

Single system

How the Unified Patent Court could affect European patents

Businesses will want to plan ahead for changes to the patent system that are likely to be implemented across much of Europe. Continent-wide patent protection under the new system could introduce consistency and cost-effectiveness, making access to hundreds of millions of consumers more profitable.

Smart Business spoke with Mark D. Klinko, an attorney at Fay Sharpe LLP, to learn more about the potential impact of Europe's Unified Patent Court (UPC) and its affect businesses active in those countries.

What is the UPC?

Under Europe's current system, a patent applicant must seek validation in each country where protection is sought. Validation can be prohibitively expensive if protection is sought in many different countries, particularly if the countries have different language requirements.

Patent rights also are enforced on a country-by-country basis, which can mean inconsistent results and uncertainty.

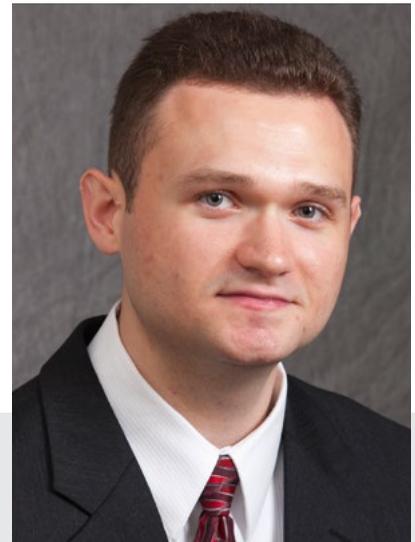
The European Union patent package (EUpp) was designed to streamline the validation process and address enforcement inconsistencies. It included regulations to create the European patent with unitary effect, regulations to install a simplified language system to reduce the number of translations an applicant must obtain, and an agreement to create the UPC.

Twenty-five countries have signed the agreement to create the UPC will go into effect when 13 of these 25 countries, including the three with the most European patents currently in force, ratify the agreement. Most observers expect the agreement to be ratified and implemented within the next couple years. The UPC will not have jurisdiction over critics like

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Spain, which objects to the EUpp's language regulations and is not a signatory.

What is the structure of the UPC?

There are two levels: the Court of First Instance and Court of Appeal. The Court of First Instance includes the Central Division, Regional Divisions and Local Divisions. The Central Division will have three sections focused on different technology areas. For example, the London Section will preside over cases involving biotechnology and pharmaceutical patents, the Paris Section will handle information technology patents, and the Munich Section will oversee automotive and mechanical patents.

The Court of First Instance will not include juries of lay people. The idea is that technical and legal experts may be better at analyzing complex facts and less susceptible to emotional appeals than juries of lay people. The presiding panel will generally include three legally qualified judges and technically qualified judges. If both parties agree, a single, legally qualified judge may hear a case. There are somewhat different requirements for the nationalities of judges and the breakdown of legally qualified and technically qualified judges for Local Divisions, Regional Divisions and the Central Division.

At the Court of Appeal, a five-judge presiding panel will include two technically

qualified judges and three legally qualified judges from different countries.

Unlike lifetime federal appointments in the U.S., the UPC judges will be appointed to renewable six-year terms.

What are the expected effects of the UPC?

The UPC is expected to eliminate inconsistent rulings by courts in different EU countries that have ratified the agreement. It also raises the stakes of litigation. Under the current system, an adverse decision in one country does not necessarily rule out a favorable decision in another. In contrast, an adverse decision by the UPC would apply to all countries that have joined it.

For a transitional period of seven years after the UPC is established, a party that desires to avoid a unitary decision may opt out of the UPC and litigate before national courts individually. Although this option may be more expensive, it may appeal to risk-averse clients that want to avoid the UPC.

The UPC has several procedural protections for defendants against the frivolous claims of patent trolls. For instance, its 'loser pays' system may force the patentee to pay the court costs of the alleged infringer if the case is meritless. Joinder limits also force a patentee to sue unrelated alleged infringers individually, increasing litigation costs and creating a disincentive to frivolous infringement suits. ●