection within the European Union, with the ultimate ambition of unifying the European patent system as much as possible.[3] Moreover, a central aim of the establishment of the UPC and the UP and the UP is to offer inventors and businesses a more streamlined and easy-to-use system that is also cost-effective. The second part of this book gives academic consideration to all relevant aspects of the reforms, and evaluates what the impact of the UPC and the UP is likely to be on patent litigation in Europe in the short term and in the long term.

Thus, over the course of this book I ask and answer a series of questions: first, what is the current state of patent litigation in Europe? Second, what are the aims and crucial features of the reforms? Third, in practice will these reforms likely succeed at achieving their overall aims; and, finally, what will the overall picture of European patent litigation look like in the decades following the coming into being of the new system? As explained further on, one of the novel things about this book is the use of interview data – gathered from patent experts in the legal and business communities – to answer questions concerning the challenges facing patent litigants and their legal representatives in Europe over the coming decades.

Following this introductory Chapter 1, Chapter 2 examines the current state of European patent litigation, which, although it is framed by the European Patent Convention (EPC), is

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[2] Agreement on a Unified Patent Court (The UPC Agreement), C 175/01 (2013) - accessible at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:175:0001:0040:EN:PDF

[3] Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection (UP Regulation), OJ L 361/1 (2012) and
Council regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements (Translation Regulation), OJ L 361/89 (2012) – both documents accessible at:
http://ec.europa.eu/internal_market/indprop/patent/documents/index_en.htm
For a further explanation of the changes see the EPO website:
http://www.epo.org/law-practice/unitary.html
See also R. Romandini and A. Klicznik, 'The territoriality principle and transnational use of patented inventions - the wider reach of a unitary patent and the role of the CJEU,' International Review of Intellectual Property and Competition Law 44 (2013), 524 and M. Brandi-Dohrn, 'Some critical observations on competence and procedure of the unified patent court,' International Review of Intellectual Property and Competition Law 43 (2012), 372.

actually undertaken on a largely national basis.[4] European Patents (EPs) granted by the European Patent Office (EPO) must be validated - and subsequently, litigated - within national jurisdictions.[5] National courts have the ability to issue binding rulings concerning patent infringement within their national territories, and they also may consider questions of patent validity - although the EPO retains the final say on validity via its patent opposition service.[6] Indeed, it is not uncommon for national patent litigation to take place at the same time as parallel EPO opposition proceedings; and the lengthy backlog at the EPO means that national courts sometimes rule on questions of validity and infringement before the EPO Board of Appeals has reached a final decision regarding validity.[7] Moreover, due to the fact that national courts have the ability under the EPC to make decisions based on their own jurisprudence, the courts in one EPC member state (e.g. the UK) may reach different conclusions to the courts of another EPC member state (e.g. Germany) when resolving the central questions of patent litigation: what amounts to infringement of a patent in suit? Is the patent in suit valid or invalid? In what circumstances is it appropriate to grant a preliminary injunction to a patentee? And if EPO proceedings are ongoing, should a stay of national proceedings be granted?

The precise intricacies of the way this system works are examined in Chapter 2 by assessing the state of patent litigation within Europe‘s four key patent litigation venues: the UK (London), Germany (Dusseldorf, Mannheim and Munich), France (Paris) and the Netherlands (The Hague).[8] As noted at the outset, until recently there was a lack of empirical evidence concerning patent litigation within these four major jurisdictions; in light of recently published studies, this chapter explores litigation at an in-depth level in each of the above

[4] Text of the European Patent Convention, of 5 October 1973, as revised by the Act revising Article 63 EPC of 17 December 1991, and the Act revising the EPC of 29 November 2000, available at http://documents.epo.org/projects/babylon/eponet.nsf/0/00E0CD7FD461C0D5C1257C060050C376/$File/EPC_15th_edition_2013.pdf. - also accessible at http://www.epo.org/law-practice/legal-texts/html/epc/2010/d/index.html

[5] See also The Agreement on the application of Article 65 of the Convention on the Grant of European Patents agreed on 17 October 2000 (see OJ EPO 549 (2001)) (hereafter known as the London Agreement) - available at http://documents.epo.org/projects/babylon/eponet.nsf/0/7FD20618D28E9FBFC125743900678657/$File/London_Agreement.pdf

[6] See generally EPO, Patent Litigation in Europe - An overview of national law and practice in the EPC contracting states (2013) - https://www.epo.org/learning-events/materials/litigation.html

[7] K. Cremers, M. Ernicke, D. Harhoff, C. Helmers, G. Licht, L. McDonagh, I. Rudyk, P. Schliessler, C. Schneider & N. van Zeebroeck ‘Patent Litigation in Europe,’ ZEW Discussion Paper No. 13-07 (2013), 1, 1-3

[8] As discussed further in Chapter two, between them these four jurisdictions handle the majority of European patent cases, with Germany by far the most popular venue.

