How the Unified Patent Court Reshaped Pan-European Patent Enforcement Strategy for US Companies | November 20, 2025

Wayne Stacy 00:34
Welcome everyone. We have a special program here at Berkeley Law today about the Unified Patent Court. Three years back Berkeley, and Robins Kaplan and Steve Carlson here, which I'll introduce formally here in a moment, really got to looking at the UPC and what that would mean for the future of patent litigation, patent enforcement, innovation here in the United States. Steve was kind of a luminary in this idea. He brought this to me, and when he first brought it, I was thinking, that's a problem, and that's an issue that's not really going to affect many US companies. Steve corrected me, told me I was wrong. It's not going to affect companies today, but it's going to affect companies in the future. Turns out, much as I hate to say it, I was wrong, he was right, and now that I've said it on a recording, I'm kind of bound by that. But this has been a bit a partnership with Steve to really bring this knowledge to US companies and to us policymakers. And so I kind of wanted to start this with a thank you to Steve for highlighting this issue before anybody else was so with that, let me introduce the co founder of this entire UPC program, and that is Steve Carlson, he's a partner at Robins Kaplan, a, you know, well known and well well respected US Patent litigator, but a US patent litigator with a lot of clients that do business worldwide, and I think that's what brings this kind of special knowledge. So Steve, I want to let you introduce your your co-panelist, who I will also mention, has been with us since day one of all of this, and really been a been a thought leader for us here at Berkeley Law. So thank you and all yours.

Steven Carlson 02:34
Thank you very much. I'd love to introduce my co-panelist here, Konstantin Schallmoser from the firm of Bonabry. I've been working with out with Konstantin and his his colleagues now for really 20 years since I've been a junior attorney here in Silicon Valley, practicing now for over 20 years in patent litigation. I've been aware of the German system and the importance that it's had, kind of the power it's had in patent litigation. What's happened in the last 20 years is there's been a tightening of the US system, making really hard to enforce patents in the US. Meanwhile, we've had a this, this launch of the Unified patent court in Europe, and that very quickly has become probably the foremost forum in the world for enforcing patents. It is cheaper, faster and more reliable in terms of what you might get as a claimant. And so what we did starting about 20, well, 2010 I worked with Konstantin's colleague, Alexander Harguth, and then Konstantin in doing these, these books about the German patent litigation system to explain it to the American audience. It is a different system out there in many aspects, quite advantageous from the plaintiff's side. And we wrote a book back in 2010 and we did a retread in 2016 and then as the unified patent court came online, we've done now our third edition of this to track the structure of it and the strategic value of it. And there is a lot of fundamental strategic value in the way the UPC is structured, and this, very quickly, has become the form now for patent litigation. And so now I want to introduce Konstantin. You want to say a bit about yourself and your practice?

Konstantin Schallmoser 04:35

Transcribed by https://otter.ai

Thank you very much for having invited me. Thank you, Steven, for the for the introduction. My name is Konstantin Schallmoser. I'm a German educated patent litigator. I used to work in Munich, and I've moved now 10 years ago, to Paris, France. I'm doing patent litigation and revocation actions in almost all fields of of industry and business. Yeah, that's it from my side.

Steven Carlson 05:03
Well, let's jump right into what's going on, because it has started. So we'll talk first about the structure of the EPC, and then we'll talk about what's been happening in practice since the launch of the UPC. So Konstantin, when, when did the court go in effect, and what kind of IP races they have jurisdiction over?

Konstantin Schallmoser 05:24
Yeah, the the UPC agreement was originally signed in 2013 and then it had to be ratified. This is a proceeding that takes a long time in Europe, because every state, every every country, has to ratify. And ultimately it went it force on June 1, 2023, which means, like 30 months from from now on. And the unified patent court is a court that is not only does not only have jurisdiction for a an invention that has been filed from that date on, but has jurisdiction for all existing and future European patents. This is one of the key points that you have to know. That means that all European patents that are still enforced and that have a date of application after June 1, 2003, they are into this system when they are still alive. So all existing and future European patents that are granted will be granted or have been granted by by the European Patent Office (EPO). You see in orange that we've put in there, which not have been opted out. We will have a short point on this opt out, because actually it is possible to register that a patent shall not fall that is existing shall not fall under this new system. It was kind of a reinsurance for stakeholders that they are not obliged to get into the new system from the very outset. But unless you don't do this, unless you do this, you will be in the system, and then the UPC has jurisdiction also for the unitary patents. A unitary patent is a kind of abbreviation for European patents with unitary effect. It means that this is only European patents that have been granted after June 1, 2023, and then within one month, you can apply for the so called unitary effect, which means that this European patent is automatically validated in the 17 or now 18 countries of the European Union in which the unified patent court is enforced. The system is now fully established, and we see case law emerging quickly. We've seen a lot of first instance decisions. We have not seen a full bunch of Court of Appeal decisions. They come up one after the other, with some questions being resolved, others are still not finally resolved.

