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Issue 155

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Unitary Patent (UP)

In December 2012, following an earlier European Council decision in June of that year, the European Parliament voted on the formation of a pan-European patent system which includes a Unitary Patent (UP) effective in all participating EU member states and a Unitary Patent Court (UPC)² having jurisdiction over all such member states. The coming into effect of this pan-European patent system requires ratification of the UPC Agreement by at least 13 EU countries that must include Germany, France and the UK. A total of 11 countries, including France, have already ratified the UPC Agreement. The remaining countries are the UK and Germany, with the expected ratification by both.

The Unitary Patent Protection (UPP) will make it possible to get unitary effect for a European patent in 25 EU Member States by one request. The UPP builds on the European Patent Convention (EPC). The applicant applies for a European patent at the European Patent Office (EPO). The EPO handles the application in accordance with the EPC and, if all relevant criteria are met, eventually grants a European patent. The owner of the European patent will, after grant, have the opportunity to file a request for unitary effect. Consequently, by the means of one single request, the proprietor of a European patent will be able to get patent protection in 25 Member States of the European Union.

The Unified Patent Court (UPC) will be a court common to the Contracting Member States and thus part of their judicial system. It will have exclusive competence in respect of European patents and European patents with unitary effect. The exclusive competence is however subject to exceptions during the transitional period. The UPC's rulings will have effect in the territory of those Contracting Member States having ratified the UPC Agreement at the given time. The UPC will not have any competence with regard to national patents. The UPC Agreement is open to accession by any Member State of the European Union. The Agreement is not open to states outside of the European Union. Up to date, all European Union Member States except Spain and Poland have signed the Agreement³.

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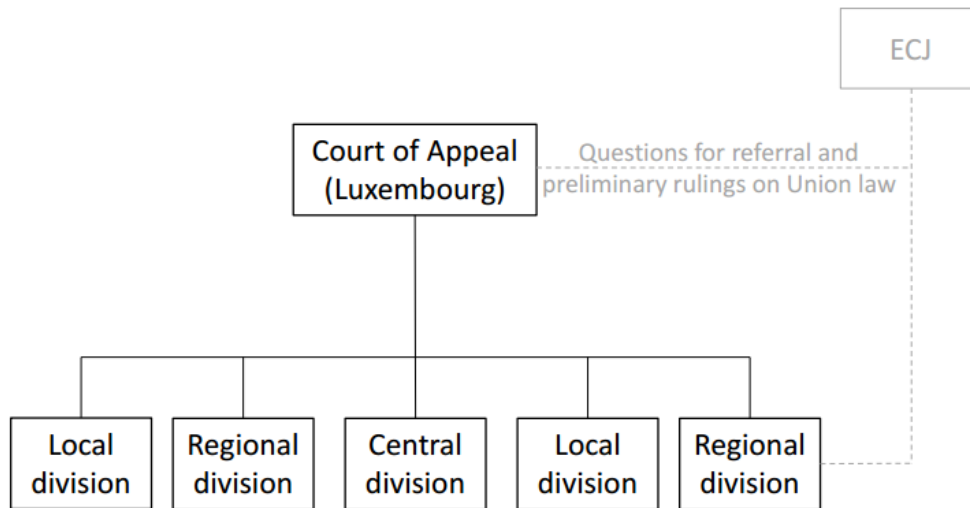
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Structure of the Unified Patent Court



ECJ = Court of Justice of the European Union

PTAB and Article III Standing Requirement

Congress created new processes for challenging the patentability of patent claims in trials before the PTAB and created statutory standing requirements and restrictions.

Phigenix, a pharmaceutical and biomedical research company, sought cancellation of eight claims in a patent after unsuccessfully sought a license from Genentech. The PTAB issued a final written decision denying the petition to cancel the claims. Appellant Phigenix, Inc. sought inter partes review of US Patent No. 8,337,856 ('856 patent), alleging that claims 1–8 of the subject patent are unpatentable as obvious

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over various prior art references. In its final written decision, the US Patent and Trademark Office's (USPTO) Patent Trial and Appeal Board (PTAB) found the asserted claims nonobvious⁴.

