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Team 4 Report

**Topic:** Patent Litigation in Europe and the USA: Are Specialized Courts a Good Option?

**Chosen subtopic:** Cons and pros of Patent Specialized Courts

**Research question:** Do specialized patent courts increase the legal certainty?

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1. Introduction

The objective of this paper is to analyze the experience from the specialized jurisdiction of the United States in order to predict the possible benefits and risks of a specialized patent court at the European Union level. In order to achieve this objective, the jurisdictions from United States and Europe will be scrutinized and compared. In the case of the European Union an analysis from the current situation and predictions of the Unitary Patent Court will be provided. Once all the jurisdictions have been studied, the we will compare them and draft conclusions about the question studied: are specialized patent courts better than non-specialized? In this line of debate, possible measures for avoiding the disadvantages of specialized patent courts will also be provided.

2. Analysis and Argumentations

2.1. Patent litigation in the United States of America:

2.1.1. The U.S. Court of Appeals for the Federal Circuit

2.1.1.1. Historical background: from general to specialized.

The United States (US) judicial system is built around general courts that are decentralized. However, patent disputes in the United States are resolved in the Federal Court System, not in State Courts.¹

Before 1982², patent litigation took place before the District Courts of the 1st, 2nd or 10th Circuits and then, an appeal process was brought in front of a regional appeal court (of the 1st, 2nd and 10th Circuit respectively). In first instance it was also possible to initiate a procedure before the United States Patent and Trademark Office and an appeal of a decision was before the Court of Customs and Patent Appeals. From both ways of litigation, a case could finally be heard before the US Supreme Court, in case they were admitted by its discretionary criteria after an appeal procedure³

Nevertheless, general courts were viewed as the wrong forum for patent litigations. Non-uniformity and lack of predictability was observed across the country. Indeed, the law of one regional circuit court of appeal was disregarded by courts in other regions. Besides, the law of the court which heard appeals from US Patent Office proceedings was not imposed on the

² The Federal Courts Improvement Act of 1982 created the Court of Appeals for the Federal Circuit (CAFC) which marks a radical shift away from the previous US patent litigation procedure.
regional circuit. Finally, judiciary was perceived to be anti-patent, especially at the Supreme Court level.4

Eventually in 1978, the first proposal to form the Federal Circuit Court of Appeal was set in US Congress. In 1982, the Federal Courts Improvement Act5 created the United States Court of Appeals for the Federal Circuit (CAFC) from two existing courts: the Court of Customs and Patent Appeals and the US Court of Claims6. This new court brought the idea of multiple specializations including patents7. The main objective of the CAFC was to “eliminate stark differences in approaches and outcomes among the eleven regional federal circuits and thereby discourage forum shopping in patent cases, which had become rampant”8. Also, many judges “felt uncomfortable and sometimes incompetent to rule on patent matters”9.

### 2.1.1.2. Judicial activity of the CAFC and its criticism.

Since 1982, the first ruling of patent infringement litigation is made by the District Courts and all appeal processes are heard by the US Court of Appeals for the Federal Circuit. Appeals to the second instance can be filed before the US Supreme Court.

The new federal circuit had a huge impact on patent value. Indeed, it led to a greater uniformity of the law which became very “pro-patent” as it adopted the Court of Customs and Patent Appeals’ precedents which became binding on District Courts10. With patents being upheld and found infringed, and with damages awards becoming more and more important, Judge William C. Connor even said that the “Golden Age” of patent law had been reached11. Consequently, US

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5 Signed by the president Ronald Reagan on the 2nd April 1982.
7 According to the website of the CAFC “The court’s jurisdiction consists of administrative law cases (55%), intellectual property cases (31%), and cases involving money damages against the United States government (11%). The administrative law cases consist of personnel and veterans claims. Nearly all of the intellectual property cases involve patents. Suits for money damages against the United States government include government contract cases, tax refund appeals, unlawful takings, and civilian and military pay cases.” CAFC, ‘Jurisdiction of the Court’, <http://www.cafc.uscourts.gov/the-court/court-jurisdiction>, accessed on 10 April 2016.
has increased the rate of patent applications and granted patents together with the growth of investment and infrastructure regarding research and development in the field of patent law.  