Steven Carlson 08:04
Thank you. So here we've got a map of Europe. And what does this map represent? And we'll compare that to now, what's the jurisdiction of the UPC? So what's in red here?

Konstantin Schallmoser 08:19
Well, we will have several maps on the next slides. And it's it's really important to distinguish these countries, because we start with the the map with the most countries involved. We have like here, 39 countries, and they all cover the European patent convention. The European patent convention established the European Patent Office in the late 70s, 1970s and basically it's one organization that grants patents. And whenever you want to have a European patent, you have to do this by by asking for it at the European Patent Office. It covers the whole European Union, but it also covers very important countries that are not part or not part anymore of the European Union, such as Switzerland,

Transcribed by https://otter.ai

Turkey, Norway, and, of course, the United Kingdom. And as you can see, with 570 million habitants, it covers a huge market, and they are all covered by this organization, the European Patent Office. And what then happens when they grant, when the EPO grants a patent, they it falls to a bundle of national patents. So when, when patent is granted and you validate it in one of these countries, it will be treated like a national patent. And of course, in all these countries, we have still national patent offices. They continue to grant national patents. This is a layer which is separate and different from. The EPO and the national courts, they continue to have jurisdiction over all cases based on European patents or national patents, at least during a transitional period until 2030.

Konstantin Schallmoser 10:12
And I want to underscore, as a from a litigation standpoint, what this meant was that if you got a patent through the EPO, you could enforce across all these red countries, basically all of Europe, but you would have to do it on a country by country basis, and that was very costly and very slow, and you have a lot of inconsistent decisions. So that was a drawback of the old system. So now what we've got is the unified patent court, and the map looks quite different. It is, we got three different colors, or four different colors even. And it's, it's quite different. So you, Konstantin, what's going on here with the UPC?

Konstantin Schallmoser 10:49
Well, there was a lot of discussions and political discussions and also judgments and opinions going on between the end of the early-2000 years and and now and the it turned out that the Court of Justice of European Union said that it will not be possible for countries outside the European Union to take part of this adventure, what is called the Unified patent court agreement. So all all countries that are not members of the European Union were kicked out in 2011 from this project. So this removes Switzerland, and later removed the United Kingdom, but also Iceland, Norway, Turkey, to name some. And then there was some political objection in other European countries, especially in Poland and in Spain, they wanted to stick with their own national system, so they did not ratify this agreement. And then we have some other countries, like Greece or Hungary or the Czech Republic, which eventually will take part in the Unified Patent Court, but they don't do it for now, there has been some evolution in the last years, Romania joined and as 18th country, and we are still hoping that Ireland will join the system in 2027. So if you look at this map, the countries in dark blue, which represent 315 million people, they are in the system. So basically the whole central Europe, Germany, France, Italy, which is by far the most important European industries, besides the United Kingdom, they are the Nordic countries and Benelux countries, and some and yes, in the east and some of the West. So we have these 18 countries, and they take part of the Unified patent court, but it's without UK, Spain, Turkey, Poland, Switzerland, Norway and other countries. And in these countries, you can apply for the unitary patent. As a reminder, the unitary patent is only open for European patents that are granted since they have been granted since June 1, 2023, and in this like 28 months, we have seen 70,000 requests for unitary patents, I think they're like 10 have been denied, but the rest has been granted, and we see now 25% of all newly granted EPs are unitary patents, which the main benefit of the unitary patent that you have one single Office, which is the European Patent Office to do your renewals, and you have one single renewal fee, and we are renewal fee, which makes it a lot easier for you to have patents validated in Europe, and you get basically the most important countries in Europe.

Transcribed by https://otter.ai

Steven Carlson 13:56
Very good. Thank you, Konstantin. Want to tell me a little more about the deadline to request the unitary status. What do you need to do in order to get this?

Konstantin Schallmoser 14:04
Yeah, when we, when we're talking about the unitary patent, this is, I mean, you are in it is a very important crossroads in the faith of your European patent. And we have seen patent holders that have missed already this deadline, because it's only one month after the patent has been granted. In one month is really very short. But the reason for this is that people have to third parties involved, have to have legal certainty. Does this patent? Does this invention fall into the new system with being a unitary patent or not, so—

Steven Carlson 14:45
A grant of a patent, you got them one month to elect to have a unitary effect. Is that right?

Konstantin Schallmoser 14:51
Yeah, yeah. But you can do it, of course, before you get a notification that your patent will be granted, like three or four months before the patent is actually granted. So you have. Four to five months to discuss this with your client or the other stakeholders.

Steven Carlson 15:06
So let's talk about the jurisdiction of the court. So the UPC, the Unified Patent Court, what kind of IP rights have jurisdiction over?