The US Court of Appeals for the Federal Circuit concluded that petitioners must have Article III standing to appeal a Patent Trial and Appeal Board (PTAB) decision in Phigenix⁵. Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy required by Article III. An appellant "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the [appellee], (3) that is likely to be redressed by a favorable judicial decision.

The Federal Circuit set forth the legal standard for demonstrating standing in an appeal from a final agency action, addressing (1) burden of production⁶, (2) requisite evidence to meet that burden, and (3) when evidence must be produced⁷. First, the Court stated that the burden of production standard at summary judgment applies in the present scenario. Second, an appellant "must either identify . . . record evidence sufficient to support its standing to seek review or, if there is none because standing was not an issue before the agency, submit additional evidence to the court of appeals," such as "by affidavit or other evidence." Third, the appellant must identify the relevant evidence demonstrating its standing "at the first appropriate" time and at the earliest possible opportunity, whether in response to a motion to dismiss or in the opening brief. It is important to be aware of limited appeal opportunities as well as the estoppel effect under 35 USC § 315(e) before filing an IPR.

The Federal Circuit concluded that because Phigenix had not substantiated its alleged injury in fact, it lacked standing to appeal the PTAB's Final Written Decision affirming the patentability of the Asserted Claims of the '856 patent.

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REFERENCES AND NOTES⁸

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² Unitary Patent System in Europe: http://www.rcip.co.il/en/article/unitary-patent-system-in-europe/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=inter-article-link

³ A single patent court covering 25 countries: <https://www.unified-patent-court.org/>

<https://www.unified-patent-court.org/sites/default/files/upc-agreement.pdf>

<https://www.epo.org/law-practice/unitary.html>

A single patent court covering 25 countries: <https://www.unified-patent-court.org/>

An Enhanced European Patent System: <https://www.unified-patent-court.org/sites/default/files/enhanced-european-patent-system.pdf>

⁴ See generally Phigenix, Inc. v. ImmunoGen, Inc., No. IPR2014-00676, 2015 WL 6550500(P.T.A.B. Oct. 27, 2015).

⁵ Phigenix, Inc., v. Immunogen, Inc., Case No. 16-1544 (Fed. Cir., Jan. 9, 2017) (Wallach, J.):

<http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/16-1544.Opinion.1-6-2017.1.PDF>

⁶ “Burden of production” means “[a] party’s duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling such as a summary judgment or a directed verdict.” Burden of Production, Black’s Law Dictionary (10th ed. 2014).

⁷ 35 U.S.C. § 141(c) (2012) (“A party to an inter partes review . . . who is dissatisfied with the final written decision of the [PTAB] . . . may appeal the [PTAB]’s decision only to the . . . Federal Circuit.”). An appellant’s obligation to establish an injury in fact remains firm even though it need not “meet[] all the normal standards for redressability and immediacy”

when, as here, a statute provides the appellant with a right to appeal. Massachusetts, 549 U.S. at 517–18 (quoting

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Lujan, 504 U.S. at 572 n.7).

⁸ In addition to the primary sources cited above, additional references include:

[New York Times](#), [Washington Post](#), [Mercury News](#), [Bayarea.com](#), [Deccan Chronicle](#), [the Hindu](#), [Hindustan Times](#), [Times of India](#), [AP](#), [Reuters](#), [AFP](#), [The Guardian](#), [Pravda](#), [Spiegel](#), [Connexion](#), etc.

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“Where the mind is without fear and the head is held high, Where knowledge is free Where the world has not been broken up into fragments, By narrow domestic walls.” [Rabindranath Tagore \(1861-1941\), Gitanjali, 1912.](#)

One World One Family

AUM! SWASTI!

Om! Asatoma Sadgamaya, Tamasoma Jyotirgamaya, Mrityorma Amritamgamaya, Om Shantih, Shantih, Shantih! (Aum! Lead the world from wrong path to the right path, from ignorance to knowledge, from mortality to immortality, and peace!)

SWASTI! AUM!

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