23 November 2015
www.stjerna.de

The European Patent Reform – The peculiar silence of the German professional associations

Rechtsanwalt Dr. Ingve Björn Stjerna, LL.M., Certified Specialist for Intellectual Property Law, Düsseldorf

Office translation of the original German language document, the article reflects the personal opinion of the author.

A further unusual characteristic of the legislative proceedings on the "unitary patent package" is the silence exerted by influential German professional associations in relation to it, in particular by the German Association for the Protection of Intellectual Property and by the Chamber of Patent Attorneys. On the one hand, this is characterized by the almost complete lack of official contributions to the discussion and, in general, statements on the legislative plans and, on the other, by the debarment of critical comments from the professional journals published by them. The following article should be food for thought not only for the members of said associations.

I. Starting position

As is known, traditionally, Germany is the EU Member State in the courts of which the most patent infringement proceedings take place. In the judiciary and the Patent Office as well as among the lawyers and patent attorneys, there is a vast number of competent and experienced practitioners whose expertise, usually, should be in high demand when it comes to creating a new system like that of the "unitary patent" and court system. Accordingly, one would normally expect that the German associations in which these practitioners are organized (afterwards "professional organisations") closely involved themselves in the negotiations on the "unitary patent package" (afterwards "patent package") with all of their pooled expertise. Surprisingly, this was not the case. Instead, they exercised an unusual reluctance to get involved, totally contrasting the activities they usually deploy in legislative proceedings relating to intellectual property law.

II. German associations dedicated to patent law

In Germany, the organisation of people working in the patent field mainly comes down to three associations. The largest is the tradition-rich German Association for the Protection of Intellectual Property[1] (afterwards "GRUR Association"), followed by the Chamber of Patent Attorneys[2] (afterwards "PAK") and the Association of Intellectual Property Practitioners[3] (afterwards "VPP"). As the activities of VPP have a stronger emphasis on the exchange between members and on their training, although it also engages in supporting the legislator on aspects of intellectual property law, this article will concentrate on GRUR Association and PAK.

1. The German Association for the Protection of Intellectual Property

Founded in 1891, the GRUR Association currently has approx. 5,400 members, predominantly patent attorneys (industry-employed and private practice) as well as judges, lawyers, academics and administrative lawyers operating in the field of intellectual property and copyright law.

Its statutory objective is promoting the scientific education and further developing the protection of industrial property and copyright at the level of German, European and international law.[4] Pursuant to the GRUR Statute, this purpose shall be served, among other things, by the following (translation form German):[5]

> *"a) Discussion and assessment of industrial property and copyright issues in committees, assemblies, seminars and scientific publications and the publication of professional journals (print and online);*
>
> *b) Support of the legislative organs and administrative agencies with regard to industrial property and copyright issues;"*

As an *"important and recognized task"* the GRUR Association considers (translation form German)

> *"…especially the assistance of the national, European and international legislative bodies and to the authorities competent for issues of intellectual property and copyright law. Moreover, GRUR maintains frequent contact with national and international associations devoted to the same or similar tasks and participates in the discussion of current issues and developments in the field of intellectual property."*[6]

In doing so, great importance is attached to statements on current issues (translation from German):[7]

> *"The Association regularly submits statements on current developments in the field of intellectual property and copyright law. These are prepared in the specialist committees and, due to their competence and neutrality, attract great attention."*

[1] www.grur.org/en.html.
[2] www.patentanwalt.de/en.
[3] www.vpp-patent.de (German language).

[4] Sec. 2 (1) of GRUR Statute of 27/09/2013, accessible at xup.in/dl,19319388; due to flaws in the English translation on the GRUR webpage, this article relies on the German original text.
[5] Sec. 3 (1) of GRUR Statute (German version, fn. 4).
[6] Cf. archive.md/xCeXM, translation of the original German text.
[7] www.grur.org/en/advisory-opinions.html, translation of the original German text.