2.1.1.3. Criticism of the Federal Circuit

Despite its effort to provide uniform application in patent law and provide legal certainty, the Federal Circuit has also been the target of criticism. Indeed, it has been noted that “many of the «general rules» that the Federal Circuit developed in its effort to simplify patent law turned out to be too crabbed and formalistic. As a result, the Supreme Court had to step in. In virtually every case where it has done so, the High Court has rejected a narrow, formulaic rule proposed by the Federal Circuit and opted for something more general and flexible.”

This kind of narrow rules proposed by the CAFC, and rejected by the Supreme Court can be appreciated in Festo. Other example of discordance can be found when the Federal Circuit tried to simplify the doctrine of “obviousness”, and established that a combination of prior art is obvious, only if a “teaching, suggestion or motivation” appears in the prior art to combine them. This was called the ‘TSM test’ and allowed limiting the patent inventiveness by adding the word “motivation”. In practice the Federal Circuit required an “explicit suggestion to combine the prior-art references in order to render the invention obvious and therefore unpatentable”. In 2007, in the case KSR International Inc. v. Teleflex, Inc., the Supreme Court rejected the ‘TSM test’ and set more flexible standard that relied on the hypothetical person of ordinary skill in the art (“HIPOSA”), promoting “the usual cause of substantive justice at any cost.”

In relation to patentable subject matter, the interpretation has varied. In State Street Bank, the district court found that the claimed inventions were non-patentable subject matter; however, the CAFC reversed that the inventions were patentable subject matter because they produced “a useful, concrete and tangible result”. This decision resulted in increasing the number of business method patents and patent lawsuits thereby. The CAFC reconsidered the "useful, concrete and tangible result" test in Bilski. The CAFC concluded that the ‘machine-or-transformation’ test should be used for the judgement of the patentable subject matter in

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13 Jay Dratler, Jr. ‘The Supreme ...,187.
14 Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co. 535 U.S. (May 28, 2002): In this case, the Federal Circuit Court sought different ways to limit the doctrine of equivalents with the establishment by the CAFC of the “complete bar doctrine”, meaning that “the doctrine [of equivalents] would not apply to any claim element that had been amended in the course of patent prosecution”. The Supreme Court rejected this limitation to the application of the doctrine of equivalent.
15 Jay Dratler, Jr. ‘The Supreme ...,193.
17 Jay Dratler, Jr. ‘The Supreme ...,193.
18 149 F.3d 1368.
19 545 F.3d 943, 88 U.S.P.Q.2d 1385.
replace of the "a useful, concrete and tangible result" test. This change was slightly adjusted by the Supreme Court to rule that the ‘machine-or-transformation’ test is useful but not the only test. The standard to judge the patentable subject matter had become unclear after Bilski.

This ambiguousness was mitigated by Alice\textsuperscript{20}. In Alice, CAFC ruled that the abstract ideas without inventive concept should not have the patentable subject matter. After Alice, the majority of the software patents has become invalid due to lack of the inventive concept. Even after Alice, there remains uncertainty of the definition of the “inventive concept” and the interpretation of the patent subject matter is still unclear. Consequently, the establishment of CAFC supposedly contributed to obtain unified decisions, but in the end the verdict of the court in this matter appears to be inconsistent.

As a result, the CAFC has to improve its legal system in combination with the US Supreme Court regarding how specialization is required, how it should be provided, and how a specialized court should give its expertise. They should learn from each other’s perspective to bring a significant contribution to judicial administration both in the United States and abroad, in particular to update patent law and to the emerging needs of the “knowledge economy”\textsuperscript{21}.

Finally, it should be noted that despite some problems, the CAFC’s legislative mandate was to bring uniformity to the patent law administration. Those critical to the CAFC’s record in remaining faithful to this function have arguably lost sight of the unsettled nature of the patent judgments in the regional Circuits before the sanctioning of the Federal Courts Improvement Act.

\textbf{2.1.1.4. A need for specialized First Instance Judges?}

It is notable that the CAFC has achieved paradigmatic status in the debate over specialized courts. Nevertheless, the question whereby having a specialized appellate court eliminates the need for specialized courts at the first instance still remains.\textsuperscript{22} In 2005, Professor Kimberly Moore’s presented a report before the Subcommittee of the US House of Representatives which indicated that a possible remedy to the problems underlying the CAFC’s high reversal rate would be the training and assignment of specialized patent judges at a first instance level. At the same time, criticism has been made towards the staggering transactional costs of patent litigation and the associated effects across competitive industries, including obstacles to research and development as well as barriers to public access to patented technology.

