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Prospects And Challenges For Expert Evidence At The UPC

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Two years after the creation of the Unified Patent Court in Europe, the use of expert witnesses by parties in UPC proceedings has remained limited. To the best of our knowledge, expert testimony on economic or damages-related issues has not played a part in UPC proceedings.

This will change, likely sooner rather than later. This article is intended to assist counsel for parties involved in UPC proceedings to be better prepared for this inevitability.

Areas in which such testimony may be provided include, inter alia: opining on the economic effects of the grant of an injunction, preliminary or permanent; assessing damages in relation to a finding of infringement; and assisting the court in understanding general market and economic circumstances.

While economic expertise may be applicable in cases spanning a variety of industries, we focus on its use in disputes involving parties in the life sciences industry.

After briefly summarizing developments at the UPC, including the use of experts thus far, we explain why we believe expertise on damages and economic issues will become highly relevant in the near term; review some important open questions with respect to the deployment of such expertise; and conclude with a summary of key challenges that counsel, their experts and the court are likely to encounter.

UPC Establishment and Goals

The unitary patent system, encompassing the creation of unitary patents and the establishment of the UPC, took effect in June 2023, having as its legal basis the Agreement for a Unified Patent Court.

The court has authority to rule on infringement, validity, and remedies with respect to both declared unitary patents, i.e., patents having a unitary effect across member states, and classic European patents granted by the European Patent Office, or EPO, assuming the patent owner has not opted out of UPC competence.[1] Eighteen countries have become UPC member states.

The unitary patent system is intended to streamline patent procedure by enabling a single patent to

have effect across all member states. The court aims to reach decisions quickly, within approximately 14 months of initiating proceedings.[2]

As of this April, UPC courts of first instance had received 836 cases.[3] Life sciences companies have figured prominently in the success of both the unitary patent system and the UPC. Nearly 20% of unitary patents declared by late 2024 relate to life sciences subject matter, and patents in related technology classes have accounted for 27% of UPC infringement proceedings and over half of all stand-alone revocation actions.[4]

Expert Evidence at the UPC

The use of expert evidence is relatively uncommon in certain UPC member-state national courts. Article 53 of the Agreement for a Unified Patent Court states that the court has authority to consider all relevant evidence, including opinions by experts. Expert witnesses in UPC proceedings are expected to submit a written witness statement and, depending on the case, may be required to provide oral testimony and be subject to cross-examination.[5]

Parties have submitted expert evidence on technical questions in several recent UPC cases;[6] as such, written and oral technical expert testimony is not unknown in UPC proceedings. In contrast, we are not aware of expert testimony in UPC matters on economic and damages issues. We expect this to change.

First, based simply on the volume of UPC cases, the duration of the court's operation and the pace at which merits decisions have been issued, it is reasonable to expect a material number of cases to reach the stage at which damages evidence would be heard during the next 12 months.

Damages and adjacent economic concerns have already arisen to a limited degree in recent matters. For example, in NanoString v. 10xGenomics, resolved last month, NanoString sought damages for the period it was barred from the market due to a preliminary injunction.[7] In Sumi Agro v. Syngenta last year, the UPC Court of Appeal cited the risk of permanent price erosion in the marketplace as an important factor in considering whether an injunction is necessary.[8]

Second, the enhanced stakes at issue at the UPC weigh in favor of more cases reaching the damages phase than parties might be accustomed to from their experience in patent litigation in European national court systems.

The more expansive jurisdiction of the UPC, covering an area with a population of nearly 300 million, and generating a GDP of more than €12 trillion (about $13.88 trillion), should make the additional effort and expense of a damages inquiry a much more attractive proposition to parties.[9]

Recent decisions indicate that the UPC's effective jurisdiction could be expanded even further. In BSH Hausgeräte v. Electrolux, the Court of Justice of the European Union held in February that courts in the EU, including the UPC, have the power to decide on infringement of foreign patents, including those of non-UPC member states such as the U.K.[10]

This significantly broadens the geographic footprint that may be at issue in eventual damages assessments; for example, the 39 member states of the EPO have a population of over 700 million.

Open Questions

Despite our conviction that damages and economic expertise will become an increasingly relevant component of UPC proceedings, there remain open questions. One concerns the lens through which the court will address damages issues, given the lack of jurisprudence in this area.

Established damages methodologies have a long track record in the U.S. and the U.K. These include the hypothetical negotiation approach to reasonable royalty determination and various approaches to determining lost profits, including, in the U.S., the conventional four-factor Panduit test and its elaborations and extensions.[11]

Will the UPC adopt similar methods in future damages inquiries? It seems plausible that the court will look to wider experience with standard methods for its guidance, even if those methods have been applied principally in jurisdictions outside the UPC member states.

In addition, the relevance of economic evidence in injunction proceedings remains an open question. The UPC Court of Appeal ruled that the presumption of potential financial loss due to patent infringement does not strictly require evidence of irreparable harm.[12]

However, as noted above, the UPC Court of Appeal considered economic factors in the form of likely price erosion as part of its assessment of the necessity of granting a preliminary injunction. This is analogous to the type of evidence that is commonly evaluated in addressing the likelihood of irreparable harm to the patent owner in U.S. and U.K. preliminary injunction proceedings.[13]

Will UPC courts import comparable analyses of adequacy of damages to an extent that they are, in effect, addressing irreparable harm? Generic and biosimilar entry at risk is not uncommon, and price erosion effects are likely to be as relevant in many European national markets as they are in the U.K. On balance, it is reasonable to expect these issues will be heard at the UPC.

Challenges Ahead

Several challenges may arise with respect to the application of economic and damages expertise at the UPC.