Organs of the Association are the General Council ("Gesamtvorstand"), the Executive Committee ("geschäftsführender Ausschuss") and the General Assembly ("Hauptversammlung"), the General Council being responsible for the management of association matters and the Executive Committee for its day-to-day business.[8] In their activities, the General Council and the Executive Committee are supported by the Secretary General, who is also the port of call for members.[9]

Under the GRUR Statute, the decision to submit such "position paper" (afterwards "official statement") is made by the General Council; the President and the Secretary General who are jointly responsible for its external representation.[10]

GRUR Association is the publisher of a number of professional journals[11] on intellectual property and copyright law, among them "Gewerblicher Rechtsschutz und Urheberrecht" ("GRUR"), probably being the most influential and highest-circulation IP journal on the German market. Other titles are dedicated to specific focuses, for instance "GRUR Int." for international issues or "GRUR-Prax" for topics from practice.

2. Chamber of Patent Attorneys

No less influential is PAK, the statutory self-regulatory body of patent attorneys admitted to practice in Germany. According to its own statements, PAK currently has approx. 3,500 members, a third of them also being a member of the GRUR Association.

Part of PAK's statutory tasks is maintaining and promoting the interests of the patent attorney profession.[12] Accordingly, by its own account PAK engages in, inter alia, *"getting involved in national and international legislative projects"*, for instance by submitting respective statements.[13]

PAK's business is conducted by its 18-person board, its tasks being subdivided into five departments.[14]

The PAK Board publishes a journal on topics of intellectual property law titled "Mitteilungen der deutschen Patentanwälte" (afterwards "Mitteilungen").[15] Together with the "GRUR" series, "Mitteilungen" is the most important German specialist publication on intellectual property law, in relation to patent law probably even the leading one.

3. Overlaps

A closer inspection reveals that GRUR Association's General Council as the body responsible for conducting the Association's business also includes a large part of the PAK management personnel as well as of that of VPP. In the present context, it is of interest to note that the PAK's Vice-President, patent attorney Dr *Christof Keussen*, is also the Chairman of the GRUR specialist committee on patent and utility model law, this committee will have a role to play at a later stage.

III. The German professional associations and the "unitary patent package"

The conduct of said associations as to the "patent package" is special insofar as GRUR Association as well as PAK have, to a large extent and regardless of its relevance for the future professional practice of their members, abstained from the otherwise customary involvement in the legislative proceedings by official statements. Moreover, during its decisive phase from the middle of 2012, they have excluded articles criticizing the plans from publication in the professional journals edited by them.

1. Silence on the legislative proceedings

Prior to describing the respective (in)activities of GRUR Association and PAK, the way until the adoption of the "patent package" shall be summarized briefly.

a) Course of the legislative proceedings

Subsequent to a Commission draft[16] on the creation of a Community patent from the year 2000 which did not achieve the necessary unanimity in Council and after the Commission's public consultation on "The patent system in Europe" in 2006, the discussions on the creation of a Community patent were resumed in Council, based on the Commission communication[17] on "Enhancing the patent system in Europe" of 03/04/2007. In December 2009, the Council adopted conclusions[18] on an "Enhanced patent system in Europe" as well as a "general approach"[19] on a Regulation for the creation of an "EU patent". After the necessary unanimity on the issue of the language regime could again not be obtained, the proceedings were continued by way of an enhanced cooperation in early 2011. On 13/04/2011, the Commission submitted draft Regulations on the creation of a "unitary patent"[20] and a respective language regime[21]. Following the disputes about the seat of the Central Division of the Unified Patent Court and the former Art. 6 to 8 of the "unitary patent" Regulation in summer 2012 and a respective compromise reached in November 2012, the legislative proceedings ended on 11/12/2012 with the adoption of respective Regulations by the European Parliament. In the process, the Parliament

[8] Sec. 9 (1), 14 (2), 15 S. 1 of GRUR Statute (German version, fn. 4).
[9] Cf. archive.md/vmFFF.
[10] Sec. 14 (1) 2, (2) of GRUR Statute (German version, fn. 4).
[11] Cf. archive.md/47S7B.
[12] Sec. 54 of the Regulations for Patent Attorneys (Patentanwaltsordnung, PAO).
[13] www.patentanwalt.de/en/chamber/position-papers.html, cf. archive.md/mQ8jo (German language).
[14] Accessible at bit.ly/3urI7wX (German language).
[15] Cf. archive.md/4EUMw.

