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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

3 Int'l Patent Developments Attys Should Know About

By **Matthew Bultman**

Law360, New York (January 26, 2018, 8:31 PM EST) -- From the revocation of a CRISPR patent in Europe to a first-of-its-kind injunction against Samsung in China, there have been some notable developments in the patent landscape outside the U.S. in recent weeks. Here, Law360 takes a look at stories attorneys need to know.

CRISPR Patent Takes Hit in Europe

The closely watched fight over breakthrough gene-editing technology CRISPR took another turn this month when the European Patent Office revoked a patent held by the Broad Institute.

In a decision on Jan. 17, the EPO's Opposition Division held that one of Broad's CRISPR patents could not claim priority to U.S. provisional applications that date back to 2012. Without the earlier priority date, the patent was found invalid based on intervening prior art.

At issue was the fact that the U.S. filings included an inventor, Luciano Marraffini of The Rockefeller University, who was not listed on the European patent. Marraffini's role in certain CRISPR inventions has been a point of disagreement between Broad and Rockefeller.

Broad has described the situation at the EPO as a "technical formality" and said it plans to appeal to the EPO's Technical Board of Appeal. But if the decision stands, it could lead to the revocation of some other Broad CRISPR patents in Europe, Brian Nolan of Mayer Brown LLP said.

"I think people expect those other patents that have the same defect that the Opposition Division identified with this patent will likely come to the same fate," Nolan said.

The EPO's decision comes as Broad and the University of California Berkeley are locked in a heated dispute in the U.S. over CRISPR technology — described as the "holy grail" of molecular biology for its capability to revolutionize many scientific fields.

CRISPR, an acronym for clustered regularly interspaced short palindromic repeats, represents a major advance in the field of gene editing, allowing scientists to edit DNA in a way that is cheaper and easier to use than previous methods.

After both institutions claimed to have been the first to invent the technology, the Patent Trial and

Appeal Board in February determined that competing research teams had sought patents on distinct subject matter, and that Broad's claims were not obvious in light of UC Berkeley's claims.

UC Berkeley has appealed the decision to the Federal Circuit, calling the ruling “profoundly erroneous.”

The EPO’s decision, which was based on a rule unique to Europe, isn’t expected to impact Broad’s patents in the U.S. Nolan said there was a general feeling, even before the decision, that Broad’s position on CRISPR technology was stronger in the U.S. than it was in Europe.

“You never want to lose a patent, but the Broad Institute would still have a stronger position in the United States unless UC Berkeley wins its appeal at the Federal Circuit,” he said.

German Court Mulls Unified Patent Court

As a German court weighs a constitutional challenge to national legislation ratifying the European Union’s new Unified Patent Court, which would adjudicate patent disputes across the EU, various outside groups have started to publish their thoughts on the complaint. The general consensus: It should be dismissed.

The German Federal Constitutional Court invited various organizations to submit their views on the challenge, which was lodged last year by a Düsseldorf patent attorney. The details of the complaint are not currently available. Seven groups have submitted opinions, which were due by the end of 2017, according to reports.

Currently, patent owners can get either a national patent that offers protection in one country or a European patent, which is essentially a bundle of national patents that must be enforced with separate litigation in each country.

The UPC system, which has been years in the making, would provide an EU unitary patent that would offer protection across 25 EU countries. Infringement disputes could be handled in a single case at the Unified Patent Court.

But German ratification is needed in order for the new system to take effect, which cannot happen as long as the complaint is pending. The U.K. also needs to ratify the UPC, a process that has been muddied by Brexit.

Deutscher Anwaltverein, a German bar association, said the current complaint is inadmissible and, if it were admitted, should be held unfounded. The federal bar association, the Bundesrechtsanwaltskammer, came to the same conclusion. Addressing the admissibility, it wrote the “applicant lacks the right of appeal.”

The German Association for the Protection of Intellectual Property and the European Patent Litigators Association have also said the complaint should be rejected. The other three opinions don't appear to have been made public.

While it's not clear how much weight the Constitutional Court will give to the statements, Alexander Robinson, an attorney at Dehns in London, said the fact the court called for a range of observations suggests it wants input from stakeholders.

"If [the opinions] all go along similar lines and reach the same conclusions — which are that the complaint is either inadmissible or that it is unfounded — and if they reach those conclusions applying broadly the same lines of reasoning, I'd think that might weigh the argument fairly heavily on that side," he said.

Although the German court hasn't made the complaint public, attorneys from Hogan Lovells have published a summary of its arguments. Generally, the complaint claimed the UPC agreement doesn't comply with EU law, according to their article. It was also said to have raised concerns about the procedure by which the German legislation was enacted and the process for appointing UPC judges.

Even with the outside opinions from the German legal and IP groups, Robinson said it's not a foregone conclusion the court will throw out the complaint.

"Even if they do that, then of course Brexit is really an entire herd of elephants in the room," he said.

China Cracks Down on Samsung

The Shenzhen Intellectual Property Court on Jan. 11 announced a decision ordering Samsung to stop making or selling devices that infringe two Huawei patents that were found to be essential to industry standards for 4G wireless technology.

The decision was another milestone for China's evolving IP system. In a notice released on its official social media account, the Shenzhen court said it was the first injunction to be issued in China based on an "international" standard-essential patent.

The case, filed in 2016, is part of a broader patent dispute between Huawei and Samsung, which have filed a series of lawsuits against each other in the U.S. and China. The Shenzhen court said it found Samsung had made "obvious mistakes" by delaying licensing negotiations that dated back to 2011.

The ruling followed an 18-day trial, according to the court, which said the decision creates a "fair market competition environment for our country and equally protects the legitimate rights and interests of intellectual property owners at home and abroad."

China, which lacked a patent system until the mid-1980s, has taken steps to bolster its IP enforcement efforts in recent years. This includes beefing up its patent laws and creating specialized IP courts, like the one in Shenzhen.

Patent owners who win an infringement case have a right to an injunction that applies to products sold in China, as well as exports of goods made in that country. But there had previously been a question about whether a plaintiff could enforce an SEP patent in China and get an injunction.

Then, in March, an IP court in Beijing granted an SEP injunction in a case Iwncomm brought against Sony. But unlike the Huawei case, the standard at issue there was for a wireless local area network that is only implemented in China.

It was not clear from the court's announcement which Samsung devices would be impacted by the ruling.