

THE PATENT
LITIGATION
LAW REVIEW

THIRD EDITION

Editor
Trevor Cook

THE LAWREVIEWS

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PREFACE

Although patent litigators should always be mindful that patent litigation has, with some justification, been called the ‘pathology of the patent system’, not so much as a criticism, but more in recognition of how remarkably little patent litigation there is, in fact, when seen in relation to the ever increasing number of patents in force at any one time, patent litigation is also the anvil on which patent law is forged. This is because the ‘black letter’ law of patents tends to be terse by comparison to most other areas of law, and it is only with experience of how courts and tribunals interpret such law and apply it that one can start to appreciate its true scope and effect. This, in part, explains how such similarly expressed statutory provisions as one finds in different patent laws can sometimes result in such different outcomes in different jurisdictions – disparities that are all the more evident when they concern the same product or process, and patents that, though in different jurisdictions, are all members of the same family, and are all intended to protect the same invention. As it becomes increasingly common for patent disputes to proceed in multiple jurisdictions these differences in outcome become ever more apparent.

Such disparities are not only a consequence of differing substantive laws, or differences in interpretation of similarly expressed laws. They can also be a consequence of the considerable procedural differences between jurisdictions, the nature of which is outlined in this Review. However, the Review does not only summarise patent litigation procedures. The respective contributors to it, as leading practitioners in each of their jurisdictions, also focus on recent developments in substantive patent law as demonstrated by the most important recent court decisions in their respective jurisdictions, meaning that this Review also provides insight into the current controversies that affect patent law generally.

On a global basis courts in multiple jurisdictions continue to be involved in controversies over standard-essential patents, one emerging aspect of which is the potential challenge that these present to the territorial nature of patents, as exemplified by the appeal, to be heard by the UK Supreme Court this autumn, against the imposition by the English courts of a global licence, on terms that they assess, as the price for exploiting standard-essential patents in the UK. Meanwhile, three appeals concerning standard-essential patents are pending before the German Federal Supreme Court, providing it with its first opportunity for a decade (since its *Orange Book Standard* decision) to revisit this area of the law. In the United States the most prominent controversy remains the question of excluded subject matter, which for want of clear judicial guidance has now attracted the interest of the legislature. In Europe, one apparent trend is towards greater flexibility as to injunctive relief, particularly in medicine – by for example, in the UK, tailored injunctions, or, in Germany, expedients such as compulsory licences, although in Germany there is also talk of legislation to address the issue. Again in Europe, the past year has seen no progress towards the entry into force of the

long-heralded Unified Patent Court Agreement. Although the pending challenge before the Federal German Constitutional Court to the consistency of the Agreement with the German Constitution is the only formal impediment to its entry into force, the imminent withdrawal of the UK from the EU as from 31 October 2019 presents a further problem, because the Agreement as drafted does not envisage participation by non-EU Member States. This raises the prospect, even if the German challenge is rejected, of having to amend the Agreement before it can enter into force to take account of such withdrawal; either to exclude the UK from its scope or, as the UK government has urged, expressly to provide for its inclusion, a course that, however, it is not at all clear would be compatible with the case law of the European Court of Justice, irrespective of any treaty language.

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New York

October 2019

UNIFIED PATENT COURT

*Alan Johnson*¹

I HISTORICAL BACKGROUND

The Unified Patent Court (UPC) is the result of an extremely lengthy effort to streamline the patent system in Europe, a continent comprising four of the top 10 global economies by GDP, but also around 50 separate countries. These efforts date back to the 1950s and the first tangible result was the European Patent Convention 1973 (EPC). The EPC created the European Patent Organisation, with the function, exercised through the European Patent Office (EPO), of examining and issuing patents on a multinational basis. Seven countries acceded to the EPC in 1977, and there are presently 38 member countries. Hence, the EPC provides a very efficient route towards true pan-European patent protection. However, upon grant, its patents are akin to national patents in as far as they are enforced on a national basis. The EPC may, therefore, be seen as having taken one major step toward the objective of a harmonised European patent system, but as lacking the second element of a harmonised enforcement system.

