

Bifurcation: bad for business.

Our experience

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This is a presentation given to the UK IPO in Concept House, Newport on 12 April 2012 by Richard Vary and Tim Frain of Nokia. The purpose is to explain why the proposed Unified Patent Court will not benefit industry based in the UK or Europe if it allows a bifurcated system. In a bifurcated system infringement is heard and determined separately from validity. Infringement is typically heard first, and remedies awarded once infringement is determined. Validity proceeds on a separate and slower track. If the patent is later shown to be invalid, any injunction may be lifted and damages repaid.

Today bifurcation is practised by the German patent courts. Patentees seeking to enforce an injunction pending the invalidity decision may have to post a bond, to compensate the defendant if he is later shown to have been wrongly excluded from the market. But the value of these bonds is typically lower than the lost sales for the year or so that it takes to determine invalidity. The value is very much lower than the cost of factories or distribution hubs lying idle for such a period.

Under the proposals, local divisions have jurisdiction to grant pan-European relief. They may bifurcate, granting pan-European injunctions for infringement of a patent before any consideration of the validity of the patent.


Proponents of bifurcation argue that the patentee can enforce his patent more quickly and cheaply. This makes patents more valuable, giving greater reward to the inventor, and fostering innovation. The patent has already been examined for validity by the patent office: why should the patentee suffer a second examination when he wishes to enforce the patent?

In this presentation, we explained to the UK IPO why bifurcation would place European industry at a significant competitive disadvantage.

2) How does patent litigation happen in the bifurcated system?

Bifurcated system

- Race to a remedy: get injunction before patent invalidated
- argue for broad construction before infringement court, narrow on invalidity



Given that the patents tend to fail on validity, patentees prefer the bifurcated system. The fast infringement proceedings in the regional courts mean that it is (at least in theory) possible to get to an injunction before the patent can be invalidated by the slower invalidity courts, or the EPO. Patent litigation becomes a race to a remedy.

It is not easy for a defendant to get a stay of the infringement proceedings pending invalidity. The infringement court will only stay where there is clear invalidity, for example novelty destroying prior art with no dispute as to publication. So you can see that the patentee is at something of

an advantage compared to a system where validity is heard at the same time as infringement.

Patentees in a split system can also adopt the “Angora Cat” approach. Before the infringement court they argue a wide, fluffy, all-encompassing construction capturing infringement. Before the nullity court, the cat is presented wet, small and sleek, slinking between and around the prior art without touching it. This isn’t merely a theoretical problem. In EP 1 186 189, IPCom overcame GPRS prior art before Germany’s Federal Patent Court by arguing that the patent was narrow, strictly limited to a system in which threshold value is assessed before access class. In the infringement case they argued that the patent was broad, also encompassing a system where access class is assessed before threshold value. They were successful in those arguments, obtaining an injunction against HTC.

Result: If you haven’t been enjoined in Germany by now, you should probably be a little offended

| Parties | Court | Date of Decision | Decision |
|----------------------------|---------------------------|------------------|---|
| Apple ./ Motorola | Regional Court Munich I | 01 March 2012 | Injunction against Motorola |
| Apple ./ Motorola | Regional Court Munich I | 16 February 2012 | Injunction against Motorola |
| Motorola ./ Apple | Regional Court Mannheim | 3 February 2012 | Injunction against Apple |
| Apple ./ Samsung | Regional Court Munich I | 01 February 2012 | Injunction against Samsung |
| HTC ./ IPCom | Regional Court Düsseldorf | 19 December 2011 | Injunction against IPCom (misleading warning letters) |
| Motorola Mobility ./ Apple | Regional Court Mannheim | 09 December 2011 | Injunction against Apple |
| Motorola Mobility ./ Apple | Regional Court Mannheim | 04 November 2011 | Injunction against Apple |
| IPCom/Nokia | Regional Court Mannheim | 8 February 2011 | Injunction against Nokia |
| IPCom/HTC | Regional Court Mannheim | February 2009 | Injunction against HTC |

The result of a system so favourable to the patentee is that injunctions are becoming a little bit like combat wounds to soldiers: they are inevitable if you’ve been in the front line for any length of time. They mark you out from the rookies, the small players: the people who are not worth suing.

What an injunction from a German Court does not mean is that the defendant is infringing someone’s reward for a significant contribution to society. This is because the validity of the patent has not been decided before the injunction, and

if past experience is anything to go by it is statistically unlikely that any of these patents are valid.

Indeed, in some of the cases listed above, the injunction has already been lifted after the patent was found invalid. In other cases, the defendant has re-designed their products, or removed them from the

German market pending invalidity. In all cases, the defendant has incurred costs or lost sales during the period of the injunction until the finding of validity.

This disruption has not occurred in other countries where equivalent patents were asserted, principally the US, the Netherlands and the UK. For example, the patent on which HTC was enjoined (EP 1 186 189) was found invalid when asserted against Nokia in the UK. Apple obtained an injunction in Germany against Motorola on its “swipe to unlock” patent (EP 0 964 022), a patent which a Dutch court found to be anticipated by a paper from the early '90s.