[16] Commission document KOM(2000) 412 endgültig, accessible at xup.in/dl,17010477 (German language).
[17] Commission document KOM(2007) 165 endgültig, accessible at bit.ly/3xMoeCW (German language).
[18] Council document 17229/09, accessible at bit.ly/3b8FyZo.
[19] Council documents 16113/09 and 16113/09 ADD1, accessible at bit.ly/2RzrDEI and bit.ly/2RvI6K6.
[20] Commission document KOM(2011) 215, accessible at xup.in/dl,12543713 (German language).
[21] Commission document KOM(2011) 216, accessible at xup.in/dl,21301155 (German language).

also approved the conclusion of an international Agreement on the creation of a Unified Patent Court (afterwards "UPCA")[22] by the Member States, which 25 of them signed on 19/02/2013.

When reviewing the activities of GRUR Association and PAK between 2000 and 2013, it is noteworthy that official statements on the subject of a Community patent and court system, which initially well existed, were ceased almost entirely with the intensification of the political efforts.

b) GRUR Association

After having submitted a statement[23] during the consultation "The patent system in Europe" in 2006, GRUR Association widely refrained from official comments. Apart from a 5½-page paper sent to the EU Commission in February 2008 in which the intent was communicated *"to provide comments on the project as a whole and in detail"*,[24] there is no official[25] pronouncement from GRUR Association until the end of the legislative procedure.

Immediately after the adoption of the "patent package" in the European Parliament on 11/12/2012, however, they expressed their sympathy for these decisions in a very unusual way. On the same day, they posted a comment[26] in the "news" section of GRUR Association's website, offering for download an article by Prof. *Tilmann* – whose tireless dedication to the "patent package" has been described repeatedly –[27] titled „Endlich: Entscheidungen zum Einheitspatent und zum Europäischen Patentgericht" ("Finally: Decisions on the unitary patent and European Patent Court") as a pre-release from issue 2/2013 of the "GRUR" journal (accompanying text: "*On this, please read the actual article of our author Prof. Dr Winfried Tilmann here (pre-release from GRUR 2013, issue 2).*"). Interestingly, the article[28] of "our author" was marked with GRUR Association's letterhead, creating the impression that this was an official communication by the Association. Thus, in an article in "VDI Nachrichten" (the Circular of the Association of German Engineers) of 04/01/2013[29], it was said that GRUR Association had *"praised"* the adoption of the "patent package". Asked about the source of this statement, reference was made to the *Tilmann* pre-release paper on GRUR Association's webpage.

After the conclusion of the legislative procedure, GRUR Association returned to its usual *modus operandi*, submitting official statements on a draft of the Rules of Procedure for the Unified Patent Court[30] and during the public consultation on the cost provisions from the Rules of Procedure[31]. Interesting in this respect is the slightly misleading remark of GRUR Association's former Secretary General Prof. Dr *Michael Loschelder,* in the Management report 2013/14, stating (translation from German, emphasis added):[32]

> *"In the reporting year, key proposals on procedural aspects in relation to the reform of the European patent system, on the amendment of the Community Trademark Regulation, on the design of certain aspects of the European copyright system and on the protection of business secrets were submitted at European level. The [GRUR] Association has involved itself in these legislative processes with various statements."*

The legislative procedure on the "patent package" ended – see above – on 11/12/2012, respectively on 19/02/2013. With how many statements did the GRUR Association get involved in these proceedings, Mr *Loschelder*?

c) Chamber of Patent Attorneys

PAK's conduct is not much different.

After in the run-up of the legislative procedure they involved themselves intensively, publishing no less than 14 (!) statements on the topic Community patent and court system between 1999 and 2006[33] – i. e. on average two per year –, they remained silent almost throughout the legislative proceedings, officially commenting only on the competences and seat of the Unified Patent Court's Central Division in a "position paper".[34]

After the adoption of the "patent package", PAK stopped its silence as well and submitted statements on the draft implementing regulation on unitary patent protection[35], on one of the draft Rules of Procedure for the Unified Patent Court[36] and on the renewal fees for "unitary patents"[37].

d) Interim conclusion

Different from similar professional associations abroad which involved themselves intensively, during the legislative proceedings on the "patent package" neither GRUR Association nor PAK provided an official statement on it and its controversial aspects, regardless of the great relevance these legislative proceedings have for the professional activities of both associations' members and alt-