A major initiative started in 1999, with a proposal to create an optional protocol to the EPC. Under this proposal, individual EPC members could (optionally) cede their patent jurisdictions to a common court. Although this concept was abandoned a few years later, it was a catalyst towards the creation of what we now know as the UPC because it spurred the European Community (as it then was) to propose a Community patent and a court in which the patent would be litigated. Naturally, since the EPC proposal was unconnected with the European Community, it did not exclude non-Community states, nor did it propose a common patent. The Community proposal was a little more complicated. It proposed a new international agreement (i.e., a treaty) to create the court, which was envisaged to be signed by the Community (latterly the EU) such that all Member States would participate, but it would also be open to all EPC states. The Community (latterly EU) patent, on the other hand, would be created by a Community (latterly EU) instrument – a regulation – in the same way as the Community trademarks (now known as European Union trademarks).

In 2009, a draft of the court agreement was submitted to the Court of Justice of the European Union (CJEU) for an opinion on its compatibility with EU law. The resulting opinion, rendered in 2011, was widely interpreted as holding that only an agreement among European Union states (as by that time they were known) would be lawful. As a result, non-EU states were excluded from further participation, and a new agreement – a treaty known as the UPC agreement (UPCA) – was prepared, creating a unified patent court

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that would come into existence when 13 countries had ratified the agreement, mandatorily including Germany, France and the United Kingdom. The UPCA was signed in February 2013 by all EU countries except for Spain and Poland. The EU itself was not a signatory.

In parallel, there was a deadlock among EU states on the issue of the language regime for the EU patent to be created by the Regulation. This was resolved by the use of the EU's 'enhanced cooperation' procedure, supported by all EU states except for Spain and Italy. As this patent would not cover the entirety of the EU, it was dubbed a 'unitary patent' rather than an EU patent. Moreover, because it would be litigated in the new unified court, its territorial extent was to depend on the extent to which participating states had ratified the treaty creating the UPC.

In consequence, the regime in place is in many ways a curious beast. It comprises:

- a* the UPC, which is open to all EU countries, but participation in which:
 - cannot currently extend to Spain or Poland (by virtue of their refusing to sign the UPCA) nor to Croatia (which was outside the EU when the UPCA was signed, and which has failed to sign since its accession to the EU in July 2013); and
 - depends on ratification of the UPCA by individual countries pursuant to their individual national constitutions; and
- b* a unitary patent covering those EU countries that have joined in the enhanced cooperation process and also ratified the UPCA.

II PATENTS WITHIN THE JURISDICTION OF THE UPC

As explained above, the UPC brings together two separate functions. The first is a jurisdiction to litigate new unitary patents. The second is a jurisdiction to litigate existing and future European patents. These latter patents have been termed 'classical' European patents to distinguish them from unitary patents. Both of these types of patent are granted by the EPO by a process that is almost entirely unchanged. All pre-grant and most post-grant EPO processes remain as before. The unchanged post-grant processes include the centralised opposition function, and the centralised limitation (amendment) function. The new element in the post-grant process is the possibility within one month of the grant to elect for unitary protection in respect of those states then in the system by the use of new online procedures and forms. This has the following consequences:

- a* applicants can elect for unitary protection in respect of any patent applications granted after commencement of the new system, irrespective of when the application was made, provided that all states participating in the system were members of the EPC at the date of application. In practice, this means that all applications made after the date Malta joined the EPC (1 March 2007) may benefit from unitary protection;
- b* the geographic scope of protection is inflexible (as are the renewal fees payable), with no element of choice by the patentee;
- c* in addition to unitary protection, applicants may choose to validate their newly granted patents in all other EPC Member States in the conventional way, but may not validate in any state for which unitary effect is claimed; and
- d* alternatively to unitary protection (with or without additional validations), applicants may validate their newly granted European patent in any one or more EPC states (as at present).