Konstantin Schallmoser 15:16
Well, this is one of the most important slides we will have for you today, because we really have to know what is the jurisdiction about. As I told you, the UPC has jurisdiction for unitary patents and but it also has jurisdiction for European patents, and not only new ones, but also old ones. And this is something we have still. Last year, I talked with with patent attorneys and attorneys from from other countries, and they said, Yeah, we basically, we don't care about the UPC right now, because we didn't, we didn't file any unitary patents, so we are not concerned. This is the, one of the key mistakes you could do with this system, you should be reminded that all European patents after having an application date after June 1, 2023, 20 years ago, could fall under this system. So it's new unitary patterns, new European patents, but also old ones, of course, patent applications, but we have seen no case involving with respect to an application and all also the SPCs that can be litigated through the UPC. On the other hand, we don't have jurisdiction for EPC states which are not participating in the UPC agreement, which is, as I mentioned, already United Kingdom, Switzerland, Turkey, Norway, Iceland, but also the countries that could be at a later point in time, part of the UPC, but that aren't we have seen some cases where parties try to get an injunction for Ireland or for other countries, and the court said, No, as long as they are not contracting member states, you will not get this. So for these countries, it will, there will be no change with respect to the old situation.

Steven Carlson 17:12
Okay, now what kind of IP rates are not to be enforced in the UPC?

Transcribed by https://otter.ai

Konstantin Schallmoser 17:18
Well, it's, as always with Europe, you have always different layers. So the establishment of the Unified Patent Court does not mean that we don't have any national patents anymore. The National patent system remains unaffected. It rains unchanged, and you still can apply after you have your PCT application, you can still apply for French national patent, for a German national patent, and you can even do both now. You can have a European patent and you can have a national French patent and a national German patent. For these national patents, the UPC will never be, will never have jurisdiction. And in some countries, especially in Germany, we have utility models. They are a very cheap possibility to get a first protection because they cost like 300 400 euros, plus cost for translation, which usually is a machine translation. So this is a very cheap way of having protection from the very outset, and these are, of course, still litigated under the national systems.

Steven Carlson 18:30
Very good. All right, so that's a very important facet of the UPC is different divisions. You've got Local and Regional Divisions on one hand, and then you get a Central Division on the other hand. And it's important to know this kind of two division structure. So can you tell us about that?

Konstantin Schallmoser 18:50
Yeah, one sentence before this is that we have a two instance court system. We have what we see here is the different divisions in the first instance, and then we have one court of appeal. There's no third instance. So we have like two layer, two instance system, and then it's then, then it's final. The divisions in the first instance, they are spread all over Europe. And basically we have, on the one hand, local or regional divisions. A local and a regional division is basically the same. The only difference is that a regional division covers more than one country. We have one which is called the Nordic Baltic division, covering the Baltic states, Iceland, Lithuania, and Latvia, and Sweden. And then we have a lot of local divisions, especially the four local division Germany. They are based in Munich, Hamburg, Düsseldorf, and Mannheim. We have a local division, important one in Paris, and we have one in Milan. And they are they have jurisdiction for usual. Patent infringement action. So when you start your infringement action, you usually will go to a local division, same for a preliminary injunction. And when once there is a infringement and infringement case pending, the counter claim for revocation must be brought or should be brought to this very local division. They have also competence. They have all this also jurisdiction for the evidence preservation, what is what we call in France, the city contre Faison. That is, that falls in that jurisdiction to the Central Division that its its main competence is actions for revocation, standalone revocation actions, they have to be brought to the Central Division in Paris, or they have some subsections also in Munich and in Milan. But basically it's in Paris. But there could be patent infringement cases where the Central Division also but this is something we have not seen so far in the last two years, and

Steven Carlson 21:04
it's if we go to enforce a patent, like in the US, you go to a district court to enforce your patent. That's analogous to the local divisions, the regional divisions, yeah, all throughout Europe. Whereas here in the US, we got the PTAB, where you go to challenge the validity of patent, and that's analogous to the Central Division in some respects, is that right tosti,

Transcribed by https://otter.ai

Konstantin Schallmoser 21:24
that is right. But what we have seen the last two years is that the very essence of this court, it plays within the local divisions. So big emphasis on what's going on at the local divisions, and the Central Division does play a minor role so far.

Steven Carlson 21:48
So now let's talk about the case calendar, and this is a big distinction with with the US. So US case, you can you file a complaint, maybe court for number of months before a PTAB, file challenges filed, and then you may be on hold for 18 months while the PTAB plays out, and then you, if you win the PTAB, the court may resume, and you may have a year and a half or two years more of litigation, so maybe a really four year timeline in the US before you get to a trial. By contrast, how is that working in the in the UPC?