[22] Council document 16351/12 and CORR1, accessible at bit.ly/33vLo2p and bit.ly/2QSPnUp.
[23] Accessbile at bit.ly/33iOMxN (German language).
[24] Accessbile at bit.ly/3nR7xSr, p. 2 (German language).
[25] Allegedly, a letter was sent to the Chancellor in June 2012, but a respective public documentation is not available.
[26] Cf. archive.md/sR8PX (German language).
[27] Cf. *Stjerna*, The European Patent Reform – Prof. Tilmann, the old Roman god Janus and the requirements of Article 118(1) TFEU, accessible at www.stjerna.de/requirements-118-1-tfeu/?lang=en and *ibid*., Cypriot compromise compromised, accessible at www.stjerna.de/cypriot-compromise/?lang=en.
[28] Accessible at bit.ly/2R2ojln (German language).
[29] Accessible at xup.in/dl,17865291 (German language).
[30] Accessible at bit.ly/3urH14n (German language).
[31] Accessible at bit.ly/3b8HYHj.
[32] Management report 2013/2014, p. 1, accessible at bit.ly/3vLk8sT (German language).
[33] Cf. the list of statements between 9/1998 and 3/2011 from www.patentanwalt.de, accessible at bit.ly/2Sr53ON; there is no public documentation for statements probably published between 02/07/2007 and 20/02/2009.
[34] Accessible at bit.ly/3b5SpLR (German language).
[35] Accessible at bit.ly/3o4H7Nf (German language).
[36] Accessible at bit.ly/2RpQIBP (German language).
[37] Accessible at bit.ly/3f0doRc (German language).

hough such engagement is a core purpose for both. What is the reason for this prominent and concurring silence?

2. Publication ban for critical articles

However, their own silence was not enough. Others had to be silent as well, at least with criticism. From the middle of 2012 onwards, it was no longer possible to publish critical articles on the "patent package" in the professional journals edited by GRUR Association and PAK Board, respective proposals were rejected. All seven attempts I undertook between June 2012 and August 2014 to publish respective papers in "GRUR" or "Mitteilungen" failed.

a) "GRUR" journals

Four articles were offered to the GRUR Association for publication, none was accepted. It should be noted that prior publication does not cause a preclusion for "GRUR" – while doing so for "GRUR Int." – which is why all the articles except one were submitted for "GRUR".

aa) "GRUR-Prax", June 2012

At the beginning of July 2012, I had offered the article "Unitary patent and court system – Failed for now"[38] to the editorial office of "GRUR-Prax". After an assessment by the "circle of publishers" – consisting, at that time, of two Federal judges, two attorneys at law and one University professor –[39], the editorial office told me (translation from German):

> *"In its current version, unfortunately, your article cannot be published in GRUR-Prax. However, from our perspective, the topic in itself is certainly of interest for our readers. From our perspective, one possibility would be abridging the article. In particular the extensive quotation blocks have been met with criticism, as I had expected. These would need to be replaced by a (much shorter) explanation in own words. Likewise, additions such as 'Still very upset, Mr Rapkay said..' would have to be deleted."*

In view of this attempted contextual interference the article was withdrawn.

In January 2014, I wrote to all five members of the "circle of publishers", requesting them to explain this incident in more detail. A material answer was received only from Prof. *Karl-Nikolaus Peifer*, professor at Cologne University. He explained (translation from German):

> *"GRUR-Prax has a strict page limitation. In your case, this limitation was exceeded. This explains the demand for abridgement which our editor has directed to you. In addition, your article was mainly composed of protocol citations. We wish that our articles are formulated independently and in a summarizing manner to a greater extent. The editor has advised you accordingly. This does not mean an attempt of contextual interference. Of course, the authors remain in charge of their statements at any time."*

The article does not contain any "protocol citations", but be that as it may. Indeed, it exceeded the admissible limit of 16.200 characters by approx. 5 percent. However, the existence of a "strict page limitation" can be doubted in view of the large number of articles published in "GRUR-Prax" exceeding said limit, sometimes nearly by the factor two, including such authored by Mr *Peifer* himself.[40]

bb) "GRUR", December 2012

In December 2012 the article "Unitary patent and court system – No Light on the Horizon"[41] was offered to the former Secretary General *Loschelder* for publication in "GRUR". The article was accepted for publication, although subject to the opaque condition that *"the further development"* would have to be covered as well, and with the remark that a publication was not possible before April 2013. A publication did not take place.

