

NPEs in the new UPC patent landscape

The scope for broad injunctions at the new court could attract the attention of non-practising entities, according to lawyers at [Knobbe Martens](#)

After at least a decade of delays, the Unified Patent Court has finally launched in Europe.

The UPC wields powerful remedies; particularly important among these are injunctions that apply throughout its 17 member states. There is growing concern among US-based companies with global intellectual property assets that such broad injunctions may incentivise non-practising entities (NPEs) to bring infringement suits in the UPC at a higher rate than the EU has typically seen.

This article examines the potential for the UPC to develop into a favorable forum for NPEs to assert patent rights in Europe, albeit through a different strategy than is typically seen in the US.

In the US, NPEs, sometimes pejoratively referred to as patent trolls, often utilise a nuisance model that works largely as follows: the entity acquires rights in a patent portfolio (frequently of dubious strength) and then asserts these rights against a plethora of companies by either threatening or filing multiple lawsuits in various district courts. The NPEs then offer a settlement that is lower than the expected cost of defending the action, and the targeted companies often rationally choose to pay the nuisance settlement to minimise their losses.

This strategy works well for the NPEs in the US for a handful of reasons. Among these are that the fee required by the court for bringing a patent infringement suit (\$402) is a trivial component of litigation.



Additionally, the US allows for contingency fee arrangements in which lawyers are only paid upon a successful outcome. Further, even if an NPE loses a case, they will generally not be required to pay the defendants' fees and costs. In conjunction, these factors allow NPEs to initiate numerous actions at very low cost and relatively low risk to themselves.

In contrast to the relative ease of bringing actions for NPEs, the targeted companies, accused of infringement, face lengthy and expensive discovery early in the lifecycle of any lawsuits that are filed. Such accused infringers often consider an early settlement that avoids the time and expense necessary to defend a lawsuit as the best course of action, once they are threatened by an NPE.

The damages granted in the US also weigh in these settlement decisions. Courts in the US are amenable to large damage awards based on many different theories. NPEs can also allege willful infringement, which exposes defendants to the possibility of treble damages.

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One might initially expect based on a cursory inspection of the UPC's rules and procedures, that NPEs would avoid the new court system. For example, the filing fee for an action at the UPC is, at a minimum, over thirty-five times more expensive (\$13,500) than corresponding fees in the US.

In high-value actions, this fee can balloon to over \$360,000. Defendants in the UPC pay no part of this fee.

Moreover, defendants in the UPC have minimal expenses in the early stages of litigation, as they are not forced into costly discovery proceedings. Further, the UPC follows the globally common "loser pays" rule, in which the losing party must shoulder both parties' attorney's fees.

Accordingly, accused infringers have minimal exposure until much closer to the time the UPC reaches a final decision. Even if an unfavorable final decision is reached, the UPC limits recoveries to compensatory damages; neither punitive nor treble damages are available.

These factors are partially responsible for the widespread view in the US that patent trolls are a predominantly US phenomenon.

However, this view oversimplifies the activities of patent trolls. While it is true that the nuisance settlement strategy commonly employed by NPEs in the US is largely ineffective in the EU, entities have adapted other assertion strategies in view of the procedural and substantive frameworks that exist there. In brief, the strategy that many NPEs have adopted in the EU is based on the ability to obtain injunctions for use in settlement negotiations.

In the US, injunctions, particularly preliminary injunctions, are difficult to obtain. A plaintiff can only obtain an injunction upon a showing of irreparable injury, along with other factors that typically do not favor an NPE.

In Europe, injunctions are cheaper and easier to obtain. Article 62 of the UPC Agreement allows the UPC broad discretion to grant provisional injunctions after weighing the interests. National courts of various EU member states including Germany and Italy have long had similar standards in place, and they have typically required minimal evidence to grant such injunctions.

The UPC offers litigants the chance to obtain injunctions that are effective in all 17 of its member states. On its own, an injunction does not provide much benefit to an NPE that, by definition, does not practice its own patent's claims. However, these broad UPC injunctions may provide a powerful bargaining chip for NPEs in settlement discussions with multinational and global companies that cannot afford to give up their European market.

NPEs looking to assert weak IP against multiple smaller companies may not have the tools that are available in the US to obtain favorable outcomes at the UPC. However, NPEs with even a moderately strong patent portfolio may be able to achieve success in Europe by obtaining injunctions valid in the 17 member states of the UPC. These injunctions can be leveraged as a part of a global settlement strategy against large corporations seeking to resolve not only the UPC proceedings, but also parallel proceedings in the US and elsewhere.

As the UPC only came into effect in June 2023, it is not yet certain that injunctions will continue to be as freely available as they have been at the national courts. Indeed, there have not yet been any cases that have reached a final verdict on the merits; the first decisions of the new court will likely be issued in the Spring or Summer of 2024. There is thus little empirical data relating to how the UPC will decide injunctions or how it will award damages. NPEs will be paying close attention as the first wave of forthcoming UPC decisions shed light on the approaches that the court will take.

Companies concerned about NPEs would be wise to pay similar attention.

Michael Schneider of the Munich office of Eisenfuhr Speiser Patentanwälte Rechtsanwälte provided valuable background information and assistance for this article.



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