Konstantin Schallmoser 22:25
Well, this is a major difference to what you just described for the US system, but it is also, in the same way, a major difference to what we have seen previously, to before the UPC came into force. We have a system which is based on the idea that you have more or less than one year per instance, which gives us two and a half years until a final and binding decision. And they stick to it? It was one of the most important questions and uncertainties. Will they really stick to the calendar? Because the calendar as as foreseen, the cause of the proceedings as foreseen, and the rules of procedure once the Statement of Claim is served, then you have one month for a preliminary objection with basically all the concerns jurisdiction. And then you have three months for the defense of counter claim there you have to bring for the defense of the statement of defense against the infringement action. And you have to include, if you want to bring attacks against ability validity. At this time, the counter claim for revocation. Then it goes on with a reply. And then basically everybody, after five writs, has said everything. And then we enter into the interim procedure phase, and with a first oral hearing, which is basically organized by video conference, and then we will have the oral hearing, which is after 12 months. And they doing it. They are constantly and repeatedly refusing our request for extension of time period, because we have holidays. We are ill, we are sick, we have children. Everything is we have other hearings. Everything is rejected. Basically, they say, whenever you are in a case for the UPC, you have to stick to this calendar. So we have decisions after 15 months, 12 to 15 months.

Steven Carlson 24:15
Well, it's a major distinction between the US and Europe, and also from the strategy standpoint in the US as many off ramps for defendants, you may have a motion to dismiss, you may have a Markman hearing that gives you an out, may have summary judgment that may give a defendant an out. But is there anything like that in Europe?

Konstantin Schallmoser 24:34
No, basically, the idea was and I followed the discussions like 15 years ago, and the main concern of industry and people stakeholders in the patent system is always it takes so long until we have a decision, or until we have our damages. We have spent a lot of money, and we have had years where we are in uncertainty. We didn't know, could we launch this product? Could we get another product of a

Transcribed by https://otter.ai

competitor out of the market? And so the basic idea is, really, we want to have this being a fast system, the fastest system worldwide, if I can, if I can see that.

Steven Carlson 25:16
And in the US, often our Discord, proceed to be put on hold, padding a separate challenge in the PTAB, whereas here the common claim is being adjudicated in the same proceeding, and so it's all happening at once.

Konstantin Schallmoser 25:33
I mean that that we have seen some situations where there were European Patent Office opposition proceeding still pending and the opposition proceeding, there was an oral hearing scheduled, like four months later, and the defendant in the UPC case asked for a stay of the proceedings pending the outcome of the opposition pending with the EPO and the court, the unified Ted court, said, No four months. We will not take so much time to wait for the outcome of the opposition procedure, but clearly shows their attitude towards this calendar. They want to have it decided within one year.

Steven Carlson 26:13
In terms of the advantages of UPC, this is what I'm seeing as a US litigator, is that it provides pretty much one-stop-shop. Now, not every country in Europe, you can't get enforcement. Spain and, you know, Poland, but, but, but, and not the UK was quite important in Switzerland too, but for the core countries in Europe, so the Germany, France, Van Deluxe, Italy, you get all that enforced in one spot, and it's faster. It's a lot faster. So really talking about a year, maybe 15 months to a trial resolution and about a year for an appeal, as opposed to the US, maybe four years for trial plus another year for appeal. It's very, quite predictable, is what I'm hearing. And so, and discovery doesn't bug there's really quite limited discovery, and so you need for a plaintiff side, you need to have your case together. And if you can't prove your case, you really don't have a lot of business being in the UPC. But if you can prove your case in the outset, it provides a lot of certainty and a very streamlined procedure. Is that, what you're seeing there, Konstantin?

Konstantin Schallmoser 27:20
Yeah, basically you said everything I wanted to say on this slide, it is really the key advantages that you have, basically the possibility to have an injunction or whatever outcome you seek, seeking for, for the most important countries of Europe, you need only one court case, there are some first decisions from the Court of Appeal saying also that we will apply the law of the Unified patent court agreement uniformly, also with for cases that have started already before 2023 they say that if you have an infringement and proof of infringement in one of the UPC countries, this is sufficient to get an injunction for all the UPC countries where the patent is enforced, which is a major difference, because you don't have to collect your infringing products in 10 different countries, you just buy it, or get your proofs done in one country, and then you you go through it. There's one huge important point that we have to add, is that all these advantages, they are subject to a very sincere preparation of your case, you need to have basically everything in the Statement of Claim, because they the court and the judges, they are very reluctant to allow new evidence once this first step has been done.

Steven Carlson 28:58

Transcribed by https://otter.ai

And to add one more very key advantage to the UPC is a willingness to grant injunctive relief, which, in the United States, it's hard to win an injunction.

Konstantin Schallmoser 29:07
Well, there's no discussion. We just had one, or have one case where we were the defendant, wanted to discuss this, and the court said, no, no, our basic rule is you get an injunction. If we think that patent is valid and that it is infringed, you get the injunction. And there might be, theoretically, cases where injunction would not be the best outcome because they are third parties interest or whatever, but they always denied it. They always denied it. And also, which is important is that when the defendant brings it up, it's up to him to bring all these arguments and to convince the court. And as until now, the courts have not been convinced that there's no need for an injunction.

Steven Carlson 29:55
And so from my perspective, in the US, what companies are saying, especially when they want to enforce. Of patents is Europe is the place you want to go. It's faster, the expense are way lower, and you can get injunctive relief. And so what I'm very much seeing a shift in where companies want to enforce their IP and it's going to Europe.

