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Germany
And the Academy Award for best IP venue goes to...

Introduction

Consider the following situation. A new technology emerges that takes the film viewing experience to a previously unknown level. The enthusiastic reception that greets this new technology worldwide confirms that this is a game changer – the film industry will never be the same again.

To make full use of all the new opportunities, corporate research teams working in parallel have developed different playback devices. Naturally, there are also patents on these important, yet mutually incompatible playback devices. In the hope of monopolising the whole market, the manufacturers ally themselves with filmmakers to make sure that 'their' films cannot be played back on a competitor's device. Thus, each company manages to stake out its international territory geographically. This situation prevents some of the most popular films from entering other markets, much to the dismay of eager audiences. In addition to the playback devices, there is also a wealth of patents covering the production of the recording medium itself and various other important steps in the recording process.

The multinational line-up of patent proprietors is about as diverse as it gets. There are the multinational corporations involved in everything electrical; the small teams of brilliant inventors backed by financial investors; the companies usually involved in music recording; and the movie production companies.

Soon a flurry of patent litigation in dozens of countries ensues. Some attempts to obtain evidence of infringement become cinematic themselves. Whole teams of patent experts analyse a profusion of patents with regard to their relevance for possible infringement by competitors. Strategic alliances between different patent proprietors are formed.

Finally, all the parties involved realise that it lies in the best interests of all stakeholders – including patent proprietors, playback device manufacturers, movie production companies and, of course, the general public as consumers – to establish a common patent pool.

The creation of the patent pool is the culmination of protracted legal wrangling in several jurisdictions around the world. It settles all the suits and establishes legal certainty, thus promoting the unrestricted spread of exciting technologies. The stated goal of the patent pool is to ensure interoperability and the removal of international barriers. The worldwide cinema-going audience need no longer miss a film performance just because the film can be played back only with a device manufactured by a foreign competitor.

For anybody familiar with patent pools, this situation may sound familiar. If one were to hazard a guess, the most likely events that would spring to mind are the MPEG-2 cases tried in the Dusseldorf courts. The period between 2000 and 2009 saw the filing of more than 300 patent infringement suits from a patent pool with about 800 patents and numerous proprietors.

Thus, it may come as a surprise that the story described above is that of the Paris Sound Film Peace Agreement in 1930. It appears that the fundamentals of the industry have not changed at all – only the technology has become more modern.

Of the many events leading up to the Paris Sound Film Peace Agreement, none took place in Dusseldorf, and yet one patent attorney who earned his stripes on this case would ultimately share responsibility for the fact that numerous patent cases are tried there almost 80 years later.

Films with sound: new issues for patent law

In the 1920s the film industry was not discussing MPEG video coding. It was as unthinkable as a trip to Mars. The recently emerged technology in question was that of sound. The first feature-length sound film, *The Jazz Singer*, was made in 1927. It was such a success that it single-handedly saved Warner Brothers from impending bankruptcy. Harry Warner, one of the original Warner brothers, infamously asked, "Who the hell wants to hear actors talk?" But the popularity of sound films was unstoppable.

Junior patent attorney Werner Cohausz was hired to review, manage and enforce the patents of the newly formed German firm Klangfilm GmbH, into which several companies had bundled their movie recording and playback divisions. At that point it was not even clear which of the patents held by an individual company might be relevant in terms of infringement, which patents were otherwise important and which were not.

Cohausz started out with a comprehensive inspection and evaluation of the Klangfilm patents and those of its competitors. He eventually managed to get hold of an actual competitor's film playback device, discovering that it infringed at least two of Klangfilm's valid patents. Subsequently, Klangfilm filed infringement suits in several European countries. The venues in which suits were filed included Berlin, Brussels, Budapest, Copenhagen, Milan, Paris, Prague, Stockholm and Vienna. Further filings were prepared for Belgrade, London, Rome and The Hague.

Not only was Cohausz involved in the first international litigation on film-related patents, but he was also instrumental in the shaping of the German patent jurisdiction landscape following the Second World War.

A new home for patent cases

Until the end of the Second World War, Berlin was the undisputed centre of patent law in Germany. In 1877 the Imperial Patent Office was established in Berlin. Soon after this, the leading German industrial property law firms clustered in the capital and the Berlin Regional Court became the venue of choice.

After the Second World War Germany was occupied and divided into four Allied control zones, as was the former capital Berlin. These developments later resulted in the formal division of Germany into two different countries and encirclement of the Western sectors of Berlin by the Berlin Wall.

