

# EUROPEAN UNITARY PATENT AND UNIFIED PATENT COURT

An Industry Perspective

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# UP and UPC impact on industry

- In general, the UP and UPC will have a positive impact on industry:
  - Possible reduction in application/renewal/maintenance fees.
  - Unitary patents do not need to be validated in each member state.
  - Unitary patents will not be subject to challenge in national courts, removing the possibility of parallel litigation and inconsistent decisions as to patent validity.
- Two main areas of concern:
  - Bifurcation.
  - Test for Injunctions.
- These concerns can and should be addressed in the Rules of Procedure of the UPC.
- We are also keeping an eye on other issues: Fees, one-day trials, funding of the Unified Patent Court (UPC), composition of panels, etc.

# Bifurcation

- **Concern:**

- The UPC Agreement allows patent infringement and validity to be decided by different courts in the same case, without giving any guidance as to when or how this should or should not be done.
- Having different courts decide validity and infringement claims involving the same patents can involve unnecessary duplication, delays, costs and disruptions of legitimate business.

- **Solution:**

- There should be a presumption that validity and infringement cases will be heard in the same court, and that validity issues will be decided prior to infringement issues, except where mandated or consented by the parties.
- This presumption should be incorporated into the Rules of Procedure of the new UPC.

# Injunctions

- **Concern:**

- Injunctions are often appropriate remedies in patent cases. Not every case is this straightforward, however.
- Recent experience in patent litigation demonstrates that injunctions can be used to disrupt business unfairly and to extract excessive royalties.

- **Solution:**

- The Rules of Procedure of the UPC need to be clarified to ensure that injunctions are granted only in appropriate circumstances.
- The Court should be required to apply a balanced test for issuing injunctions in patent cases, which takes account the injury to the patentee, the balance of potential harm between the parties resulting from the granting or the refusal of the injunction, whether any of the parties could be adequately covered by an award of damages, and the public interest.

# Other possible Issues

- Application/Renewal/Maintenance Fees:
  - Majority of applicants do not validate in more than 3-4 countries.
  - If the UP fees exceed the total fees for 3-4 countries, applicants are unlikely to apply for UP.
- One-day trials:
  - Requirement for one-day trials may be unrealistic and could reduce the quality of UPC decisions.
- UPC funding/Composition of panels:
  - Local divisions hearing a small amount of patent cases should not be penalized. Otherwise, they may have an incentive (real or perceived) to become pro-patentees.

# Next Steps

- Microsoft is collaborating with other industry players to address these issues.
- We generally support the UP and UPC package and believe that these concerns can be (and should be) addressed as part of the Preparatory Committee, Select Committee and Administrative Committee discussions.
- We look forward to participating in the public consultation on the UPC Rules of Procedure.

