

INTELLECTUAL PROPERTY

A SPECIAL REPORT

It's a shrinking IP world out there, as we note this week with a piece focusing on the potential for patent trolls to make headway into Europe, which is revolutionizing the way countries there handle evolving ownership and licensing disputes. We also look at a more nuanced practice area involving so-called "standard-essential" patents. In addition, we examine a recent U.S. Supreme Court ruling that has drawn a sharper line between infringement and invalidity.



Will Trolls Make Their Way Across the Pond?

Europe's new Unified Patent Court could mean problems—as in the U.S.—with system abuse.

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The biggest change in the European patent system in history is approaching. In particular the introduction of the Unified Patent Court will bring dramatic changes, which will not only affect European businesses but every stakeholder involved in patent litigation in Europe.

For the first time, the UPC's decisions will have pan-European effect, thereby putting at stake in one action a market of 500 million people. There have been concerns that the UPC system may lead to a rise in the number of suits by "trolls" (nonpracticing entities) in Europe. Although troll suits are common in the United States, such suits have been relatively insignificant in Europe.

As such, it's a good idea to examine the reasons for the "success" of troll litigation in the United States, its implications for businesses, and evaluate whether the UPC system includes sufficient safeguards to prevent history repeating itself in Europe.

The term "patent troll" entered the lexicon in the 1990s. Like the fairy tale troll who charged a toll for crossing a bridge he had not built, the "patent troll" asserts patents it usually purchased from someone else and does not practice in order to extract a license fee. Troll litigation has proliferated in the United States and still con-

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tinues, albeit in the face of obstacles from judicial decisions over the past decade, including those commonly referred to as *eBay*, *Bilski*, *Alice* and *Octane Fitness*, procedural changes, and recent legislative enactments, most notably the America Invents Act.

Many factors have contributed to the success of troll litigation in

the United States. American patents are often broad and sometimes cover business methods. In Europe, by contrast, historically patents have been more narrowly drawn and business methods are not patentable. These patents can be asserted against a host of industries and potentially impact the core of a defendant's business. Patent litigation is expensive and often protracted, and the cost to the defendant—both money and time—is significantly more than the cost to a troll plaintiff, which will have few documents and whose only business is asserting its patents.

Before *eBay*, if infringement was proven, an injunction was virtually automatic, which would cover all of the defendant's U.S. operations. In Europe, by contrast, proceedings in multiple jurisdictions were required. In addition, a troll has a better chance of proving infringement than a defendant does of proving invalidity. (The availability of inter partes review and covered business method proceedings in the Patent Trial

and Appeal Board have changed the dynamic somewhat.)

Thus, patent trolls had extraordinary leverage, and most companies sued by a troll will settle for some amount less than the cost of defense, which can be millions of dollars, to obtain a license and be rid of the troll. Although settlement is often a prudent business decision, these settlements fund the troll's ability to sue additional defendants.

Despite these continuing risks, in recent years trolls have faced an increasing number of significant impediments to their business model. As Europe embarks on a new course in patent enforcement, some wonder whether the door that has been closing somewhat in the United States is now about to open in the E.U.

LESSONS LEARNED

Against that background, some have questions whether the European UPC system has sufficient safeguards to avoid a similar experience. An industry coalition, including major global players from the information technology and other industries, sent two letters to the European Commission voicing concerns that certain elements of the UPC system may lead to "a rise of abusive litigation." European Patent Office President Benoit Battistelli assured prospective users that the UPC would be "well balanced and fit for the purpose," but several characteristics of the UPC system merit critical review.

The opportunity for forum-shopping typically favors plaintiffs. An action for infringement before the UPC may be brought either at the place of infringement or the defendant's seat. Because many products are offered online, with infringement occurring across Europe, the plaintiff may be able to choose from a wide variety of UPC divisions. In addition, during an initial seven-year transitional period, plaintiffs can also



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bring an action in the national courts, which retain concurrent jurisdiction with the UPC. Defendants have limited transfer options.

Although speculative at this time, these options may allow some of the less established local or regional divisions to develop as attractive venues for plaintiffs, creating a "European Eastern District of Texas."

The UPC system includes an element of bifurcation, a procedural particularity borrowed from the German patent system. In Germany, infringement and validity proceedings are handled by separate courts with separate procedural rules and time lines, potentially allowing a plaintiff to obtain an injunction on a patent that is later invalidated. This procedure obviously provides leverage for patentees. However, bifurcation is not mandatory under the UPC system, and judges are not expected to make use of bifurcation frequently.

Automatic injunctions on a finding of infringement are a major boon for trolls. An ongoing dispute exists as to how much discretion the UPC Rules of Procedure allow. The current—and most likely penultimate—18th draft provides for discretionary injunctions, but in public discussions, experts and judges have expressed differing views as to how the UPC judges will exercise that discretion. The majority appears to view an injunction as the default remedy, with denial of an injunction only in extraordinary circumstances (e.g., a standard-essential patent).

Finally, the UPC is generally a "loser pays" system, in which the winning party may be reimbursed for its court and attorney fees. However, only a certain portion of a winner's attorney fees will be recoverable.

While some aspects of the UPC system may be less attractive to trolls, opportunities for forum-shopping and a strong possibility of obtaining an injunction, may encourage an unprecedented number of European troll suits, at least in the initial years.

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