\textsuperscript{20} 573 U.S. ___, 134 S. Ct. 2347 (2014).
\textsuperscript{21} Rochelle Cooper Dreyfus ‘What the Federal Circuit can learn from the Supreme Court- and vice versa’ (2009-2010) Heionline, Citation: 59 Am. U. L. Rev. 787.
Widespread forum shopping, and the CAFC's high rate of reversal of District Court judgments in patent cases, also helped fueling the push for specialized first instance patent courts. The landscape was ripe for legislative action, and in 2011, the US Congress approved the Public Law No. 111-349, which will provide for a pilot program within the US District Courts to create specialized first instance patent courts\(^\text{23}\). These designated federal patent courts will have jurisdiction to hear cases relating to patents or plant variety protection. In addition to the assignment of all cases filed within a district to the specialized patent court, the judges in other District Courts could refer patent cases to these courts.

The legislative framework contemplates at least six District Courts in three separate regional circuits. The District Courts will be chosen based upon those fifteen that have had the greatest number of patent or plant variety protection cases filed in the past year. The law embodies an opt-in approach in the sense that, to be eligible, the Circuits must have at least ten district judges to be appointed by the President, and at least three judges who have requested to be designated as patent judges. In case the district has fewer than ten district judges authorized to be appointed by the President, at least two judges must have made the request\(^\text{24}\). The bill also provides funding to support the training of the district court judges and to recruit law clerks with specific expertise in technical matters.

The main purpose of this program is to diminish forum shopping, as more district court judges will refer cases involving patents or plant variety protection to these specialized courts. Hopefully, the expertise of these specialized trial courts would lead to a decrease in the CAFC's reversal rate.

One equally relevant action has been the practice under Paul Michel's tenure (as Chief Judge at the CAFC) of incorporating into the exclusive appellate patent forum various judges from the regional circuits, especially the trial judges from districts hearing the greatest number of patent cases. Also, various US District Courts have started to consider employing specialized patent law clerks to serve across the district in technology disputes. Furthermore, to rely on arbitrators and mediators with technology backgrounds for alternative dispute resolution is still explored as a relevant option for resolving technology cases.

### 2.2. Patent Litigation in Europe: from national courts to a specialized common jurisdiction

#### 2.2.1. Present European patent litigation landscape

The European patent system is based on the European Patent Convention (EPC) and it is far from being harmonized or unified. Under the EPC, the European Patent Office (EPO) examines a

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European patent application which can be later granted as a national patent\textsuperscript{25} in each of the EPC member states\textsuperscript{26}. The European patent, instead of being a unique title, it is a bundle of national patents whose decisions of validity or infringement are exclusively a matter of national courts. For this reason, decisions on patents with the same European application can differ in the different member states as they can be considered invalid, they can be restricted in their scope and they can be considered as infringing another national patent.

In order to analyze the main patent jurisdictions, we have studied the statistics published by the EPO for the year 2015. The member states of the EPC with more European patent application filings were Germany, France, Netherlands, Switzerland and United Kingdom\textsuperscript{27}.

2.2.1.1. Litigation in national courts: the risk of diverging decisions

We will now analyze the degree of specialization in four of the five countries that filled more European patent applications in 2015: Germany, France, Netherlands and United Kingdom. Switzerland will not be considered as this country is not part of the Unified Patent, nor of the Unified Patent Court\textsuperscript{28}.

2.2.1.1.1. Patent litigation in Germany: the tradition of bifurcation

Germany has a specialized dual patent system were validity and infringing actions are studied and decided separately. Validity\textsuperscript{29} procedures are directly referred to the Federal Patent Court\textsuperscript{30}.

