

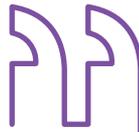


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Patent litigation in Europe's five year evolution

By Victoria Bentley



Patent litigation in Europe in five years will look very different from now due to major reforms to the patent framework and a new wave of technology in wearables and the 'internet of things'.

With an ever-evolving landscape of technological development and significant changes to EU patent law on the horizon, we consider how patent litigation in Europe is likely to change over the next five years, and what this might mean for businesses.

Patent litigation in Europe in five years will look very different from now due to major reforms to the patent framework and a new wave of technology through wearables and the 'internet of things'. It is also likely that more companies will choose to settle patent disputes through arbitration. At the same time, we can expect the unitary patent and Unified Patent Court (UPC) reforms to have influenced the way businesses obtain, defend and challenge patent rights, with different approaches to be expected in different sectors.

The UK's 2017 referendum on whether the UK should remain a member of the EU will also have a bearing on patent strategies, with a vote to leave the EU likely to prompt changes in the UK's relationship with the new unitary patent system as well as an overhaul of existing rights and case law.

Future patent wars

Many of the prevailing intellectual property disputes of the past decade have been in relation to patented technology relevant to smartphones. Only in recent months, after years of litigations in jurisdictions around the world, has there been a slowdown in the number of court battles taking place. Many technology companies have called a truce and looked to solutions, such as collaboration and cross-licensing agreements, instead.

The next round of patent wars between technology companies is likely to centre on developments in wearables.

Wearables are gadgets with connectivity features and functions that people wear on their body. Many of the publicised developments in wearables have been in the context of smart watches or in the digital health context with the rise of fitness and lifestyle trackers. However, it is in the development of ever-more advanced augmented and virtual reality technology that the wearables market could see major growth and where patent rights are likely to be keenly contested.

Virtual reality headsets have existed for years and are perhaps most associated with the gaming world, but the potential of the technology as a tool of leisure and business goes much further, offering users a 4D perspective on the world and the chance to experience simulations of real-life landscapes and activities. Augmented reality allows the user to see the world around them with an overlay of useful information/graphics. This technology of the future is likely to be outside the scope of settlement agreements already reached by the technology companies and so promises to be a major patent battle ground as competition increases for a share of growth in the market.

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The internet of things, standards and patent licensing disputes

The development of technological standards for the IoT will lead to the generation of a new wave of standard-essential patents (SEPs).



The increasing connectivity of devices, commonly referred to as the internet of things (IoT), is also likely to develop further in the next five years, and have implications for patent litigation.

The IoT age is already well in progress, with examples including smart metering systems in the energy market and the development of connected cars. The IoT offers the opportunity to make everyday items into devices capable of transmitting and receiving data, and to change the way that businesses operate. In the new industrial age referred to as 'Industry 4.0', the supply chain in advanced manufacturing is increasingly characterised by connectivity, whether between machines and devices or between parties in the supply chain. However, to harness the potential this connectivity offers, technical standards are vital to achieve interoperability so that different systems and devices can 'talk' to one another.

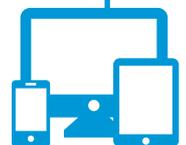
The development of technological standards for the IoT will lead to the generation of a new wave of standard-essential patents (SEPs). Companies that develop SEPs are generally bound by the standard-setting body they have engaged with to license the patented technology for use by others on fair, reasonable and non-discriminatory (FRAND) terms.

Recent court decisions have helped to shape what can be considered FRAND terms and when owners of SEPs can be said to be breaching their commitment to the FRAND principles by pursuing injunctions against infringers.

However, litigating over SEPs in open court presents a risk that sensitive details over licensing agreements and royalty rates in particular, become public and diminish a patent holder's bargaining position in negotiations with other prospective licensees.

In search of private proceedings where such issues can be kept confidential, there has been growing use of arbitration to resolve patent disputes, in particular in relation to FRAND disputes. This trend is likely to continue in the next five years, especially in the case of disputes over the licensing of SEPs relevant to the IoT.

We can expect parties to licensing negotiations to agree upfront that disputes will be referred to arbitration, but others may propose arbitration in the event of a dispute and in the absence of an existing agreement. In many technology fields such as telecoms, in particular, many licensees are at the same time licensors of other patents, and so will be keen for terms that may be relevant to cross-licensing agreements to remain private.



The unitary patent and Unified Patent Court reforms

The new UPC could prove to be an attractive forum for resolving other disputes concerning technology patents.



The new UPC could prove to be an attractive forum for resolving other disputes concerning technology patents. The UPC is a new court system being set up to underpin the creation of new unitary patents and will involve the operation of Central, Regional and Local Divisions. Unitary patents, which could become available for businesses to acquire from as early as 2017, will provide almost pan-European protection of inventions through a streamlined application and approval process that avoids having to validate the patents in each country participating in the unitary patent system, as has to be done with traditional European patents.



Businesses will face a number of choices when the new unitary patent system kicks in

Each business will need to make up its own mind about whether it can afford to risk a patent being revoked across multiple jurisdictions through just one decision.