territories.[9] It is shown that each of these four major jurisdictions has developed its own unique characteristics in the field of patent litigation: the UK's courts possess a well-earned reputation for requiring broad disclosure on the part of both parties, making use of a great deal of expert evidence, and conducting lengthy and detailed (and, consequently, expensive) hearings on the issues of patent validity and infringement; the German courts, meanwhile, represent the most popular patent litigation venues in Europe, and are often commended for providing parties with relatively cost-effective and speedy infringement hearings, though they are sometimes criticized for the complexities which can arise due to the system of bifurcation – a process required by the German Federal Constitution that is not present in any of the other three jurisdictions – whereby the issues of infringement and validity are resolved by separate courts in separate hearings; by contrast, the French courts are admired for the unique set of saisie procedures that enable a party to gain access to another company's premises to speedily and efficiently collect evidence on allegedly infringing acts; and, finally, while for a long time the advantage to filing suit in the Netherlands was the availability of cross-border injunctions – now less common – in more recent years, the Dutch courts have been praised for the speed and cost-effectiveness of their proceedings, and the technical expertise of their judges. In Chapter 2 each of these jurisdictions is examined in detail with respect to the key aspects of the litigation process and the volume and nature of the cases taken in the jurisdiction. The final part of this chapter sums up the various commonalities and differences present in the key jurisdictions of European patent litigation, shedding light on the advantages and disadvantages of the patent litigation system as it is currently framed.

Following this assessment of the current state of patent litigation in Europe, Chapter 3 outlines the motivation behind the reforms – the perceived need to provide a more efficient, cost-effective, harmonious litigation system – as well as the structure of the proposed reforms, i.e. the UPC and the UP. The key EU reformative innovations[10] and the two EU Regulations implementing enhanced cooperation with regards to the creation of unitary patent protection and facilitating translations of such patents as granted[11] - are discussed. The fact that Spain has, thus far, refused to sign up to any part of the 'reform package' is noted

[9] K. Cremers, M. Ernicke, D. Harhoff, C. Helmers, G. Licht, L. McDonagh, I. Rudyk, P. Schliessler, C. Schneider & N. van Zeebroeck 'Patent Litigation in Europe,' ZEW Discussion Paper No. 13-07 (2013), 1. See also European Patent Office (EPO), Patent Litigation in Europe - An overview of national law and practice in the EPC contracting states (2013) - available at https://www.epo.org/learning-events/materials/litigation.html

[10] UPC Agreement.

[11] UP Regulation and Translation Regulation.

here, as is the fact that Poland has decided not to participate in the UPC; while Italy has, having wavered, agreed to sign up to both the new UP and the UPC.[12] Croatia, an EU member state as of 2013, did not join until after the above agreements/regulations had already been signed/passed. At the time of writing, Croatia had not yet decided whether to participate in the UPC or the UP.

This third chapter goes on to analyse the background of the EU-driven patent reform package, including the questions of why reforms were thought necessary and why these particular reforms (UPC, UP) were chosen. The key legal aspects of the UPC and the UP are then discussed.

The UPC is examined with regards to the court's key institutional architecture: its sources of law; its jurisdiction; the substantive law to be utilized by the court; the UPC's relationship with the Court of Justice of the European Union; issues of standing and legal representation; the court's structure and competence; the practicalities and procedures of filing a UPC case; the way bifurcation is likely to operate within the UPC; the process of making appeals; the availability of the opt-out from the UPC's jurisdiction; the UPC's enforcement powers; the make-up of its judiciary; and, finally, the transitional period that will see national courts and the UPC share jurisdiction for at least 7 years. Throughout the chapter, reference is made to the UPC Rules of Procedure, where relevant. The fees for using the UPC are also discussed in this part of the chapter and are further outlined in the conclusion of this book.

Regarding the UP, this chapter explores its central features: the processes of application and grant; its territorial scope; the consequences of unitary effect; the property considerations involved in holding a UP; translation requirements; and the various fees involved, including the annual UP renewal fees. The third chapter concludes with a summary of the most significant elements of the of the UPC and UP with a view to the empirical study featured in Chapter 4.

At this point of the book, a crucial question is posed: in light of the underlying rationale for the reforms – the need to provide a more efficient, cost-effective and harmonious litigation

[12] See, generally, T. Cook, 'The progress to date on the Unitary European Patent and the Unified Patent Court for Europe', Journal of Intellectual Property Rights 18 (2013), 584.

system – what features of the new system will be particularly crucial to achieving these aims? A number of potential positives and negatives of the reforms are outlined here, including the impact of the fees/costs of the new system (given the aim to reduce overall litigation costs); the availability of centralized enforcement via the grant of patent injunctions and revocations spanning 25 UPC Signatory States (regarding the aim to create more legal harmony and certainty); the possibility that forum shopping will occur within the UPC and the associated risk of 'patent troll' litigation (given the need for an efficient and fair litigation system); and, finally, the lack of uniformity of patent enforcement across all 28 EU member states (MS) (in light of the fact that Spain, Poland and Croatia are, as yet, not parties to the UPC).