This geographical isolation amid the looming shadows of the Cold War led to the wholesale shift of important administrative, political and economic institutions away from Berlin to parts of Germany at a safe distance from Soviet control, but the leading law firms and patent attorneys remained in Berlin. However, in 1954 Cohausz, having founded his own law firm after leaving Klangfilm, presented a bold proposal to the representatives of the Berlin firms assembled at a witness hearing: the establishment of a new centre of competence for patent jurisdiction in Germany, the heir to Berlin's previous role. Under German patent law, six courts of first instance had exclusive jurisdiction for patent infringement suits. Berlin's problematic geographical situation made it unpopular for law firms and corporations alike, but as yet none of the other venues was an odds-on favourite.

After some discussion, Dusseldorf emerged as the unanimous venue of choice for a variety of reasons. The current presiding judge of the Patent Chamber of the Dusseldorf Regional Court, Werner vom Stein, had already proven his worth and qualifications. In addition, the appointment of Judge Kusch, a well-qualified patent law judge in Berlin, to the Dusseldorf Higher Regional Court as presiding judge appeared possible. This appointment would strongly signal the concentration of Germany's most able patent law judges in Dusseldorf. The assembled lawyers asked Cohausz to conduct meetings with the state minister of justice of North Rhine-Westphalia, his colleagues in Berlin and Kusch himself to effect this appointment on their behalf.

Kusch was appointed presiding judge of the Dusseldorf Higher Regional Court and, as anticipated, shortly afterwards distinguished patent law firms moved to Dusseldorf. The rest, as they say, is history. Dusseldorf has since gained in stature with regard to patent law: what started as a patent competence centre for West Germany has now become the most important European and worldwide hub for patent decisions.

Dusseldorf: the leading patent court in Europe

As there is no Community patent for the European Union as yet, within Europe revocation and infringement proceedings are tried nationally. In theory, all the appropriate courts in Europe should be equally competent. However, in practice infringement proceedings are strongly concentrated in just a few venues. Only four of the 27 EU member states try more than 50 patent cases a year. All the other EU member states try fewer than 10 cases a year.

The United Kingdom and the Netherlands see an average of just over 50 cases a year, while France reports about 150 cases each year. In Germany, there are an average of 900 patent infringement cases a year. At the same time, the average costs of patent infringement proceedings in Germany are less than one-third of those in France and the Netherlands, and less than one-sixth of the costs in the United Kingdom.

Given these figures, it should come as no surprise that most of the parties involved in German patent proceedings, and in fact the majority of plaintiffs, are not from Germany. The fact that the proceedings are carried out in German does not detract from the venue's attractiveness to foreign plaintiffs. Simultaneous translation for the parties involved is a common practice.

The parties involved and the efficiency of the system

benefit from strong judicial competence in Dusseldorf, arising from a long tradition of excellence in this field passed down from one generation of judges to the next. Specialised lawyers and patent attorneys contribute with their extensive experience in the respective technological fields and help to present often complicated cases clearly and effectively.

The Dusseldorf judges can have recourse to a strong body of specialised case law. The underlying legal principles are often decades old and have been continually developed to keep up with current legal and technological developments. Moreover, infringement and revocation proceedings are separated, thus ensuring an even greater level of specialised expertise among the judges. In practice, a judge presiding over infringement proceedings will consider a temporary suspension only if the invalidity of the patent in question is strikingly obvious. Statistically, this is rarely the case at first instance. For infringement proceedings and revocation proceedings, there is a special senate of the Federal Court of Justice. This senate serves as the appellate court for infringement proceedings and as the court of appeals for revocation proceedings.

This strong tradition and continuing practice help the court reach a decision quickly. They also provide a framework of legal certainty. The rich history of cases decided according to longstanding principles and sound rules offers both plaintiffs and defendants a reasonable basis on which to assess the outcome of proceedings before taking action. By arriving at a realistic evaluation of their respective positions, the parties concerned can arrive at a fair estimate of their legal positions. This helps to speed up settlement proceedings because neither party should have unrealistic expectations.

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Gottfried Schüll is highly renowned for his work in patent litigation actions. He has handled such actions for global clients as lead counsel, as well as part of teams of international legal counsel. Based on his study of physics at the RWTH in Aachen, Mr Schüll handles cases related to various sophisticated technologies.