cc) "GRUR", October 2013

In October 2013 I offered Mr *Loschelder* the article "Unitary patent and court system – The sub-sub-suboptimal compromise of the EU Parliament"[42] for a publication in "GRUR" which had first been published on the internet at the end of August 2013. He answered that a publication was neither possible in "GRUR", nor in "GRUR Int.". For "GRUR" there was said to be an accumulation of articles due to the annual meeting, so that a publication could not take place before summer 2014. A publication in "GRUR Int." was said not to be possible as a result of the article's prior publication.

dd) "GRUR", December 2013

In December 2013, I offered Mr *Loschelder* the article "Unitary patent and court system – Law-making in camera"[43] for "GRUR", it had been published on the internet shortly before. He answered that the editorial office deemed the paper to be *"better suitable for GRUR Int."*, without providing reasons. A publication of the article in "GRUR Int." was rejected shortly thereafter due to – as you have guessed already – its prior publication.

b) "Mitteilungen der deutschen Patentanwälte"

The situation as regards "Mitteilungen" was similar. In early 2012, they had shown a certain degree of openness even towards critical comments on the "patent package", e. g. evidenced by the publication of the article "The deliberations on the "unitary patent" and the related court

[38] Accessible at www.stjerna.de/failed-for-now/?lang=en.

[39] Its personal composition is displayed at rsw.beck.de/cms/?toc=GRUR-Prax.50 (German language).

[40] Cf. *v. Gerlach/Hunfeld*, GRUR-Prax 2013, 104 (ca. 31.700 characters), *Krüger*, GRUR-Prax 2012, 129 (ca. 23.800), *Peifer*, GRUR-Prax 2013, 149 (ca. 18.235) or *Peifer*, GRUR-Prax 2012, 521 (ca. 18.300).

[41] Accessible at www.stjerna.de/horizon/?lang=en.

[42] Accessible at www.stjerna.de/suboptimal-compromise/?lang=en.

[43] Accessible at www.stjerna.de/intransparency-lproceedings/?lang=en.

system – On the way to disaster"[44] in February 2012. After that, "Mitteilungen" likewise denied the publication of articles critical of the "patent package". Two of the aforementioned papers offered to GRUR Association as well as a further one were also sent to "Mitteilungen", none of them was accepted. Also for this journal, a prior publication does not cause a preclusion of the respective article.

aa) December 2011

The history of the article printed in February 2012 showed where the journey would be going in the future. Initially, the editorial office had expressly indicated their interest in the article and its topic, even envisaging its immediate publication in the next issue (January 2012). After the submission of the final article on 02/01/2012, nothing happened over several weeks, until the editor, patent attorney Dr *Malte Köllner*, surprisingly advised me as follows (translation from German):

> *"I would rather like to abstain this time. The reasons are the following:*
>
> *– the issue is full already.*
>
> *– We usually do not report about ongoing legislative proceedings, but only, once everything is finished."*

Hence, the original interest and the readiness to immediately print the article had meanwhile turned into its opposite, now it was meant not to be published at all. Although the editorial office could ultimately be convinced to change their mind, this was indicative of the future position "Mitteilungen" would take towards critical articles on the "patent package".

bb) November 2012

In November 2012 I sent the article "Unitary patent and court system – No Light on the Horizon"[45] to the editor for his information. This was not an offer for publication. However, he understood it accordingly and stated (translation from German):

> *"…for MITTEILUNGEN, I would rather like to wait until something adopted is on the table. I would not like follow each step with a publication. This only causes confusion."*

Avoiding an alleged "confusion of the readers" is a favorite of the editors when it comes to rejecting publication.

cc) March 2014

In March 2014, I offered for publication to "Mitteilungen" the articles "Unitary patent and court system – The sub-sub-suboptimal compromise of the EU Parliament"[46] and "Unitary patent and court system – Law-making in camera"[47]. The editor again rejected publication (translation from German):