3) So with that in mind, imagine you are the CEO of a high tech company.

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| <p style="text-align: center;">Imagine you are a CEO</p> <ul style="list-style-type: none">• Would you locate your factory in Germany?• Would you import into Europe via Germany?• Would you locate a distribution hub or warehouse in Germany? • Borne out in practice: we have put in place alternative arrangements | <p>Would you locate your factory in Germany? Would you import into Europe via Germany? Would you locate a distribution hub or warehouse in Germany?</p> <p>Of course not. And this is why all of these injunctions in Germany have not yet proved too disruptive to the ICT industry. Participants in the industry do not locate their factories or distribution hubs in Germany any more. Bosch and Siemens, two of the world’s greatest technology companies, have sold or closed down their mobile phone businesses. Nokia</p> |
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closed its factory in Bochum. HTC ceased importing its products into Europe through Frankfurt: Nokia too has redirected products to reduce risk of customs seizures. Since delivering this talk, the New York Times has reported Microsoft’s decision to relocate a distribution centre from Germany, expressly to reduce its exposure to Germany’s bifurcated system. If major employers such as Microsoft are leaving the county, that is very bad news for an already struggling economy. And they are doing it because of the patent system.

Microsoft has also taken a further step. Knowing that it is likely to get enjoined by the German courts over patents enforced by Motorola (before the validity trial), on 11 April 2012 it obtained an injunction from a Washington court to prevent Motorola enforcing any injunction it may obtain in Germany. To be clear, this is a pre-emptive step: the German courts have not yet granted any injunction against Microsoft.

This degree of interference in our system by a foreign court is not something that we should welcome. But I imagine that the Washington Court did not take this decision lightly: principles of comity require courts of one country to respect the jurisdiction of the courts of another, and assume that they will make sensible decisions. If a US court is prepared to order Motorola not to enforce remedies that they might legitimately expect to obtain in the European system, it shows a lack of trust that our courts will reach sensible decisions.

4) Why is the EU pushing for the bifurcated system?

Patents are a good thing. We all agree with that. They promote innovation, they foster economic progress.

But patent litigation is expensive. To litigate patents, the lawyers have to be real experts in their field. Having been involved in some general chancery litigation, I can tell you that our patent judges, patent bar and the patent solicitors' firms are streets ahead of other parts of the litigation profession. Although the subject matter is complex, their advocacy is better, their case preparation is better, and the quality of the judgments is superb. But they charge a fortune.

It is also inefficient, and even more expensive, to have to litigate in every country. The proposed system allows one court to decide for all of Europe. Patentees can file one action. Enforcement is quicker and easier. So surely this will be good for our industry?

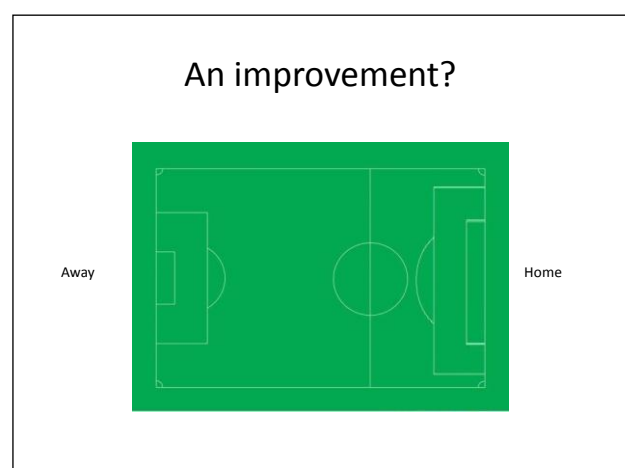
Unfortunately, it isn't that simple. Imagine if you asked management consultants to look at a football team. The objective of football is to score goals: that's what the crowds enjoy, that's what they pay to come and see. And yet despite spending millions on the most talented players, most teams only manage to score one or two goals per game. It is horrendously inefficient.

So how would our management consultants make the process more efficient? There would be more goals if we moved kick-off closer to the net. We could make the goal mouth bigger, too. And if the process of scoring was easier, we wouldn't need to spend a fortune to procure the unequalled skills of Wayne Rooney, Ryan Giggs or Richard Meade QC.

This overlooks that patent litigation, like football, is a contest. It is not just being fought in Europe. Europe is where the European industry gets sued, but we need to sue our competitors where they are located: the US, China, India, Korea, Taiwan, because that is where they are infringing our patents. Those are the countries where European businesses need efficient patent litigation systems. But what do we have there? US District courts hear invalidity and infringement together, and can take a very long time. The ITC is quicker, but statistically rarely finds for the patentee. It can only ban imports, which doesn't hurt a US-based company. And you can't use it unless you yourself have a domestic industry in the US to protect.