III UPC TRANSITIONAL ARRANGEMENTS

One of the UK's conditions for agreement to the new regime was that there should be transitional arrangements so that patentees could opt their patents out of the UPC system for a period. These arrangements are to be found in Article 83 of the UPCA. The transitional period is seven years, extensible to up to 14 years. The arrangements have the following key features:

- a* all existing patents and applications (and their supplementary protection certificates (SPCs)) may be opted out of the UPC for the life span of those rights;
- b* all 'classical' European patents that are granted during a transitional period, and all applications published during this transitional period (in both cases together with their SPCs, existing or future) may also be opted out of the UPC for the life span of those rights;
- c* any opt out may be withdrawn at any time, provided that no national litigation has been conducted under the patent; and
- d* during the transitional period, in addition to the above arrangements, national litigation is also possible even if the patent (or SPC) has not been opted out.

As will immediately be appreciated, due to the longevity of patent rights, with additional periods of SPC and paediatric extension protection, the transitional arrangements have the potential to be relevant until at least around 2050; and if the transitional period is extended, until the late 2050s.

IV FORUM SHOPPING BETWEEN NATIONAL COURTS AND THE UPC

The legal basis for the conclusion that during the transitional period, even patents that are not opted out may still be litigated in national courts, is Article 83(1) UPCA. It reads:

During a transitional period of seven years after the date of entry into force of this Agreement, an action for infringement or for revocation of a European patent or an action for infringement or for declaration of invalidity of a supplementary protection certificate issued for a product protected by a European patent may still be brought before national courts or other competent national authorities.

Although reference is made only to actions for infringement or revocation, it is widely understood that this is shorthand for any action that comes under the UPC jurisdiction. That this provision is a particular source of potential problems is most conveniently illustrated by this example.

Suppose a patentee wishing to take the benefit of the UPC's broad geographic jurisdiction decides not to opt its patent out of the system. It finds an infringer and writes a warning letter threatening UPC litigation. The alleged infringer responds by seeking a declaration of non-infringement in one participating state (e.g., in respect of the EP(UK) in the United Kingdom). Where does this leave the patentee? Can it nonetheless bring its intended UPC action in respect of the alleged infringing activities? And if not, what can it do?

To answer these questions, one must consider Articles 34 and 76(1) of the UPCA and various provisions of the updated recast Brussels Regulation (1215/2012). Article 34 UPCA reads as follows:

Decisions of the Court shall cover, in the case of a European patent, the territory of those Contracting Member States for which the European patent has effect.

This suggests that UPC decisions must apply to all parts of European patents then in force in countries participating in the UPCA.

Next one must consider Article 71c(2) of the Brussels Regulation. This requires that the rules on *lis pendens* and related actions in Brussels Regulation should be applied during the UPC transitional period to cases involving UPC actions and national actions. Those rules are in Articles 29 and 30, which provide that the court first seised of an action shall have priority to deal with it over a second seised court. Article 29 applies in cases of the same cause of action between the same parties, and requires a mandatory stay of the second case, while Article 30 applies in cases of related actions and a stay is discretionary.

Putting together these various provisions, and bearing in mind that under CJEU case law a declaration of non-infringement action is regarded as being equivalent to an infringement action, one can see that there is a strong argument that if a party that is threatened by UPC proceedings launches a national declaratory action, the patentee cannot then pursue its threatened UPC infringement action, because in part the subject matter is the same. If so, this amounts to what has been termed a ‘UPC torpedo’.

However, can the patentee dodge the torpedo by limiting the relief it requests from the UPC so as to exclude the jurisdiction (in this example the UK) where the national action has been commenced? Arguably, support for this comes from Article 76(1) UPCA, which reads:

The Court shall decide in accordance with the requests submitted by the parties and shall not award more than is requested.