\textsuperscript{25} European Patent Convention (EPC), article 2.1.
\textsuperscript{26} The member states of the European Patent Convention are: Albania, Austria, Belgium, Bulgaria, Switzerland, Cyprus, Czech Republic, Germany, Denmark, Estonia, Spain, Finland, France, United Kingdom, Greece, Croatia, Hungary, Ireland, Iceland, Italy, Liechtenstein, Lithuania, Luxembourg, Latvia, Monaco, Former Yugoslav Republic of Macedonia, Malta, Netherlands, Norway, Poland, Portugal, Romania, Serbia, Sweden, Slovakia, Slovenia, San Marino and Turkey.
\textsuperscript{28} Against the predictions of having a unified patent title within the European Union at the beginning of 2015, the ratification of the Unified Patent Court has not started yet (April 2016). So far, the signatory States are Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Germany, Denmark, Estonia, France, United Kingdom, Greece, Hungary, Italy, Ireland, Lithuania, Luxembourg, Latvia, Malta, Netherlands, Portugal, Romania, Sweden, Finland, Slovenia, and Slovakia.
\textsuperscript{29} Validity of German national patents and validated European granted patents in the territory of Germany.
\textsuperscript{30} Bundespatentgericht <https://www.bundespatentgericht.de/cms/>., accessed on 10 April 2016.
(Bundespatentgericht or BPatG), while infringing actions are brought in front of the District Courts (Landgerichte)\(^{31}\).

There are twelve District Courts in Germany\(^{32}\) where at least one chamber of each court is specialized in patent disputes (Kammer für Patentstreitsachen). The three members of these chambers, normally without technical background, have specialized patent training\(^{33}\). Appellations to the judgements of the District Courts are directed to the Higher Regional Courts (Oberlandesgerichte) where the patent infringement procedures are heard by the Senate for Patent Disputes (Patentsenat). These Senates are composed by three judges with legal training and they normally analyze only the matters of law\(^{34}\).

In infringing cases, appeals to the Higher Regional Courts’ decisions are directed to the Federal Court of Justice (Bundesgerichtshof). This court also hears from the appellations to the Federal Patent Court decisions in the nullity/validity procedures\(^{35}\) and only hears from matters of law.

\[\text{2.2.1.1.2. Patent litigation in France: recent specialization of first instance}\]

From the 1st November 2009 the Paris Court of First Instance (Tribunaux de Grande Instance de Paris) has the exclusive jurisdiction in patent disputes\(^{36}\). This court may hear from validity\(^{37}\) and infringement cases. The third chamber of the Paris Court of First Instance is specialized in intellectual property matters and is composed by four panels of three judges.

Appeals to their decisions are handled by the Paris Court of Appeal (Cour d’Appel de Paris). This appellation court has an intellectual property specialized division, the fifth one, with two


\[\text{32 Nevertheless, the District Courts of Düsseldorf, Mannheim and Munich receive the most number of cases.}\]

\[\text{33 Heinz Goddar and Carl-Richard Haamann, ‘Patent Litigation ... .}\]

\[\text{34 Nevertheless, if new facts are introduced in the case of infringement, the court may consider them, at the discretion of the Senate members.}\]

\[\text{35 Heinz Goddar and Carl-Richard Haamann, ‘Patent Litigation ... .}\]

\[\text{36 Stuart J.H. Graham and Nicolas Van Zeebroeck, ‘Comparing Patent ... .}\]

\[\text{37 Validity of French national patents and validations of European patents in France.}\]
chambers formed by three judges\textsuperscript{38}. In case of further appellation, the patent dispute can be heard by the Supreme Court (\textit{Cour de Cassation}) which is not IP specialized and will only hear from matters of law\textsuperscript{39}.

\subsection{2.2.1.1.3. Patent litigation in the Netherlands: forum shopping and cross-border injunctions}

The Dutch patent system is a specialized non-bifurcated system where the same court hears from validity\textsuperscript{40} and infringement matters\textsuperscript{41}. The patent chambers of the District Court of The Hague (\textit{Gravenhage}) have exclusive jurisdiction as first instance court in patent disputes. Patent disputes can be fully reviewed in appellation in front of the patent chamber of the Court of Appeal of The Hague (\textit{Gerechtshof}). Parties in patent disputes can appeal this last decision in front of the Dutch Supreme Court (Hoge Raad) which only hears from matters of law.