Konstantin Schallmoser 30:16
That is true. And we have one indication that clearly shows that this is true, and we have seen a huge number of cases that have been settled after first instance decision. And the reason for this is that once you have a court saying the patent is infringed and it is valid, and you may enforce it with maybe a bond to be paid or not, because a lot of decisions were did not require the plaintiff to make a bond, and then basically, within some weeks, you have a settlement, because the market is down, and that makes parties move.

Steven Carlson 30:58
So some of the from a prosecution standpoint, trying to get patents, you've now got layers of different kinds of IP rights, and I want to, I want to make sure that's clear to the audience that there's different kinds of patents you can get, and there was strategies for assembling that portfolio. So what are the different layers costing of patent rights you can get?

Konstantin Schallmoser 31:17
Yeah, we touched on this at the beginning. Already we have the unitary patent, which is the the newest, latest on what you can do, which is the European patent granted after first of June, July, 2023 and then you have, you request the unitary effect. And you have protection in 18 countries. You have only one annual renewal fee, you have only one office to deal with, so it reduces significantly administration work and costs, and you can litigate this in all of the 18 countries. Then we have the traditional, traditional, I'm sorry, European patents that can be opted out, which means that, for the time being, they are not in the system. The opt out could be withdrawn once you see that you have now an interest of going to the UPC. And as I mentioned it, we have national patents still, the National patent system has not been affected, and we have even the possibility to have identical patents for Germany and France in parallel to the European patent, or in parallel to the unitary patent, so you can mix and match. And it depends

Transcribed by https://otter.ai

on where are your market. It depends on how much budget do you have for protecting your inventions, but you should consider carefully all of these possibilities.

Konstantin Schallmoser 32:47
There's been a lot of talk, especially when the UPC came online in 2023 about whether to opt out, meaning whether to file a form that says, This patent shall not be subject to the UPC. And there was a lot of interest in whether to opt out. So let's, can you explain kind of the pros and cons here of opting in—or opting out, pardon me.

Konstantin Schallmoser 33:08
Yeah, my personal view has has not changed over the last years. It is a for me, it is a no discussion because it does not make sense to opt out. But this is only my personal view as a introductory remark on this slide, the opt out is brings you to a situation that the UPC has no jurisdiction for actions relating to the European patent, and it can be withdrawn later on if no action was pending in relation to that EP on a national level. So the main advantage, or the what people thought, thought would be the main advantage, of opting out was to avoid a standalone revocation at the UPC that in would invalidate rights across all participating countries. And of course, we have seen some important opt outs for pharma patents that are litigated all all over Europe and that are where the patentee was really looking for the that to avoid a situation where the patent is revoked within one one shot. But on the other hand, we have seen only like 70 standalone revocation actions out of 600,000 opt outs that have been declared. So it was a massive administrative task for not a real for not a real issue, and the disadvantage of the opt outs that you have then to enforce country by country, with risk of divergent rulings, of course, if you have a very poor, weak patent, you might think about getting at least one one egg in the basket. But basically, this is the main disadvantage of the opt out.

Steven Carlson 34:55
From my perspective, we had a lot of us clients who were very concerned that their IP could be with one well thrown challenge at the Central Division, given the PTAB of the UPC, that they would lose all the rights with one single challenge. Whereas if you have national rights, it's a lot harder to knock those rights out. And so there was a general inclination when this came online to opt out, to avoid that that vulnerability of a single challenge at the Central Division, wiping out the entire portfolio.

Konstantin Schallmoser 35:29
Definitely, I this reason was a good reasoning for patents that are already litigated or that are about to being litigated. For patents where no litigation is inside, where no competitor is really making use of your invention. It was not necessary, because you don't just initiate revocation actions, which triggers a lot of costs, and you need the people, and you need their state of the art research. And so basically, for patents that are already litigated. It made sense for patents that are just there and you don't know what will happen. It was not a good idea.

Steven Carlson 36:11
So let's talk about money, in terms of cost of going through the UPC. So we got three slides here, kind of first, about court fees. So can you talk about the court fees? How does it compare to the the old, old school German litigations?

Transcribed by https://otter.ai

Konstantin Schallmoser 36:25
Yeah, we have a system of court fees, where we have a fixed fee, which is for infringement actions, 11,000 euros, and then you have a value based fee, and they are counted together. And then you see the value and dispute and in every line. And then you can compare it with the German system we used to have. We have seen just one remark on this, values and dispute. They are usually in the range between €500,000 and €10 million. Most cases are between €1 and €5 million. We have some big pharma cases where one case where the wedding dispute is more than €100 million. But basically we are, in most cases, we are in between €1 million - €5 million, and the court fee is then between €15,000 and €40,000. If you compare this to the German system, not only once, one instance is cheaper with the UPC, but you have the same cost in appeal. So if you double this second column, you have your maximum cost risk with respect to the court fees, whereas in German, you would like to have to multiply by four because you have three instances, and every instance it's getting more expensive. So it is a lot cheaper with the UPC. This is really in contrast to what people think about the system. They said, I it will be very expensive, at least for the court fees. We don't see this.

