The present and future EU landscape for patent litigation

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Roadmap

What is the current legal landscape in the EU?
  – How are the courts being used to assert patents NOW?
    – 4 case studies
  – Tactics used in the prosecution of patents
  – The rise of trolls
  – EU competition law – a sword and a shield . . .

How will it change?
  – Is community-wide patent enforcement a real prospect?
  – What other developments are likely?

Some comments on the US position
What is the current legal landscape in the EU?
How are EU courts being used now?

- Quick results in UK for *invalidity* attacks
- Availability in UK for *essentiality* to be tested
- Border detentions in NL (and elsewhere)
- Infringement in DE: quick and pro-patentee procedures
- Criminal proceedings in IT/DE
Case study 1: Rambus in DE/UK/FR/IT

- Developed RDRAM technology
- DE/UK/FR/IT - brought infringement claims vs Hynix and Micron re: JEDEC-standard SDRAM memory chips
- Actions stayed in 2000 pending EPO, then patent revoked in EPO in 2004
- US proceedings ongoing . . .
- August 2007 – EC SoO to Rambus alleging "patent ambush" – Art 82 abuse
Case study 2: Interdigital in UK

- Patent licensing company re: wireless technology platforms
  - “aggressive licensing policy”

- In the UK
  - CA re-affirmed jurisdiction for DONE on 5 Dec 2006
  - UK1 – trial of DONE on 2 IDT GSM patents, settled
  - UK2 – 31 IDT 3G patents challenged – all but 3.5 patents admitted not essential (Oct 07)
  - UK3 – 35 Nokia patents challenged (trial in tranches over 14 months in 2008-9!)
Case study 3: Sisvel in UK/DE/NL/IT

- NL - border detention based on *asserted* essentiality to mp3 standards, followed by litigation

- DE - criminal law - public prosecutor seized *allegedly infringing* products (also IT)

- UK - SanDisk brought revocation, non-infringement and non-essentiality claims

- UK – Art 82 dominance challenge to Sisvel failed (Mar 07) – no jurisdiction and anyway no abuse!
Case study 4: Inpro in DE and UK

- Dispute with RIM over Blackberry technology

- Inpro sued in Germany, RIM sought revocation in UK & DE

- UK - trial in 5 months ("streamlined procedure") - patent invalid

- Compare with US – ntp received $612 million . . .

- NB – Also RIM v Visto (Mar 08): 2 RIM and 1 Visto patent revoked by UK court
Summary - how are EU courts being used now?

- Quick results in UK for *invalidity* attacks
- Availability in UK for *essentiality* to be tested
- Border detentions in NL (and elsewhere)
- Infringement in DE: quick and pro-patentee procedures
- Criminal proceedings in IT/DE
- Others (eg *saisie* in France)
Tactics used in the prosecution of patents

- 1st application sets priority date and defines disclosure
- Patentee can then amend claims provided they are supported by initial disclosure
- Divisional – divide separate inventions into separate ongoing applications
- Then prosecute divisional(s) as separate applications
- G1/06: “unsatisfactory” practice, but unobjectionable

General prosecution and divisional filing practice in the EU – used to map claims onto standards
The rise of trolls

- US: forum shopping, juries, triple damages for “wilfulness”, contingency fees
- EU: no juries, no triple damages, no pure contingency fees
- But there is forum shopping . . .

US is primary hunting ground for trolls – but procedural advantages in EU make it attractive
EU competition law – a sword and a shield

Worldwide, the agency most active on investigating/penalising misuse of market power is the European Commission.

For example:

- **Microsoft** (fines and sanctions)
- **Rambus** (statement of objections)
- **Qualcomm** (investigation announced)

EU law also raised (unsuccessfully) in **Sisvel** case

US and Asian companies are bringing their disputes to Europe . . .
How will the landscape change?
Community-wide patent enforcement

- Various attempts at Community Patent:
  - CPC in 1975 (never ratified)
  - Community patent proposed again in 2000 (Lisbon)
  - “Common Political Approach” in 2003
  - But then silence, and Commission announces CP dead in 2006
- In parallel, EPLA made progress:
  - IGC in 1999
  - International Treaty draft in 2003
  - Then no progress – Commission opposes EPLA (doctrine of pre-emption/mixed competence)
  - 2005-2007 – judicial and political support: progress!
  - 2006/7: France, Spain, Italy, Portugal, Cyprus, Luxembourg, EU Parliament object!
CP: surprising late 2007 developments

PORTUGUESE PRESIDENCY:

1. 12 July 2007 – Agenda for 4 meetings with national experts
2. 10 October – First “Non-Paper”: bifurcation on table – UK v Germany
3. 30 October – Third Paper (Working Document No 14492/07) – now has UK and broad support for:
   - Central chamber and national/regional chambers
   - Pure validity actions and declarations of non-infringement go to central chamber
   - Counterclaims for invalidity heard locally with full court (German support?)
   - Standard procedures for all courts (based on Venice Resolution)
   - One level of appeal on substantive patent issues
   - Limited review by ECJ
   - Flexible language regime
CP: the future – it’s now or never!

- EPLA - VENICE 2007
  - Dr. Fröhlinger wins cautious support of Judges for Portuguese proposals: “EPLA IS DEAD”

- CP – the opportunity in 2008
  - Portuguese report to Competitiveness Council dated 9th November:2007
  - Broad agreement on “most” of key features of 14992/07
  - Outstanding is issue of bifurcation at first instance and the language of judicial proceedings
  - Work must now begin on COMPAT urgently
  - Slovenian Presidency: March 2008 - issued working paper & further meetings of experts planned (languages, fee allocations)
  - French Presidency: July 2008
  - EC personnel change at end 2008
In the meantime . . .

- Forum shopping in the EU
- The rise of the trolls
- Patents drafted onto standards
- EU anti-trust law will become increasingly influential
EU competition law

- Appears that the Commission will be increasingly active in investigation of oppressive use of litigation as an abuse of a dominant position
  - Eg comments in *Astrazeneca*
  - Effect on standards: EC complaints and/or defences in litigation may arise from
    - unreasonable / false assertion of essentiality and effect on licensing (stacking)
    - Patent concealment (ambush)
    - Refusal to licence on FRAND (but what is FRAND?)
Some comments on the US
The US environment is patentee-friendly

- Juries, presumption of validity, triple damages, contingency fees, no costs awards, software patents . . .

- Forum shopping:
  - Eg. Eastern District of Texas
But that is changing . . .

- eBay – award of an injunction is discretionary
- KSR – obviousness decision, already having an effect in the USPTO Court/Legal system
- Legislative changes . . .
US legislative proposals

- **HR 1908 proposals**
  - Limits to damages (reasonable royalty is economic value attributable to the patents specific contribution)
  - Venue (limiting choice of “rocket dockets”)
  - Wilfulness (good faith belief of invalidity)