The Netherlands is considered as a patent favorable jurisdiction where patent right holders tend to go “forum shopping” due to their preliminary relief proceedings (\textit{Kort Geding}) with cross-border effects\textsuperscript{42}. Cross-border injunctions were a common practice in the Netherlands based on article 6(1) of the Regulation (EC) 44/2001\textsuperscript{43} which the Court of Justice of the European Union (CJEU) had to limit\textsuperscript{44}. Nevertheless, after \textit{Solvay v Honeywell}\textsuperscript{45} the Dutch

\begin{itemize}
\item \textsuperscript{39} Stuart J.H. Graham and Nicolas Van Zeebroeck, ‘Comparing Patent … .
\item \textsuperscript{40} Validity of the Dutch patents and those European patents validated for the territory of the Netherlands.
\item \textsuperscript{41} Stuart J.H. Graham and Nicolas Van Zeebroeck, ‘Comparing Patent … .
\item \textsuperscript{42} Stuart J.H. Graham and Nicolas Van Zeebroeck, ‘Comparing Patent … .
\item \textsuperscript{43} Article 6(1) of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, provided that in cases of multiple defendants, the court of the place of the domicile of one of these defendants can hear from the dispute “\textit{provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings}”.
\item \textsuperscript{44} The case C-539 Roche v Primus of 13 July 2006 determined the end of the ‘spider in web doctrine’. The CJEU determined that article 6.1 of the Regulation (EC) 44/2001 did not apply for cases of patent infringement where the defendants were different corporations based on different member states of the European Patent Convention even when the different entities belonged to the same group and acted following a common internal policy.
\item In the case C-4/03, GAT v LuK, of 13 July 2006, the CJEU was asked to interpret art. 16.4 of the Brussels Convention (art. 22.4 of Regulation 44/2001 or art. 24.4 of Regulation 1215/2012). In this case, the CJEU established that the
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practice of granting cross-border injunctions on preliminary proceedings has been confirmed by the CJEU when the patent disputes refer to infringement claims and the defendant is located in the Netherlands.  

2.2.1.1.4. Patent litigation in United Kingdom: the bifurcation depending on its value

The British patent system has three jurisdictions: Northern Ireland, Scotland and England and Wales. Most of the patent cases are brought to the English and Welsh jurisdiction in London; therefore, this paper will focus only on the English and Welsh jurisdiction.

The English and Welsh jurisdictions establish a specialized system where lower monetary value cases are presented to the Intellectual Property Enterprise Court (IPEC) and those more complex cases with higher value are heard at the Patents Court of the High Court. These courts can hear from validity and infringement cases. Judgements from both the IPEC and the Patents Courts can be appealed to the Court of Appeal and, sometimes, they might be appealed for a second time to the Supreme Court (the British House of Lords).

In this specific jurisdiction the UK Patent Office, through the Comptroller of Patents, can also resolve certain kind of patent disputes in a cost-effective manner. Generally the Comptroller...
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does not decide on infringement and has no jurisdiction over validity disputes. Comptroller’s decisions can be appealed to the Patents Court (Higher Court) and eventually to the Court of Appeal and the Supreme Court.

2.2.1.2. Boards of Appeal of the European Patent Office and their limited appellation power

The Boards of Appeal of the European Patent Office (EPO) does not hear about the validity of a granted European Patent neither from infringement actions against it, instead, they are the last instance in for the grant of European patents, as well as the following procedures before the EPO: opposition, limitations and revocation. These courts are only bounded by the European Patent Convention and they are independent from the EPO in the appellation of European Patents.

The Boards of Appeal of the EPO are conformed by three bodies: the Technical Board of Appeal, the Enlarged Board of Appeal and the Disciplinary Board of Appeal. These specialized courts rule over all the European Patent Member States and will coexist with the future Unitary Patent Court, but the Board of Appeals of the EPO will remain competent only for appeals from its examination or opposition divisions.

Appellations to the decisions related to the grant or refusal of a European patent and those from the Opposition Division of the EPO are handled by the Technical Board of Appeal. For those appellations without technical matters which are based on legal issues, the Legal Board of Appeal is responsible. Finally, in the cases where there has been a “fundamental procedural

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53 The Comptroller can decide on infringement “but only if the owner of the patent and the person who has allegedly infringed the patent agree that the matter should be referred to the Comptroller”.


58 The Boards of Appeal of the European Patent Office will remain competent in the appellations from the EPO in the examination of EPO granted patents and its opposition.

defect\textsuperscript{59} in the proceedings of the appellation within the Boards of Appeal of the EPO, a party may appeal to the Enlarged Board of Appeal. This body also hears from the disputes concerning the uniformity in the application of the law and whenever an important point of law is directed to the board by another body of the Board of Appeal of the EPO or the President of the EPO\textsuperscript{60}.