Steven Carlson 38:06
And comparing the revocation actions. So how does it compare, you know, the UPC versus Germany?

Konstantin Schallmoser 38:13
Yeah, this, I to start with the second tech take away the court fees for revocation accident, that UPC, they are aggressively lower than in Germany, we have seen in Germany that patents also weak patents with a huge economical impact. They are not challenged by the defendant, simply because the court fees they are too expensive in German under the German system. So in order to not make the same mistake, the founders of the UPC, they said everybody should have the possibility to attack a patent and to argue invalidity of that patent. So they made a cap at €20,000 for the for the court fees for the revocation action, so it's aggressively lower than the court fees that have to be paid in Germany.

Steven Carlson 39:08
Okay. And briefly this a concern is the loser pay scenario. So in America, it's basically the American system, which is each side based on fees, whereas in Europe, it's a loser pays. And so what's the risk here on the plaintiff side, if you lose? How does that happen? And then how does it compare to the old, old, old German system?

Konstantin Schallmoser 39:32
Yeah, maybe we start with the with the traditional German system. In the German system, we have statutory fees, and the cost reimbursement is foreseeable. To that end, that if you start with the right value and dispute, and usually you do, then you you know in case you lose, this is the amount you have to pay to the patent attorney and the attorney at law that has been representing your opponent in this case, whereas in the UPC. And there's no such statutory fee, but you have maximum a list of a maximum amount that can be reimbursed. And it's getting, it's getting up to several €100,000. We have not so much case law, so that I can give you a good overview on this, what we have seen is that in almost all cases that are not clear, where the outcome is not clear, from the outset, parties agree on a maximum cost reimbursement that is lower than what is in this list, simply to minimize the risk, and

Transcribed by https://otter.ai

that's what's playing out now? So for the timing, we don't see very big numbers with respect to cost reimbursement, but there's a small caveat. We don't have jurisprudence on this on in all questions.

Steven Carlson 40:55
Very good. So we're going to pivot now see how it's been kind of playing out in practice. So we got the basic structure here, and I want to see what's happened over the last two years. So first opt outs. I did teach costing the word stampede and stampede to the exits when people were being confronted with the launched UPC, a lot of people opted out. And so how has this played out, Konstantin?

Konstantin Schallmoser 41:20
Well, this is one of the of the lines that did not change in the in the different presentations we made the last two years. It was 34% of European patents that have been opted out of the Unified patent court system. This numbers was true in 2023 and it is still true end of 2025, we have around about a third of European patents that have been opted out. We had some clarifications of the Court of Appeals saying that if you have opted out, and there was already national litigation going on, you could still opt back in, withdraw your opt outs. This happened in some major cases. So we have seen this stampede, as you teach me the word, but this, the number remains rather constant. And as I told you, the once opted out, it can be opted back in. And this what happens when you have litigation side.

Steven Carlson 42:20
Also evidence procedures. This, for me, is a fascinating aspect of European litigation, and it is not available in the US. And in us, we've got very broad discovery once you have a case going, once you get in the case, you have very broad discovery for you know your the emails and the lab notebooks and the procedures, all that is fair game, whereas in Europe, we really don't have that. But in Europe, what you do have is this front end procedure, this evidentiary seizure. And it is, it was part of French law and some other countries around France, yes, but now it's being part of the UPC and so these evidence procedures are a very interesting procedural aspect of UPC litigation. Can you tell us about how it's playing out in practice?

Konstantin Schallmoser 43:11
Yeah, this is something stakeholders make use of. We have seen something like 100 cases for preserving of evidence. I was involved in one. This is the Primetals v. Danieli case. And maybe I could best explain, in this case, it's a, it's a pending case, but the, but the saisie contrefaçon part is, is finalized. So we had, we had the the infringer, we are the alleged infringer. We knew that there was that they have sold a machine to a US customer, client to a US client, but we didn't know if there was a European entity involved in this project. So we went to the court and we said, "Look, we have seen, we have some pictures of of the machine. We think that it is an infringement." We explained them why we think that it's an infringement. And we said, "But we don't know if there was any European entity involved, because we can see it from the pictures that were taken somewhere out in Kentucky," I think. And then the court said, "Okay, so let's go there, go to their place, north of Italy, and find out if they, in fact, were part of this project or not." And that's what we did. We got the information. It was bound to confidentiality for some time, then we have found an agreement with the representatives of the defendant, and the case is now pending on the merits, but this was the starting point to get into it. And

Transcribed by https://otter.ai

we could not have started these proceedings without this saisie proceedings, because we had no clue about who was actually involved in that.

Steven Carlson 44:59
Project, so it gives you a very early attempt to get some key evidence. But then once this is done, there's no discovery during the course of the litigation, right, Konstantin?

