

Dear members, ladies and gentlemen,

the past weeks have been eventful and have raised expectations for the year 2014. Due to the stable government majority we confidently expect reforms and decisions concerning the patent system in general, and the subject of the new Unitary Patent in particular. In November 2013, a survey by patentverein.de conducted among entrepreneurs at the SPS IPC Drives trade show in Nuremberg has proven that there is a high information demand regarding this complex topic. Hardly any of the respondents was sufficiently informed about it.

We are making concrete demands for the future organization of the Unitary Patent, which we will gladly present to you in this issue of the “patentverein.de bulletin”.

Of course, we will also inform you about events related to the 10th anniversary of our founding and about the results of the general assembly in Nuremberg, at which the founding board was unanimously reelected.

We wish you a happy and successful new year and we will be glad if you stay involved in the patentverein.de in 2014.

Dr. Heiner Flocke

Chairman patentverein.de e.V.

EDITORIAL

Demands for the Unitary Patent

The basic conditions for the Unitary Patent are still unclear. What is certain, however, is that the Community patent presents opportunities and risks for the German medium-sized businesses (SMEs). Through a regulation in December 2012, the European Union decided on the “European patent with unitary effect” (short: “EU Patent”). A competent, so-called Unified Patent Court (UPC), shall be established through a treaty in the form of a convention which so far has been signed by 25

states.

The package of regulation and convention will not enter into force until Germany, Great Britain, France, and ten other participating states have ratified the convention. Spain is neither taking part in the convention nor in the regulation. Italy wants to take part in the convention for the Unitary Patent Court. However, it does not want to take part in the regulation for the EU Patent. Paris shall be the headquarters of the Unified Patent Court, with central divisions in London and Munich (mechanical engineering and lighting, amongst others). The court of appeal is located in Luxemburg. The individual member states can and will establish local divisions. The EU Patent would entail that the property right for an invention applies to all participating member states of the European Union. At the same time, the system of bundle patents on the basis of the European Patent Convention and the national patent systems of the member states persist. Applicants shall be able to choose between the new EU Patent, the existing EP bundle patent, and the national application, for example at the DPMA.

patentverein.de generally embraces the idea of a “Unitary Patent” in Europe, and particularly that the Unified Patent Court shall decide upon patent infringement and validity, and the UPC’s possibility to investigate the question of the patent’s legality in the infringement proceeding by consulting a technical judge.

Unfortunately, the package consisting of regulation and convention is afflicted with severe deficiencies. The convention especially lacks detailed procedural regulations for the future Unified Patent Court. It is unregulated in particular, when the court is supposed to suspend the infringement litigation in favor of a decision concerning the legality of the patent granting, or when it is supposed to consult a technical judge before making a decision.

It needs to be noted that those local divisions in the member states are competent for the patent infringement proceedings in whose territories the actual or impending patent infringement occurs. The plaintiff can therefore generally choose between multiple local divisions in different member states. Thus, the risk of extensive forum shopping in support of those local divisions which tend to neither stay the infringement proceeding in favor of a validity check nor adjudicate upon the question of validity. The EU patent even offers the patent holder the choice to avoid the validity check of his patent in a lawsuit according to bifurcation, which in turn is beneficial to patent tactics and forum shopping, and which disadvantages innovative SMEs. “Infringed but invalid” refers to the completely unacceptable and constitutionally intolerable cases in the current patent court practice due to bifurcation.

Furthermore, the “patent with unitary effect” is lacking exactly this unitary effect for the entire European Union, since Spain and Italy are not taking part. The costs of the application have not finally been settled yet. patentverein.de therefore makes

demands and points out the possible consequences of the EU Patent implementation:

1. patentverein.de particularly calls upon the German Bundestag to only agree to a ratification of the convention if detailed and medium-sized suitable **rules of procedure** will be established within the convention for clarification of the patent portfolio in infringement litigations before the Unified Patent Court. patentverein.de refers to its introduced bill for provisional legal protection toward the granting of a patent, which includes precise proposed rules regarding this question.
2. The new EU patent politically cannot afford to fail; therefore crucial is the **acceptance** by the applicants in Europe. The acceptance is further determined by the costs, which need to be lower for the EU patent compared to the existing EP bundle patent with an average application rate of three treaty states.

Jurisdiction is essential for the acceptance by the regular applicants that dominate the patent system in terms of the number of applications. Why would a regular applicant that uses patents as instruments of power in the competition have his threat potential undergo a validity check in a lawsuit, if he can currently still appeal to German civil courts (especially in forum shopping) which have the independent competence to adjudicate upon infringements and enforce – even on the basis of questionable patents. Furthermore, it is still completely uncertain if the proceedings before the new Unified Patent Courts can be measured against the relatively low proceeding costs in Germany.

