

LETTER FROM EUROPE

The Bifurcation Blues

IP, RWJs and the UPC

In the last *Letter from Europe*, I looked at the potential financial impact a single judge could have on the economy. As I alluded to in my conclusion, the Unified Patents Court (UPC), a proposed common patent court open for use by all EU member states, could have a much bigger impact than anyone might realise, and not necessarily in a positive sense.

This somewhat gloomy prognosis arose out of a conversation with my friend and fellow partner, James Tumbridge. James, or Jimmy T. as I sometimes call him, has been involved in politics since a youth. He even once ran as a candidate, but now scratches his political itch by occasionally advising politicians on matters in IP. Had James and other IP practitioners and organisations not raised awareness at a political level of the importance of the UPC, we wouldn't have seen any key part of it in the UK; it would all have gone to Germany.

This “new era” for patent litigation has all been negotiated by politicians who, quite frankly, are barely looking at what the UPC is all about. Part of the reason is that IP is an “intangible”, and they don't really get it. What politicians are interested in, according to James (other than getting elected again) are “real world jobs”, hence, RWJs. Since the recent economic crisis, there has been a slow awakening to the fact that financial intangibles—like loan notes, sub-prime mortgages and other such transactional instruments—can have a significant impact on traditional jobs, such as labourers.

The politicians get that construction work means jobs, but if you want to build a bridge, the financial investment required manifests itself in the form of intangible instruments.

IP is an intangible that politicians rarely think about. Yes, they are vaguely aware that it's important to have R&D because that leads to products, which lead to manufacturing, which leads to exports, for which, of course, there need to be factory workers, forklift truck drivers and long-distance haulers—in other words, RWJs. And of course, what they really want is for these RWJs to be in their constituency, and for those who benefit from these jobs to vote for them.

But why should the UPC affect any of this, you may ask? The concern stems from the possibility that the UPC will adopt the German bifurcation system, whereby patent infringement proceedings can be heard early and quickly *without* the attendant hearing on validity, which could happen months or (worst case scenario) years later. So, an injunction could be granted on a patent that may, many moons later, turn out to be invalid.

This bifurcation system has already been shown to have a dampening effect in Germany. In part because of the telecoms patent wars that have been raging, Nokia has taken its manufacturing plants out of Germany, and in doing so avoided the prospect of having plant production stopped by an injunction. Relocating outside of Germany means a German injunction



Paul Harris | Partner
Tower 42, Level 23
25 Old Broad Street
London, EC2N 1HQ
+44.20.7847.9517
paul.harris@pillsburylaw.com

would not bite and that the RWJs would be unaffected.

But with the UPC, there's no hiding place—any injunction granted will be pan-European. So if you don't want your manufacturing plant to stop producing the goods everyone's jobs rely on, the risk is that these RWJs are going to be located overseas in places such as China and India.

Of course, the distribution side of things will still have to remain in the EU, but the likelihood here is that it won't be the manufacturer who invests in that part; it will be outsourced to a third party who will take on the risk of being enjoined from keeping, distributing, importing, etc. the infringing goods.

To a politician, however, all of this seems just far too remote, even as the behaviour of Nokia shows that big business has this firmly on its radar and will act when it feels threatened.

The obvious way of alleviating the risk would be to drop the bifurcation approach, but it's too late now—this is what has been signed up for. However, there are still ways that the risk can be lessened, for example, by encouraging judges to suspend infringement proceedings, or to make the rules governing the UPC work in such a way that the bifurcation system only operates in more obvious and limited cases.

It's not my intention to come across as Eeyore-like as I bemoan the fact that the potential economic impact is too little appreciated or understood. But there's a reason why patent practitioners are waving their arms around, trying to be noticed by the politicians and civil servants dealing with this issue. It will benefit us all if they could just take a little time out of their hectic schedules to stop, listen and appreciate what is being said.

So, perhaps, as in days gone by when the then Prime Minister would open the doors to No. 10 Downing Street for the unions and politicians to sit down over beer and sandwiches, our current Prime Minister should invite us all for a cup of tea, and let us explain why IP and RWJs really are linked together. ■