2.2.2. The future landscape of patent litigation in Europe: integration of the Unified Patent Court.

2.2.2.1. The Unitary Patent Court (UPC)

2.2.2.1.1. Unitary Patent Court as first and second instance patent specialized court

The UPC will be composed by one Court of First Instance and one Court of Appeal\textsuperscript{61}. According to article 7 of the UPCA, the UPC Court of First Instance will consist of a single court with several divisions. Both the Court of First Instance and the Court of Appeal are conceived as the two instances of a single specialized court, being the only one with exclusive competence to deal with European patents with unitary effect, classical European patents, Supplementary Patent Certificates issued for products covered by such patents and European patent applications\textsuperscript{62}.

However, it must be noted that a transitional period of seven years (extendable up to further seven years) has been established in the UPCA (article 83) concerning exclusively the “classical” European patents, and offering the following options\textsuperscript{63}:

- “Classical” European patents, granted or applied, before the expiration of the transitional period may be opted-out from the UPC jurisdiction – unless an action has already been brought before the UPC –, existing the possibility for patent holders who make use of this option of withdrawing their opt-out at any time.
- During the transitional period, infringement or revocation actions regarding European classical patents may still be brought before national courts instead of the UPC; unless an action has already been issued before the UPC.

The UPC can be seen as the crystallization of a more than fifty-years process, in an attempt of achieving a unified system for patents at a EU level, parallel to the one created for the recently renamed European Union Trade Mark. Some of those who are in favor of the UPC system


\textsuperscript{62} Article 6 of the UPCA

\textsuperscript{63} Article 3 of the UPCA

conceive it as the answer to a historical demand\textsuperscript{64}. Nevertheless, there are certain sectors which appear to be very reluctant to specialization in the field of patent law\textsuperscript{65}.

\subsection{2.2.2.1.2. Part-time judges.}

According to article 18 of the UPCA, the pool of judges will be composed by full-time and part-time judges. Part-time judges may perform other functions, provided there is no conflict of interests. The possibility of having part-time judges has been received by some as a great advantage, as long as it will allow recruiting judges with great experience. On the other hand, this possibility arises the question of the aforementioned risk of conflicts of interests, which concerns some patent practitioners.

\subsection{2.2.2.1.3. Specialization by fields}

The UPC Court of First Instance, as mentioned above, will consist of one court with several divisions: a central division and local and/or regional divisions. Every Contracting Member State of the UPCA may be entitled to request up to four local divisions and/or a regional one (in this case, together with other Contracting Member States)\textsuperscript{66}.

The central division, seated in Paris, will have sections in London and Munich. Cases concerning human necessities, chemistry and metallurgy will be studied in London, while cases related to mechanical engineering, lighting, heating, weapons and blasting will be heard at Munich, according with Annex II of the UPCA.

Article 18 of the UPCA states that “the Pool of Judges shall include at least one technically qualified judge per field of technology with the relevant qualifications and experience”.

\subsection{2.2.2.1.3.1. Possible benefits of the specialization of the UPC}

It has been traditionally held that complexity of patent cases requires a high level of specialization from judges\textsuperscript{67}. Insofar this expertise would expedite the patent litigation cases

\textsuperscript{64} Manuel Desantes Real ‘Una Primera Aproximación al “Paquete de Patentes”’ Conflictus Legum Blog <http://conflictuslegum.blogspot.com.es/2013/01/manuel-desantes-real-una-primer.html>.


\textsuperscript{67} The Unified Patent Court: Pros and Cons of Specialization - Is There a Light at the End of the Tunnel (Vision)? / Schovsbo, Jens Hemmingsen; Riis, Thomas; Petersen, Clement Salung.
and would lead to higher quality resolutions, differently to what happens nowadays in most EU Member States, where third party experts’ interventions are needed in the courts in order to solve patent cases.

Those who advocate for specialization are of the opinion that the recognized effectiveness and success of some EU Member States’ Courts in patent litigation should be put to the credit of their judges’ expertise. According to the fourth Global Intellectual Property Index (GIPI4)\(^{68}\), which is a survey carried out by the international firm Taylor Wessing in order to test practitioners opinion regarding various IP matters, judges’ specialization in courts of Germany, UK and the Netherlands has been proven to be extremely positive when it comes to patent litigation, especially regarding patent enforcement. This statement has been supported by a considerable number of judges and practitioners in this area.