3. Patent court in Paris, court of appeal in Luxemburg: This could possibly discourage those medium-sized German companies which so far have been involved in the lawsuits instead of financing the representation battles solely through lawyers. patentverein.de is skeptical of the legislative procedures concerning the package of regulation (patent with unitary effect) and convention (Unified Patent Court) due to the named deficiencies and the freedom of choice for the patent holders. The majority of the patent infringement proceedings in the EU are conducted in Germany. Therefore, the German courts virtually constitute the backbone of the patent jurisdiction in the EU. If the package's deficiencies will not be resolved, patentverein.de pleads to reform the German patent procedural law with the aim of a stronger connection between infringement and revocation proceedings. With its bill for provisional legal protection regarding the granting of a patent, patentverein.de has developed detailed proposals on this and therein particularly demands the **stay** of the infringement litigation as a rule so long as the jurisdiction of the granting of a patent remains questionable.

Dr. Heiner Flocke, chairman of patentverein.de, therefore requests: “Medium-sized companies are now challenged more than ever to fight for an effective and medium-sized friendly organization of the patent system. Only then can the patents provide a real chance for innovative businesses.”

GENERAL MEETING

Executive board of patentverein.de reelected

Political work shall be continued and extended



The reelected board of patentverein.de e.V.: Lothar Kübler, Dr. Heiner Flocke and Burkhard Stritzke (from left to right)

patentverein.de e.V. celebrated its 10th anniversary and has reelected its founding committee in the course of the electric automation exhibition SPS IPC Drives in Nuremberg. The annual meeting of members confirmed Dr. Heiner Flocke from iC-Haus GmbH as chairman, as well as the board members Lothar Kübler from Kübler Group Fritz Kübler GmbH and Burkhard Stritzke from Lenord, Bauer & Co. GmbH.

The association has set itself three goals for the next year: The work for more patent quality shall be expanded. The goal of realizing the provisional legal protection regarding the granting of a patent – as already demanded in the bill – is an equally high priority. Furthermore, the association will continue to advocate the implementation of the EU Patent with medium-sized suitable changes and improvements. Dr. Heiner Flocke, the old and new chairman, is convinced: “With the help of a lawful patent system, we are on the right track again to support innovations for the benefit of the citizens. In order for our voice as medium-sized businesses to be heard, we need to continue to explicitly point out deficits and possibilities for reform, such as the EU Patent with technically qualified courts.”

APPOINTMENT REPORTS

November 13, 2013: ZVEI section microsystems technology: Guest speaker Dr. Heiner Flocke “Patent strategies for medium-sized businesses”, Frankfurt a.M.

The talk critically addressed the problems in the patent system and developed defense strategies for questions concerning patents, especially for SMEs: SME weighting of protective mechanisms, missing legal protection regarding the granting of a patent, EU Patent, and patent infringement.

November 26-28, 2013: SPS IPC Drives Trade Show, Nuremberg

Twelve Bachelor students in Technical Journalism from the Technical University Nuremberg took on the task of doing “public relations work for patentverein.de at SPS IPC Drives” in October/November. Besides a flyer for patentverein.de, they also developed a press kit, as well as several press releases beforehand. The implementation of the EU Patent (Patent with Unitary Effect) has been the main focus of their work. A survey among trade show visitors and some video interviews at the trade show have clearly shown that the knowledge of this new patent format, which is awaiting the ratification by the member states of the EU, is sparse. The majority of the nearly 50 interviewed SMEs and corporate enterprises did not know about the EU Patent; in contrast to the corporate enterprises, the majority of the interviewed SMEs do not use the existing patent system.

December 3-4, 2013: EPO 40 Years European Patent Convention, Munich

EPO ECONOMIC AND SCIENTIFIC ADVISORY BOARD: Workshop on the economic effects of the Unitary Patent and the Unified Patent Court

patentverein.de participated in the discussion on the behavior of the industry as applicant for the new EU Patent system. The represented conglomerates showed a remarkable commitment to the EU Patent, resigning parallel national applications and EP bundle patents, so far as the costs are acceptable. Furthermore, these heavyweights and regular applicants of the patent system would embrace the unitary, technically qualified patent courts with exclusive jurisdiction in infringement and validity cases, as it would unify as well as simplify their own patent strategies. This leaves no room for forum shopping or tactical patent games.

To a certain extent the workshop criticized the German bifurcation system, which is not planned for the organization of the Unitary Patent Court (UPC). It is probably due to the pressure for compromise to Germany as the main court location that once again, a freedom of choice persists. Some participants assume that the German infringement courts sooner or later have to and will adjust to the proceedings and the tenor of the UPC. Thus, the development of a new court tradition will be left to the

principle of hope.

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