Where businesses acquire a unitary patent, they will benefit from the automatic widespread protection of their invention in the 25 EU member states which look likely to participate in the new system. However, they will also be locked-in to the UPC's jurisdiction for disputes concerning such patents, and risk losing patent rights in every one of the participating member states in a single revocation action in the UPC. European patents will also be subject to the UPC's jurisdiction unless owners 'opt out' those patents, for a fee, in which case disputes would be heard before national courts.

Each business will need to make up its own mind about whether it can afford to risk a patent being revoked across multiple jurisdictions through just one decision. We can expect different approaches to this issue to manifest itself in different sectors. This is something that was considered in a 2014 report for the UK's Intellectual Property Office (UKIPO) by Cardiff University academic Dr Luke McDonagh, *Exploring Perspectives of the Unified Patent Court and Unitary Patent within the Business and Legal Communities*.

For example, in the technology sector where companies may own multiple patents relevant to different aspects of the same technology, there is likely to be greater willingness to engage with the unitary patent system. In other sectors where companies are more likely to own 'crown jewel' patents, such as pharmaceuticals, businesses will likely be more reluctant to be drawn into disputes before the UPC and risk the revocation of patents that are vital to their continuing business.

Other factors will influence businesses' appetite for UPC proceedings, including how the UPC addresses competition law issues. This is particularly relevant in relation to SEPs, and the potential to raise a FRAND defence.

The UPC will be able to consider counterclaims from companies accused of breaching patent rights that the licensors of those patents are enforcing those rights in a way which violates competition rules. However, it is unclear what weight the UPC will give to competition law considerations relative to national courts, or indeed what categories of competition law abuse will gain traction before the UPC, among other issues.

As UPC case law develops, it will have an influence on businesses' patenting strategy going forward, and the shape of patent portfolios, which may include a mix of national and European patents, as well as new unitary patents.

The UPC reforms could also attract non-practising entities (NPEs) to litigate in Europe in greater number than is currently the case. NPEs, also referred to – sometimes inaccurately – as patent trolls, are businesses that do not manufacture products or use patent rights for research, but use their patents solely for licensing and enforcement purposes.

The increased leverage that an almost pan-European patent right promises to provide under the unitary patent system is likely to be attractive to NPEs, as is the ability to 'forum shop' under the UPC regime to take advantage of possible localised differences in interpretations of the UPC Agreement and Rules of Procedure.

In addition, the possible 'bifurcation' of proceedings within the UPC – whereby issues relating to a patent's validity may be considered separately from the alleged infringement of that patent – may present an opportunity for NPEs to win injunctions for infringement. Even if later reversed by a finding of invalidity of the patent, this 'injunction gap' could serve to close off a market to unlicensed companies, particularly in fast-moving sectors such as technology.



A UK exit from the EU?



The way the new unitary patent system operates and affects companies in the UK in future will depend on the outcome of the UK's forthcoming referendum on whether the country should remain a member of the EU, scheduled for 2017 (but could be as early as summer 2016). The referendum has the potential to delay the unitary patent system taking effect, as the UK currently holds one of the keys to ratification of the UPC Agreement that will underpin the new court system.

Draft domestic legislation has been prepared in the form of a Statutory Instrument to give recognition to the UPC in the UK. The intention is for the legislation to be passed by both Houses of Parliament but the SI will not come into force until the UPC Agreement does.

The unitary patent system will go ahead regardless of the outcome of the UK referendum, albeit potentially with delay if the UK postpones its ratification pending that vote – but there are impacts for UK businesses if the UK is not part of the new unitary patent system. It is clear that participation in the unitary patent system is only open to EU member states, and only those which participate in the Unitary Patent Regulations and sign and ratify the UPC Agreement. Indeed, the UPC Agreement was amended during early negotiations to exclude, specifically, the participation of non-EU member states.

A UK vote to leave the EU would mean that unitary patents registered after the date of the exit would not have effect in the UK. It is not clear what would happen to any unitary patents that have already

been granted by then, although one solution may be to allow for conversion of the UK designation to a European patent, with the patentee required to 'validate' in the UK within a certain period.

The future of the planned London-based central division of the UPC handling patent disputes in the life sciences sector would also be uncertain. Whilst only EU member states can participate in the UPC, the UPC Agreement appears to fix one of the seats of the central division in London, alongside Paris and Munich. However, although the UK is currently the leading venue for life sciences litigation in the EU, it is very likely that the court would be moved to another member state participating in the unitary patent system (probably the Netherlands).

In the event of a no vote, some businesses operating in the UK will still take the view that it is worth obtaining a unitary patent, in order to obtain patent protection in all the remaining EU member states participating in the unitary patent system, although the cost-benefit of doing so may be diminished. Many businesses wanting protection for their inventions in the UK will seek a national patent in the UK alongside the unitary patent. For other businesses, it will be more attractive to seek a European patent which they can validate in the countries where they intend to be active.

All this means businesses can expect changes in patent litigation practices if the UK exits the EU.

With all of these developments in play, we can expect to see significant changes to the patent landscape over the next five years.

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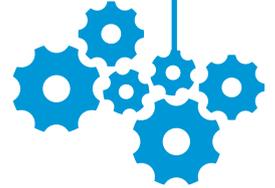
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