However, can a patentee really avoid the torpedo in this way? Is the concept of limiting relief by territory in a unified patent court compatible with the aims of the system? Again, it is necessary to consider the meaning of Article 34 UPCA. Does it mean that UPC decisions must cover all parts of the European patents in force, or does it merely mean that ordinarily UPC decisions will cover all European Patents (EPs), but this does not exclude the possibility of restricting the relief voluntarily to individual parts of the EP?

This question requires some analysis, not only of the language but of policy considerations. As to language, it is worth comparing the French and German equivalent language. These read, respectively:

Les décisions de la Juridiction couvrent, dans le cas d'un brevet européen, le territoire des États membres contractants pour lesquels le brevet produit ses effets.

and

Die Entscheidungen des Gerichts gelten im Falle eines europäischen Patents für das Hoheitsgebiet derjenigen Vertragsmitgliedstaaten, für die das europäische Patent Wirkung hat.

Neither ‘*couvrent*’ nor ‘*gelten*’ have the same imperative as is arguably present in the English ‘shall cover’.

Further, as a matter of policy it may seem obviously preferable that a tactic manifestly aimed at avoiding the jurisdiction of the UPC should be capable of being met with a response that neutralises that tactic. However, the consequences of such an approach are not necessarily desirable. For example, by the same logic, a patentee could start proceedings as follows:

- a* English Patents Court proceedings, including an application for an interim injunction taking the benefit of the low threshold to show only an arguable case;
- b* Dutch summary proceedings for an interim injunction even if the patentee had delayed starting the case, because in the Netherlands, in patent infringement cases, delay seems not to be so crucial (such proceedings can be with or without Dutch main proceedings);
- c* German district court proceedings benefiting from the German bifurcated procedure to avoid any immediate consideration of validity; and, crucially, together with any or all of the above; or
- d* UPC proceedings for all other states, taking the benefit of the centralised procedure.

‘Gaming the system’ in this way was, in effect, outlawed by the group of judges and practitioners who devised the UPC rules of procedure when they mandated (Rule 5.1(b)) that if a European patent was to be opted out, this should be effective for all designations. This would make it odd for the same gaming to be achievable by not opting out, even if it were only for a more limited period of time. Nonetheless, the issue is less than clear and will no doubt form a major part of early UPC case law as the matter is litigated.

V STRUCTURE OF THE UPC

The UPC is a two-instance court (plus a Registry), and while straightforward at the appellate level, its first-instance organisation is complex, comprising local, regional and central divisions having competence to hear UPC actions in differing situations. It should be stressed, however, that while different first-instance divisions have differing and limited competence to hear actions, all first-instance divisions have jurisdiction over the whole of the ‘UPC zone’ and can order injunctions, damages and revoke patents across the whole territory.

VI ORGANISATION OF THE UPC AT FIRST INSTANCE

The competence of the central division is primarily as a court for hearing revocation actions and actions for declarations of non-infringement. It can, however, additionally hear counterclaims for infringement, actions for infringement when there is infringement in a state where no local or regional division has competence, and cases transferred to it by local or regional divisions.

The central division has its seat in Paris, but also sections in London and Munich. The competence of each division depends on the technical subject matter of the patents in suit. This is set out in full in Annex II to the UPCA, but the main areas of work covered are:

- a* London – pharmaceuticals and chemistry;
- b* Munich – mechanical engineering; and
- c* Paris – physics and electricity.

Every contracting state has the right to host a local division or co-host a regional division. Both types of division are primarily concerned with determining claims arising from acts of infringement within their territory, or where a defendant is domiciled there. Additionally, however, they have the competence to hear revocation counterclaims. The distinction between local and regional divisions, aside from the extent of their competence arising from their territory, is in judicial staffing (see Section VIII). To date, the following countries have indicated that they will host a local division: Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, the Netherlands, Slovenia and the United Kingdom. Four countries will share a regional division: Estonia, Latvia, Lithuania and Sweden. The remaining countries will either definitely not host any division, or have yet to decide. It should also be noted that Germany has indicated that it will host four local divisions.