Konstantin Schallmoser 45:12
There's no discovery. You have some other means, like you can ask for the production of other evidence, but usually you start with this, and then you're gone and talking about this case where we were involved. We actually went to see to start preserving of evidence presented to two entities. And we quickly found out the second one was not into the project. So we find out, found an agreement with the council of opponent, and put this second entity out of the litigation, which was, in fact good for everybody, because costs remained low and no one was involved, where there was no question anymore that they have infringed the patent.

Steven Carlson 45:58
In distinction to us, litigation, this really keeps costs down. You get a very quick seizure action to grab some key documents. It's going to be focused, but you can do it, and then you're off and running with the litigation. And it really cuts down on Discovery costs. So let's move on. So a preliminary junctions another big distinction with between Europe and the US. In the US, it's rare, very rare, to be able to get a preliminary injunction. How's it playing out in Europe?

Konstantin Schallmoser 46:29
Well, we have, we have a certain willingness of granting a preliminary injunction, maybe just to give you the contrast to what happened or what used to happen in Germany. In Germany, we have a split system, so the court that is hearing the validity of the patent is not the same that is hearing the infringement case. So whenever you start a preliminary injunction proceedings before a German civil court, the German civil court said, "Okay, if we, if we are not really convinced that the patent is valid, we will not grant this injunction." By contrast, this change with the UPC system, where we have panels of judges, where always a technical judge is involved in most cases, this is someone who still is, or you used to be, a patent attorney, so he is part of the panel of judges, and they have this technical knowledge within the panel, and then they have a look on both infringement and validity, and if they are convinced that it is more likely that the patent is infringed and valid, then it is not. Then they grant the preliminary injunction in this case, 10x Genomic v. Nanostring. There wasn't even a necessity for a bond to be paid. No security was paid. Had to be paid by the plaintiff, because it was the Harvard University also, and they said they have enough funds to in case that they that the preliminary injunction is revoked at a later time to reimburse the damage that has been caused. This PI, however, has been lifted. It was rather quick case. So the case started, really on June 1, 2023, it started the very first day, and we had the injunction being granted end of September, so roughly four months later, and then the case went up to the Court of Appeal. The Court of Appeal had the hearing at end of December 2023 and they rendered their decision in February 2024 and they did not say anything about infringement, because they from their preliminary assessment. They've they said that most probably the

Transcribed by https://otter.ai

patent will be revoked, and therefore they lifted the preliminary intention that had been granted. In general it is, we see it all the time, and they grant it.

Steven Carlson 48:59
So here's the flip side of that, where we this burringer case from Lisbon, Portugal, where at the local division level, there was no pi granted, no preliminary injunction grant, but then at the court of appeals, they set it aside and actually granted the PI. Is that what happened? To give us a little context.

Konstantin Schallmoser 49:18
Yeah, actually, I put those two slides in there to also emphasize that we have a lot of first instance decisions, but we have not so far, real certainty as to how the court of appeal will develop its own case law. And of course, then the Court of Appeal case law has to be applied also by the first instance. So the local division Lisbon, it was actually their own only case. Until now, they did not grant the preliminary injunction because they said there's no risk of imminent infringement, whereas the generic company already had fulfilled all administrative tasks that are necessary to. Bring the product on the market. And the Court of Appeal did not accept this. They said, once you have done all the administrative proceedings that need to be done to bring medic a drug on the on the on the market, which in this case required a prior evaluation procedure with setting prices, if it's only a matter of starting the action, of putting the button, then, then there is a risk of imminent infringement. But what is the interesting point is that they in a second step, then said, Okay, we have this risk of imminent infringement in Portugal, because in Portugal, you have done all this, and if you have this in one country, we will grant the PI for all the UPC countries where this patent is enforced, because that is the basic rule of Article 34 you just don't do it by country as on a country by country basis, but you give grant the injunction for all the countries.

Steven Carlson 51:03
So briefly, before the UPC, Germany was the dominant form for patent litigation in Europe, and now we got the UPC with all these different countries. Is it still the case that Germany is dominating?

Konstantin Schallmoser 51:19
Yes, it is still the case. We will have the figures on the next slide and from from now on, which is, from my point of view, not a good thing. But it is as it is, the unified patent court is mainly a German unified patent court because we have, of course, some trust of the stakeholders in the patent system. They have seen so many cases in the last decades that have been dealt with in the German cases, they have seen good judges. They know the names of the judges. And all these judges they have been they moved to the unified patent court, so we have the same names and we know them, and it was, in a way, a natural move to choose the same judges that already were known in this field. So they are still choosing Germany. But by way of the UPC.

Steven Carlson 52:17
let's look at this real quick. You know, to cut the chase 80, about 80% of the the infringing cases being filed in Germany is that, is that right?