Chapter 4 – the penultimate chapter of this book – is framed around a UK IPO-commissioned empirical study, carried out by the author, that examines the perspectives of those within the business and legal communities concerning the UPC and the UP.[13] This piece of research had the specific aim of discovering at a qualitative level the answer to the following question: what are the most important issues for the stakeholders who will potentially use the new system [14] For instance, is it likely that inventors and businesses will seek patent protection via the new UP route, rather than through the existing system of obtaining EPs or national patents? If so, why (and if not, why not)? Moreover, is the proposed UPC likely to prove to be a popular venue for companies/litigants? What makes the UPC attractive to litigants (or unattractive, as the case may be)? Are patentees likely to opt-out of the UPC during the transition period? What is the likely impact of the fact that the UPC central divisions will be divided between three cities - Paris, Munich and London? For instance, do those in the Pharma/Chemicals sector favour the location of the proposed London-based court?

Thus, following on from the examination of the reforms in Chapter 3, Chapter 4 explores what the most important issues are for those within the business and legal communities, i.e. the potential users of the UPC and the UP. This chapter assesses a large amount of empirical data gathered from interviews with 28 participants from the legal and business communities. The interview data shows that stakeholders are carefully considering what the impact of pan-

[13] This study was undertaken from January-May 2014 – see further L. McDonagh, 'Exploring perspectives of the Unified Patent Court and the Unitary Patent within the Business and Legal Communities' A Report Commissioned by the UK Intellectual Property Office (July 2014) - available at https://www.gov.uk/government/publications/exploring-perspectives-of-the-up-and-upc

[14] J. Pagenberg, 'Unitary patent and Unified Court - what lies ahead?,' Journal of Intellectual Property Law & Practice 8 (2013), 480.

25 EU MS injunctions and pan-25 EU MS revocations might be; are cautiously assessing the legal costs of using the new system viz. the current system; and are trying to evaluate whether the existence of bifurcation at the UPC, the possibility of forum shopping and the possible growth in 'patent troll' litigation are causes for concern.

As detailed in Chapter 4, although this was a UK IPO-funded study, in terms of its (anonymous) participants the survey's remit includes not only in-house counsel working at businesses based in the UK, but also at businesses that operate internally and externally to the wider EU, including companies based in Germany, the United States, Canada and Japan. Interview participants were also drawn from the legal community – primarily solicitors and patent attorneys – working in both the UK and Germany, two important EU and EPC member states with large, embedded patent litigation systems – as examined in Chapter 2 – that will no doubt be affected by the establishment of the UPC.

Then Chapter 5 – the conclusion of this book – takes the key concerns identified by the empirical study and considers how both the setting up of and the organization of the UPC and the UP have moved on since 2014, looking further ahead to 2017 and beyond. Several observations are made by the author with respect to the remaining key concerns of those within the business and legal communities about the UPC and the UP, including the establishment and maintenance of a high quality judicial system across the UPC, and the maintenance of appropriate fee levels for the UP and the UPC. Additionally, it is considered how the seismic changes brought about by the UPC and the UP may end up altering litigant behaviours within Europe. Overall, taking into account empirical data concerning both the current state of patent litigation in Europe and the views of the potential users of the new system, this chapter considers what European patent litigation is likely to look like in the years following the coming into being of the UPC and the UP – a perspective taken at this crucial time, with the new system steadily emerging, but not yet fully in view.

The title of this book suggests that the UPC currently casts a shadow over patenting in Europe; indeed, my concluding argument is that it is likely this shadow will continue to be observable for some time – for, with the arrival of the UPC and the UP, we have surely come to the end of one phase of the European patent project, and are at the beginning of another. At time of writing, the UK's membership of the EU is not certain – much will depend on the

outcome of the June 2016 referendum on EU membership. If the UK remains an EU member state, then the UPC and UP will proceed as planned. However, if the UK does exit the EU, it will likely no longer be able to participate in the UPC or UP; indeed, the UPC itself may need be to redesigned to take account of a UK exit, given that the UK is currently expected to host one of the UPC's central divisions. Although this book is written with the status quo in mind, i.e. with the expectation that the UK will remain an EU member state and thus a participant in the UPC, ultimately the analysis of European patent litigation undertaken over the course of this book remains valuable even in the case that the UK does not participate in the UPC, for it highlights both the current state of patent litigation in the UK, Germany, France and the Netherlands, and anticipates expected and possible future reforms that will undoubtedly have an impact both on the continued fragmentation of litigation at the national levels and on the uniformity of patent jurisdiction at the UPC level.

Indeed, the long-term impact of the UPC is likely to be so profound that whatever the new dawn looks like, it will be substantially different from what came before. Thus, what I wish to present with this book is an in-depth exploration of European patent litigation in the context of the new court system – a work that sums up the current state of European patent litigation while simultaneously looking ahead to upcoming and future reforms.