### 2.2.2.1.3.2. Possible disadvantages of the specialization of the UPC

The main argument pointed out by specialization critics is that it is patent law that we are talking about, insofar this specialization would be confined to legal matters at a judicial level, and it will not affect technical aspects in the administrative level. Within this context, it is held that patent law “presents no greater difficulties to its mastery than any other field of law”\(^{69}\).

According to this statement, detractors maintain that expectations and prospects of those defending specialized patent courts are in fact highly unrealistic, in the sense that there is no judge able to master every specific technical field dealt with in patent litigation\(^{70}\).

As a consequence, specialization would lead to judges being disconnected from the reality of the legal system, conceived as a whole and not as different isolated disciplines or parcels\(^{71}\). Bearing in mind the ultimate goal of the legal system, which is solving problems in the light of many interconnected strata of knowledge under a simultaneously neutral and global vision, specialization would not lead to satisfactory results in patent litigation, since patent law, as any other fields of law, has implications in respect of many other branches composing the legal system, and vice versa.

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71 The Unified Patent Court: Pros and Cons of Specialization - Is There a Light at the End of the Tunnel (Vision)?: / Schovsbo, Jens Hemmingsen; Riis, Thomas; Petersen, Clement Salung.

3. Conclusions

From both experiences, US and Europe, we have analyzed two jurisdictions where patent specialization has been focused in different ways. While in US the first instance of patent litigation is directed to the general courts, the District Courts, it is the second instance which has been specialized on patent matters: the Courts of Appeals for the Federal Circuit (CAFC). Moreover, the third and last instance of the US patent litigation system is not patent specialized as the US Supreme Court has a global legal duty.

In Europe, the litigation of the European granted patents has been a matter of national law where each member state has developed their own system. These national jurisdictions have different levels of patent specialization which develops inconsistency in the outcomes of the different judgements that each country give to the same patent issue.

Specialized patent courts have showed to provide more consistent judgements, they have increased the quality of patent related issues in their decisions and, as a general outcome, they have shown to be more time and cost-efficient than those general courts hearing patent litigation where the specialized patent issues have to be outsourced.

On the other hand, specialized patent courts are not considered by all the stakeholders as a positive solution to patent litigation. Criticism on this specialization points out that patent law still is law and should not be considered as more demanding as any type of law. Another disadvantage would be the possible disconnection from the general background of patents developing a tendency of technology biased judgements.

Finally, and in reference to the Unitary Patent Court, advantages and disadvantages have been considered from the part-time judges that the UPC will have. While some sectors consider this as an opportunity to obtain experienced human quality, others point out the risk of possible conflicts of interest.

Under all this analysis, we consider that specialized patent courts do improve the quality and consistency of patent related matters as this courts have broader knowledge and experience in a technical field which normally represents serious issues to a judge only trained in legal matters.

In order to avoid the disadvantages or risks of the specialized courts, the authors consider that a first specialized instance should always be considered. This first instance would hear from the facts of the case being these facts technical related. ‘Common judges’ can feel unsure and uncomfortable dealing with patent litigation due to the lack of knowledge in these issues. Instead, a non-patent specialized court of appeal could decrease the technology bias offering a more general point of view and considering the law matters only.

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72 However, it has to be noticed that there is a pilot program to have specialized first instance courts for patent cases, as was explained the US section of this paper.
Moreover, the adoption of advisory panels of economic, social and technical experts, together with further studies regarding bankruptcy and tax courts can experiment and perfect those systems.

We have also considered that trial juries, from the US jurisdiction, and part-time judges, from the future UPC system, can harm the quality of patent decisions. The first option mentioned lack technical knowledge and their contributions can be considered as unprofessional or just a mere formality in order to obtain a judgement from a more specialized court, a court of appeal. On the second option the part-time schema can deal to conflicts of interest between the part-time judges and the parties involved in the patent litigation. For these reasons, this team considers that none of those options should be related to patent litigation.

To conclude, we have great expectation on the Unified Patent Court and on the evolution of the Federal circuit and hopes to increase the legal certainty, consistency and quality of the patent related litigations within the UPC member states on one hand and within the different US states on the other hand.
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