A first challenge concerns the sheer speed at which the UPC has heard disputes and issued decisions during its short history. It is not unusual for an expert report on irreparable harm to take two to four months to prepare.

Expert reports containing a detailed assessment of damages typically take even longer, with a time frame of at least three to six months being fairly common, with relatively less time for simpler reasonable royalty analyses and more for the inevitably more complex analyses of lost profits. Intensive work with market data, including any econometric analyses, can require even longer.

This may raise challenges for counsel and the experts they retain, depending on the ambitiousness of the schedule set by the court. At a minimum, it would appear important for counsel to instruct experts sufficiently early in the process — potentially before the conclusion of the infringement phase — to ensure enough time remains to complete the work.

The second challenge relates to the wide geographic span of UPC jurisdiction. Damages experts normally deal with one national market at a time. In contrast, differences in healthcare systems and product reimbursement across multiple national markets will be highly relevant for the determination of

damages at the UPC.

For example, circumstances may arise in which a damages analysis calls for the estimation of sales revenues for a pharmaceutical product assuming the absence of the infringement.

One might create a bottom-up forecast of category use based on data on national population, disease incidence and treatment rates, and then estimate and apply the but-for share of sales for the product along with prices applicable to each market. Conducting this type of analysis for a set of different countries requires expertise in the methods as well as the different national healthcare and reimbursement systems.

Third, the average sophistication of the damages methods applied in UPC proceedings may be higher than in cases in other jurisdictions. Medical device patent litigation provides a useful illustration. Numerous cases heard by the UPC thus far have involved medical devices.[14]

These tend to be complex products composed of many features, some of which may be patented and some not. In assessing damages for infringement of a patented technology bearing on one feature, it is important to disentangle the marketplace footprint, i.e., value, of that feature from the other product characteristics that may drive sales volumes and/or prices.

This apportionment exercise, which is relevant in both reasonable royalty and lost profits analyses, requires care from the damages expert lest it be mishandled.

Apportionment has received considerable attention in U.S. patent litigation. For example, the U.S. Court of Appeals for the Federal Circuit has ruled that in cases involving multicomponent products, damages based on a reasonable royalty should be calculated using sales of the "smallest saleable patent-practicing unit," not sales of the entire product, unless the patented feature is the basis for demand for the entire product, as it explained in LaserDynamics Inc. v. Quanta Computer Inc. in 2012.[15]

U.S. courts have also excluded testimony from experts who were deemed insufficiently careful in apportioning the royalty base or sales lost due to the infringement.[16]

If apportionment issues are central to damages analyses with respect to medical devices, and medical device companies are prominent users of unitary patents and the UPC, then it follows that complex issues of apportionment will become relevant in UPC proceedings. It will be useful for counsel unfamiliar with these analyses to receive a primer on the relevant concepts, and to engage experts who are experienced with their application.

Conclusion

The role of economic experts at the UPC has yet to come into focus. However, as discussed above, we expect that to change soon, presenting unique challenges for experts, counsel and judges alike, especially in the life sciences industry.

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[1] Patent owners can opt out European patents (but not Unitary Patents) from UPC competence for a transitional period of seven years commencing March 2023, the start of the UPC "sunrise period", with the potential to extend the opt-out for another seven years.

[2] Rules of Procedure of the Unified Patent Court (RoP), Preamble and Rule 118.

[3] "Case load of the Court since start of operation in June 2023 update 30 April 2025," UPC, https://www.unified-patent-court.org/sites/default/files/upc_documents/Case%20load%20of%20the%20Court_30%20April%20%202025.pdf.

[4] "Statistics & Trends Centre," EPO, https://www.epo.org/en/about-us/statistics/statistics-centre#/unitary-patent; "Case load of the Court since start of operation in June 2023 update 30 April 2025," UPC, https://www.unified-patent-court.org/sites/default/files/upc_documents/Case%20load%20of%20the%20Court_30%20April%20%202025.pdf.

[5] RoP, Rules 175, 178.

[6] See e.g., Sanofi and Regeneron v. Amgen (UPC_CFI_1/2023); Alexion v. Samsung Bioepis (UPC_CFI_123/2024; upheld in UPC_CoA_402/2024); and Abbott v. Dexcom (UPC_CFI_430/2023).

[7] UPC_CFI_2/2023; UPC_CoA_335/2023. In May 2025, the parties entered into a global settlement, resolving litigation in the U.S., the UPC, the EPO, and the German national court.

[8] UPC_CoA_523/2024.

[9] "Start of the Unitary Patent - A historic step for innovating businesses in Europe," EPO, https://www.epo.org/en/news-events/press-centre/press-release/2023/535927.

[10] CJEU (C 339/22). See also the UPC decision in Fujifilm v. Kodak (UPC_CFI_355/2023).

[11] Panduit Corp. v. Stahlin Bros. Fibre Works, Inc., 575 F.2d 1152 (6th Cir. 1978).

[12] Ortovox v. Mammut (UPC_CoA_182/2024).

[13] For a recent UK case, see e.g., AstraZeneca v. Glenmark ([2025] EWCA Civ 480).

[14] See e.g., Abbott v. Dexcom, noted above; Edwards Lifesciences v. Meril (UPC_CFI_15/2023); and Insulet v. EOFlow (UPC_CoA_768/2024).

[15] LaserDynamics, Inc. v. Quanta Computer, Inc., 694 F.3d 51 (Fed. Cir. 2012).

[16] For an example involving medical devices, see Niazi Licensing Corp. v. St. Jude Medical S.C.,Inc., 30 F.4th 1339 (Fed. Cir. 2022).