

Unified Patent Court IT system and confidentiality issues

Introduction

The IP Federation represents IP intensive companies in the United Kingdom – a list of members is attached. Our member companies are extensively involved with IP in Europe and internationally. Not only do they own considerable numbers of IP rights, but they are affected by the activities and IP rights of competitors.

UPC IT system and confidentiality issues – IP Federation bullet points

The following summarises concerns amongst IP Federation members regarding the broad issue of information security within the Unified Patent Court (UPC) system. Whilst these issues have arisen in the context of the UK Intellectual Property Office's proposals regarding the IT system for the new court, the issues have wider ramifications, including as to how the Court deals with the issue of parties' legitimate confidentiality concerns. The IP Federation is considering a more detailed position paper on these important issues, but in summary:

1. In relation to the IT system itself, we understand it is envisaged that this will be a hosted, cloud-based service, which will allow access in a "bring your own device" (BYOD) fashion (i.e. it will be accessible from smartphones, tablets, etc.). It goes without saying that such a system must comply with the highest standards of information security. However, given that any increase in accessibility inevitably decreases the levels of security that can be maintained, we might also question whether a BYOD approach is really necessary.
2. That however brings up the much more fundamental issue of what exactly will be stored on the system and who is intended to have access to it. That issue involves finding the correct balance between transparent / open justice and the need, where appropriate, to protect parties' confidentiality. This issue arises throughout litigation, whether at the point of filing a claim, during proceedings, at hearings, or post-judgment. The issue goes much wider than the IT system itself, although the IT system will be a key part of it.
3. The issue of confidentiality is one on which very little is said in the UPC Rules of Procedure. In addition, where it is mentioned, the Rules are fairly vague and non-prescriptive (see e.g. Rule 190(1) and Rule 262). We believe this lack of clarity could have a serious impact of the effective operation of the system – for example, we believe litigants will be deterred from using the system if they do not believe the confidentiality of their materials (e.g. technical documents) will be preserved.

4. The approach taken by the English court is multifaceted and involves a mixture of procedural rules, case law and established practice. However, the end result is that litigants can have confidence that, within reason, their confidential materials will be protected during the course of patent litigation proceedings. For example:
 - i) Parties are not required to file all documents with the court prior to trial. Instead, only the parties' main pleadings are filed with court. Whilst these will generally be accessible to the public, the court can also make an order for the court file to be sealed where appropriate (this is admittedly quite rare).
 - ii) Where confidential materials are relied on, parties can generally avoid having to file those documents at court. Often this is achieved through the use of confidential annexes to the pleadings, which are only served on the other parties rather than being lodged with the court. This is something that is tolerated by the courts in practice and does not result in claims being barred.
 - iii) The courts are familiar with confidentiality "clubs" (or "rings"), which can either be agreed between the parties or imposed upon them by the court, to control the circulation of confidential materials during proceedings. This will frequently involve limiting the circulation of documents to named individuals within the claimant / defendant companies.
 - iv) Court hearings can be heard in private where necessary, although this is rare for patent cases. The more common solution in practice is for the court to order that certain parts of the court record shall remain confidential after the hearing / trial (transcripts of that part of the hearing, as well as documents referred to during that part of the hearing, can therefore remain confidential and will not be available to the public).
 - v) The court is also able to issue redacted judgments, to avoid the need to refer to parties' confidential information in the public judgment.
5. In contrast, we are aware of other countries where parties may have confidential materials seized, with the confidential materials then potentially being included as part of the bailiff's report, and then subsequently published as part of a public judgment if the judge relies on that information in his or her decision. As mentioned, there is also considerable diversity of practice across Member States (e.g. regarding access to court records, use of confidentiality clubs, use of confidential information in judgments etc.).
6. We believe this type of uncertainty is unhelpful, could result in forum shopping, and will deter litigants from using the system. We therefore believe the framework by which confidential information / documents should be handled in the UPC should be specified. Ideally this would also be resolved in advance of the court going live, through additional provisions in the Rules of Procedure.

IP Federation
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IP Federation members 2014

The IP Federation represents the views of UK industry in both IPR policy and practice matters within the EU, the UK and internationally. Its membership comprises the innovative and influential companies listed below. The CBI, although not a member, is represented on the Federation Council, and the Council is supported by a number of leading law firms which attend its meetings as observers. It is listed on the joint Transparency Register of the European Parliament and the Commission with identity No. 83549331760-12.

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