Konstantin Schallmoser 52:26

Transcribed by https://otter.ai

Yes, if you have the text you see over there on the top of the slide you, you will remark that the for local division Germany, each of them has more cases than the next one. So even Hamburg has more cases than we have in in The Hague and that we have in in Paris. 80% of all infringement cases are filed in Germany. And the in order to cope with the case law, new judges had to be appointed. And there's a rule that in the German divisions, they have to be two German judges. In the French division, they have to be two French judges. So because there was so much of a case load in the German local divisions, and they essentially had to appoint more German educated judges and part time judges have been raised to full time judges. So there is no end of German predominance inside despite and I can only mention that I have two cases going on with local division Paris, and they have a good quality. So might be also worth it to bring cases to this to this division here, but for the time being, we see a predominance of the German local divisions.

Steven Carlson 53:42
Let's move on from here. Let's talk about the German national patents. What it you've got these different layers where you can bring case in the UPC, where you can also bring case in the National Court, even with national patents. And so how is this layering playing out?

Konstantin Schallmoser 53:59
Well, the German system did not did not change. It did not alter. What changed is that the judges that we have seen before, they are now UPC judges, but there are still a lot of cases going on, if you just take the last bullet point here, we have more than 200 new cases in 2025 only for the National District Court in Munich, which is a high number. So it is still possible to bring cases to the German system. Personally, I would not recommend it, because we have talked about the downsides, and we see a kind of a brain drain, if you could say it like this, that we have a lot of unexperienced judges, judges that have experience of less than two or three years in patent litigation. And therefore I think that on the long run, the case number in Germany will will go down and the UPC will take over.

Steven Carlson 54:59
As for NPEs, so non-practicing entities and sometimes called patent trolls as a derogatory term. Are these patent dollars really taking advantage of the UPC? Is that taking off? Or how is it playing out? And what are the restraints on that kind of activity?

Konstantin Schallmoser 55:18
It is. It isn't, from my point of view, too early to have a real tendency, because we have seen some big friend cases, some big SAP cases, and they have been decided and but it's not, as you mentioned, the word, it's not a stampede of the of the MPs towards the unified patent goal. But let me just remind you that why it might turn out to be a good idea to come to the UPC, because you have, in Germany, the problem that when you have a first instance decision that is good for you and you want to enforce it, you have to, you have to pay a bond if you win in first instance, in order to cover the risk of the defendant that the patent later on will be revoked, and this bond that could be could go up to several. We have seen one case where where the bond was €3.4 billion, because it basically was an injunction that would have stopped the production of automotive industry as a whole in Germany. So they say, "Okay, the patents infringe, but if you really want to enforce it, you have to pay this bond." And we don't have this requirement anymore, at least not in this way. And of course, if you have a decision which

Transcribed by https://otter.ai

covers infringement and validity, and this after one year, then it makes a lot of pressure, especially to the defendant, to settle this case. So this is one of the reasons why I think that we will see more and more cases, especially from NPEs, before the UPC.

Steven Carlson 56:59
To wrap it up. The UPC is, despite the name of the Unified patent court is not really unified. It's a Swiss cheese but without the Swiss. There's many countries that are not in the UPC. And from a perspective of trying to get European enforcement with a Pan-European enforcement, how, how does this limitation of the structure play out, and then, what are the recent developments in the case law?

Konstantin Schallmoser 57:25
Well, we, we have seen that the UK will still play an important role in when it comes to the importance of their judgements. They give they have a very high educative way of drafting judgements. They go really deep down. We have just to give you a comparison. We had one case going on that has been litigated on one single day before the District Court. Munich and the London colleagues from the High Court, they have been litigating this for 16 whole days. So the UK, by by its intellectual power, will still play an important role. Other countries will have it more difficult, because the big part of the European market plays, of course, in in in the UPC now, but of course, there are industries where you have products that are sold on a country by country basis. And of course, then you have to go to the other countries, like Spain or Switzerland or Eastern Europe to get your injunction, wherever you need it.

Steven Carlson 58:40
Now, lastly, we'll talk about this much more at the conference on November 20. We'll have a deep dive there, but, but this is a very important development in the case law. What can you tell us about this BSH Hausageräte case?

Konstantin Schallmoser 58:54
Yeah, it is a very important decision from the court of justice of European Union. And basically it says that if you have a defendant that is domiciled in one of the EU countries, then you can sue this defendant for infringement of for patent infringement, with respect to all territories of this European patent. So you have a German based defendant. You sue him for the infringement of the French part of European patent, for the Italian part, for the German part, for all these countries. This was not possible until beginning of 2025 and it applies also to the UK, to Spain and to Switzerland. And this is very new. We've seen a lot of cases, both before national courts and also before the UPC, because it turns out to be applicable also to the UPC. We will see a lot of discussion, especially on November 20, on this very important judgment.

Steven Carlson 59:55
So even though the jurisdiction of the UPC is somewhat limited, we have now this case law that gives more of a long arm jurisdiction to offer more Pan-European enforcement. So I think with that, let's save more comments for the panel on the conference on November 20. And thank you very much for listening.

Konstantin Schallmoser 1:00:19

Transcribed by https://otter.ai

Thank you very much for having me.

Wayne Stacy 1:00:21
And thank you both, and I look forward to seeing you shortly in DC. It'd be great to go into this in more depth.

Transcribed by https://otter.ai