VII LANGUAGE REGIME OF THE UPC AT FIRST INSTANCE

The central division operates in English, German and French. This is not, however, dependent upon the location of the relevant section, but the language of the patent. As a result, it may be expected that English will be the language of the case in 75 per cent of cases, German in 20 per cent and French in 5 per cent.

Local and regional divisions can operate in their local language (or languages) plus one or more of English, German or French. It is highly likely that all divisions will offer English. To date, only the Belgian division has indicated that it will offer all of English, German and French as well as a local language (Flemish or Dutch).

VIII JUDICIAL STAFFING OF THE UPC AT FIRST INSTANCE

All divisions of the UPC comprise multinational panels, most comprising both legal judges and a technical judge. The staffing regime, however, is also quite complex. In brief it is as follows:

- a* Central division – two legal judges of different nationalities plus a technical judge of any nationality.
- b* Local divisions – three legal judges, plus a technical judge in many cases, notably where validity is in issue. The technical judge may be of any nationality, but the nationality of the legal judges is determined by the experience of the division in terms of numbers of patent cases heard in the country concerned prior to the UPCA coming into effect. More experienced divisions will have two local judges and one non-local judge, while less experienced divisions will have one local judge plus two non-local judges.
- c* Regional divisions – as with local divisions, three legal judges, plus a technical judge in many cases, notably where validity is in issue. However, in this case, the nationality of the judges is determined differently, with two of the legal judges being local and the other being non-local. The technical judge may be of any nationality.

IX UPC COURT OF APPEAL

At the appellate level, there is a single court. It comprises two panels, but these may, in important cases, sit together. The panels will comprise three legal judges of mixed nationalities plus two technical judges of any nationality. The language of the proceedings will usually be that of the first-instance proceedings. The Court's seat is in Luxembourg, but that does not imply any connection with the CJEU.

X THE ROLE OF THE CJEU

The CJEU is not formally a part of the UPC system, but acts as a reference court in the same way as it does at present for individual EU Member State courts regarding the interpretation of Union law. The primary role of the CJEU is, therefore, in relation to matters of interpretation of the Brussels Regulation, the SPC Regulations, the Biotech Directive, Unitary Patent and Translation Regulations and EU competition law.

XI HOW VALIDITY IS DEALT WITH IN THE UPC

As already explained, the UPC is a court that hears both infringement and validity. The competence of divisions within the UPC and how in practice the two types of claims are determined is somewhat complex, however. This is mainly because of the political desire to maintain an option for litigants to choose between a system where infringement and validity were determined together (as in the UK, France, Netherlands, etc.), or a bifurcated system (as used in Germany and elsewhere).

Revocation claims may only be brought in the central division, but only where there is no pre-existing infringement action. (If there is an existing infringement action, validity may only be challenged by bringing a revocation counterclaim in that action, and hence in the division where the claim was initiated.) In the case of a revocation claim, however, a patentee wishing to counterclaim for infringement has the option of doing so in the central division or in a competent local or regional division. If it chooses the latter option, the central division case is stayed until the local or regional division decides what to do. (A similar arrangement exists with declarations of non-infringement, save that in such cases the stay depends on the infringement action being brought within three months.)

Where a local or regional division infringement claim is met with a revocation counterclaim, the local or regional division may proceed in one of four ways. It may:

- a* hear both the infringement claim and the revocation counterclaim;
- b* transfer the whole case to the central division (but only with the agreement of the parties);
- c* refer the counterclaim to the central division and stay the infringement case; or
- d* refer the counterclaim to the central division and proceed with the infringement case.

The last two options (bifurcation) will probably not be so prevalent as may have at one time been thought, for two reasons. First, requests for bifurcation may also be less common than anticipated since Rule 40(b) of the Rules of Procedure mandates the acceleration of the central division proceedings, with a requirement to endeavour to set the central division oral hearing for before the hearing of the infringement action in the local or regional division. Second, few European patent judges (even German) have expressed public support for the practice, although there may occasionally be appropriate cases – even the English Patents Court has bifurcated cases in the past.