Then there is China, which does bifurcate. But it hears validity first, so the European patent owner has to wait a long time for a remedy. There are some domestic Chinese companies making very nice mobile phones indeed. And they can do so more cheaply than their European competitors because they have no imminent need to pay patent royalties.

So what we will have is the system on this slide. Certainly it will be quicker and easier to score goals, at least in our half. But it is not a fair contest.



5) What are the results of introducing a bifurcated patents system in Europe?

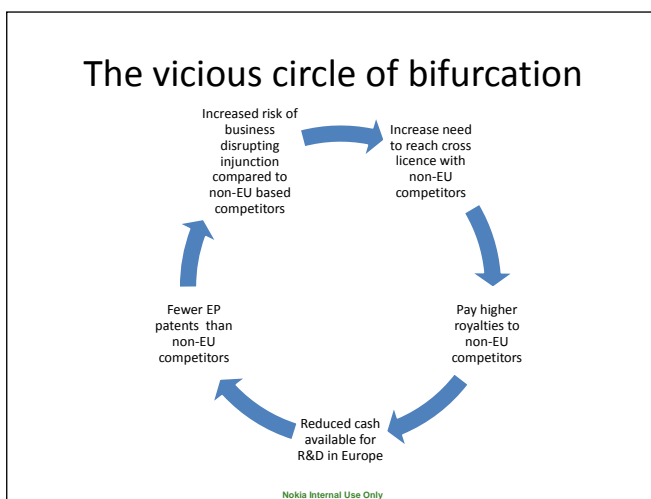
Let's just be clear, if we allow bifurcation as an option, the system will end up being bifurcated.

Imagine you are a patent owner. By suing in whichever court operates a bifurcated system, you can get an injunction covering all of Europe without having validity tested. Why would you sue in any other court?

Now imagine you are a Local Division. These divisions will be competing: the local division that attracts the most cases will secure more funding and, importantly, prestige.

We are seeing a similar process in Germany at present: by being fastest to judgment Mannheim has become the premier court, attracting high profile cases. Judges Voss and Kircher are correspondingly internationally known and respected. Other German courts are anxious to compete: Munich now offers patentees an interim decision 3 months into the case in an attempt to attract cases. Dusseldorf is opening a new chamber to reduce the backlog that is presently making it so unattractive as a venue.

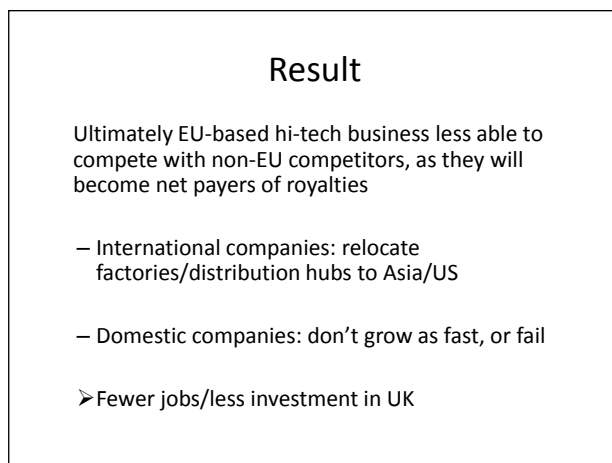
The Local Divisions will be equally anxious to attract litigants. Clearly, by operating a bifurcated system, local divisions will attract more plaintiffs. Those local divisions that bifurcate will prosper, as will the lawyers who practise in those divisions. Others will die.



What are the consequences for European industry? Businesses with factories or hubs located in the EU will face an increased risk of business-disrupting injunctions from patent litigation when compared to their competitors who don't have assets located there. This leads to an increased pressure for the European businesses to agree cross licence agreements with their non-EU competitors. To secure those licences, the European businesses will have to pay higher royalties to their non-EU competitors, which reduces cash available for R&D in Europe. This means European businesses will apply for fewer patents than non-EU competitors; which means a further increased risk of business-disrupting injunctions when compared to their non-EU based competitors. And so it goes on.

Ultimately EU-based hi-tech business will be less able to compete with non-EU businesses, as they will become net payers of royalties.

International companies can relocate factories/distribution hubs to Asia/US to reduce their exposure, but domestic companies don't have that option. The result is that they don't grow as fast, or they fail entirely because they cannot compete.



6) So what is the conclusion?

Quite simply, the current proposal is bad for European businesses, small or large. Not because there is anything wrong with a more efficient patents system: clearly that is better for patentees. But what is wrong is that the effects are disproportionate: we are making more efficient the system that US and Chinese companies use against us, without doing anything to improve the systems that we must use against them. So a more patentee-friendly litigation system is bad for European business, simply because the main beneficiaries are not European businesses but our overseas competitors. They can assert weak patents against European companies: unable to contest validity, we will be forced to settle. We are left struggling to assert even our strongest patents against them.