It is possible to amend or limit patent claims in the course of UPC proceedings, although it appears that amendments should be introduced as early as possible (in the response to the counterclaim) and conditional amendments requests be reasonable in number.

XII PROCEDURAL LAW OF THE UPC

The UPC Rules of Procedure are a blend of the procedures of the major European patent jurisdictions, shaped by judges and practitioners taken from the UK, Germany, France and the Netherlands. A UPC action, at first instance, comprises three stages: a written procedure (lasting six to nine months), an interim procedure (lasting three months) and an oral procedure (featuring an oral hearing typically lasting only one day). Hence the stated aim to have a system that brings cases to a conclusion within one year should be achievable. The procedure also involves a procedure for making costs decisions, and may include a procedure for the award of damages.

The system is a heavily front-loaded one with a requirement to set out the case in detail in terms of arguments, facts, evidence and 'where appropriate' an explanation of the proposed claim interpretation. The burden is equally large for the defendant, whether counterclaiming or not.

The system envisages that most of the procedural decisions will be taken by a designated '*judge rapporteur*'. While this may theoretically be the position, it is likely that for at least the more important procedural decisions, there will be consultation, formal or informal, with the other panel members, and to this end there are provisions permitting reviews by the panel.

One interesting aspect of the procedure arising from the blend of systems is that the rules provide ample opportunities for parties to seek evidence in the form of documents, inspections and the like during, but also before proceedings. The notable provisions are those that permit parties to seek:

- a* a pre-action *saisie-contrefaçon* to preserve evidence;
- b* an order against a party at any stage of the proceedings to 'take any step, answer any question or provide any clarification or evidence'; and
- c* an order at the interim conference regarding the 'production of further pleadings, documents, experts, experiments, inspections, further written evidence'.

The requirement to set out the case very fully at the outset makes it unclear whether, despite the apparent limitation of the scope of *saisie-contrefaçon* orders to preserve evidence (as compared with French procedure where they are used to obtain evidence regardless of whether preservation is necessary), many claimants will routinely make use of the procedure, or whether they will wait and make use of the other procedures instead. One danger of delaying is that an order for production of documents at the interim conference may seem very late when a case has already been the subject of multiple detailed pleadings, especially given the apparently strict limitation of the duration of the interim stage.

As regards the final oral hearing, cross-examination of witnesses is possible, although this may in practice only be relatively extensive if an separate witness hearing is appointed, and may very likely to be not only strictly under court control, but largely conducted by the court. Oral hearings lasting more than one day for oral evidence and one day for submissions seem unlikely, even in very complex cases.

XIII SUBSTANTIVE LAW

The law to be applied by the UPC may be dependent upon the right being asserted. In the case of ‘classical’ European patents, it may be a harmonised law as described below, while in the case of unitary patents, it may depend upon the identity of the proprietor. This curious situation, therefore, requires an explanation.

Article 5 of Unitary Patent Regulation 1257/2012 provides that infringement – technically this is referred to as ‘the right to prevent any third party from committing acts against which the patent provides protection’ – shall be as defined by the law of the state whose national law is applicable to the patent in accordance with Article 7. That Article in turn specifies the relevant law to be determined according to a cascade that considers the nationality of the first named applicant, and if that is not an EU state, the second named applicant, with a fall-back of German law. Hence, a patent with a first-named EU applicant will have infringement considered on the basis of that national law, but if the applicant is not an EU national, the nationality of the subsequent names applicants will be considered. To give examples:

- a* the law applicable in cases where there are two applicants, one German and one English, will depend on which is named first;
- b* the law applicable to a patent where the application was in the name of any one EU national and any non-EU applicant or applicants will always be that of the state of the EU applicant; and
- c* if there are no EU applicants, the law will be German.

Of course, the infringement laws of many EU states are at least very largely the same. This is for two reasons. First, with regard of scope of protection, all participating states are signatories to the EPC that includes Article 69, which governs that topic. Second, many participating states modelled their laws concerning actionable acts of infringement on the Community Patent Convention 1975 (CPC), even though that never came into force. Further, harmonisation is increasing, with, for example, the law of the Netherlands and the UK having been amended as part of the process of UPC ratification. However, differences do remain in certain areas, notably experimental use or *Bolar* provisions, and accessory liability.

In contrast to this, for ‘classical’ European patents a largely harmonised approach is more likely. This is because the UPCA, in Article 24(1), prescribes a seemingly prioritised cascade of applicable laws (in which national law is last), and in Articles 25–27 a common law relating to actionable acts of infringement (based on the CPC). Only in the areas of prior use defences does the UPCA mandate that national law applies, although the absence of any UPCA provisions on accessory liability gives rise to the question of whether a harmonised approach will be taken or national law applied.

Another issue is the extent to which EPO case law will be applied by the UPC. Undoubtedly, respect will be given to enlarged board case law and established board of appeals case law in the initial years of the UPC, but in due course it is to be expected that the UPC will establish its own case law, and to the extent that there is divergence from current EPO case law, it is to be hoped that at that point the EPO will follow UPC case law.

XIV RELIEF – INTERIM INJUNCTIONS

The court can entertain interim or provisional injunction applications, with the rules providing great flexibility for urgent, and potentially *ex parte* relief, as well as more routine cases. There is also a protective letter system under which potential defendants can register their request to be heard in the event of an *ex parte* application. The standard for obtaining interim relief is, like other aspects of the system, a blend of current national approaches. It features a requirement to establish infringement and validity with a ‘sufficient degree of certainty’, or have regard to ‘unreasonable delay’ and to ‘weigh up the interests of the parties’. All orders made on an interim basis are subject to an automatic right to claim compensation in the event that it is later found that an order should not have been granted, and security may optionally be required.

XV RELIEF – FINAL INJUNCTIONS, DAMAGES AND COSTS

Relief in the EU is theoretically harmonised by the Enforcement Directive, and the UPCA was drafted with its provisions in mind. In terms of injunctions, Europe has a tradition of granting injunctive relief virtually automatically, subject only to cases involving standard-essential patents. Hence, although strictly a matter of discretion, it is entirely to be expected that injunctions will routinely follow a finding of infringement of a valid claim except in the most exceptional of circumstances. This is not to say that that an injunction will be granted with immediate effect in all cases. Stays pending appeal are possible (but injunctions are not automatically suspended pending appeal), and in some other cases (such as where the decision is final) a grace period may be permitted so as to permit the defendant to move to a non-infringing product or process. The period of such stays may, however, be limited to not more than a few months.

Damages are also granted in accordance with the Enforcement Directive. They are to be largely compensatory in nature, with only the possibility of additional awards in cases where the defendant has enjoyed ‘unfair profits’. While this term lacks clarity, it does not suggest any awards of multiple damages as in the United States.

Costs are awarded to the successful party in most cases on a largely compensatory basis, but subject to caps based on the value of the action. In the highest value, most complex cases, such awards can be of up to €5 million, though the standard range of costs awards will be €38,000 to €2 million depending on the value of the case.

XVI ENFORCEMENT

Under the UPCA, enforcement of orders is a matter for national law.

XVII APPEALS

Although the system is complicated by the possibility of reviews by the panel in the case of certain procedural orders made by the judge rapporteur, in principle, appeals from both procedural orders and final orders lie to the Court of Appeal. Procedural orders may be decided by an interim appeal process, or may be combined with a final substantive appeal. Final appeals will, in contrast to EPO procedures, rarely result in remittals back to first instance, with the Court of Appeal having the right to decide any matters undecided by the first-instance division. The nature of appeals will be somewhere between the extremes of *de novo* and *de jure*

systems, but with relatively strict rules on the introduction of new evidence. Appeals should be completed within one year in most cases, making it entirely reasonable to expect final decisions in UPC cases within a total of two years in all but the most complex cases.

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