> *"I appreciate that you have brought these abuses to the attention of the public or have written about this, respectively. For MITTEILUNGEN, I would not like to report on this. The legislative proceedings have gone badly, but now we rather try to address topics on how to cope with the sub-sub-suboptimal compromise."*

dd) August 2014

I started the latest attempt of a publication on the "patent package" in "Mitteilungen" in August 2014 with the article "Unitary patent and court system – The oral hearing on Spain's actions at the CJEU"[48]. Publication was denied (translation from German):

> *"I would not like to report on the ongoing proceedings. But I would be glad if you wanted to comment on the judgment, once it is available."*

"Mitteilungen" sometimes do publish non-binding decisions as well as respective articles. On the question why said exclusion seems to apply only to articles on the "patent package" and whether the readers do not have a legitimate interest in being informed also insofar, I was advised (translation from German):

> "*It is a general guideline at MITTEILUNGEN not to publish about ongoing proceedings and legislative procedure, if possible. Exceptions to this are only rarely made.*
>
> *The reason simply is that the reader shall not be supplied with information which could lateron turn out not to be correct. And a lack of space."*

c) Interim conclusion

It remains to be noticed that GRUR Association as well as PAK, apart from their own silence, have also rejected the publication of critical articles on the "patent package" in the professional journals edited by them, at least the ones I submitted. The reason for this was not the prior online publication, but alleged "strict page limitations", an "article accumulation" or a feared "reader confusion". I do not know whether other authors have made similar experiences. However, it is obvious that the founded criticism[49] repeatedly voiced against the plans also in Germany is nearly non-existent in these journals.

IV. Correspondence with the responsible persons

Since the beginning of 2012, as a member of GRUR Association, I have repeatedly tried to get from the persons responsible (at that time) – the former President, Rechtsan-

[44] *Stjerna*, Mitt 2012, 54 ff.
[45] Above fn. 41.
[46] Above fn. 42.
[47] Above fn. 43.
[48] Accessible at www.stjerna.de/hearing-cjeu/?lang=en.
[49] Cf. the "Research Papers" by Max-Planck-Institute, e.g. *Jaeger*, "All back to square one? – An assessment of the latest proposals for a patent and court for the internal market and possible alternatives", accessible at bit.ly/3ttS8IF, and "What's in the Unitary Patent Package?", accessible at bit.ly/3f33uhX; *Ullrich*, "Select from within the system: The European patent with unitary effect", accessible at bit.ly/3b7oZgf, or *Hilty/Jaeger/Lamping/Ullrich*, "The Unitary Patent Package: Twelve Reasons for Concern", accessible at bit.ly/3tryInX.

walt Dr *Hans Peter Kunz-Hallstein*, and former Secretary General *Loschelder* – an explanation for the Association's continued silence on the "patent package". Likewise, in 2014 I asked said responsible persons of GRUR Association as well as the competent member of the PAK Board, patent attorney Prof. Dr Dr *Uwe Fitzner*, for a statement on the manner in which the professional journals published by them dealt with critical articles. Afterwards, excerpts of this correspondence will be described in more detail.

Due to the relevance of the "patent package" for the European economy, the high level of public interest in the topic and the relevance said associations and the professional journals published by them have for the formation of opinions, and not least with a view to the fundamental rights of freedom of speech, academic freedom and freedom of press, part of this correspondence (afterwards "GRUR correspondence"[50] and "PAK correspondence"[51]) is made public, interested persons can access it at www.stjerna.de.

Only some aspects of the discussion can be elaborated on here, for the rest, reference is made to the correspondence.

1. GRUR Association's silence

Pointing to various critical voices on the "patent package" I wrote to Secretary General *Loschelder* in January 2012, trying to find out why GRUR Association was silent.

He answered on 09/02/2012 (translation from German):

> *"As regards your question on what GRUR has done in relation to the 'EU patent', I have spoken with Dr Keussen in detail. Indeed, there is no official statement of GRUR. In the course of all these years of discussion, we did not consider it advisable to submit one as the developments were so volatile and diverse that such statement would certainly have been to little avail."*

He indicated thar the Association had developed *"various activities, in total"*. There had been *"numerous discussions"* with different persons and in different bodies. Further, he said that *"the specialist committee held a number of meetings in which also representatives of the Federal Ministry of Justice participated"* and that two annual meetings had dealt with the EU patent reforms

At that time, the Commission draft Regulations on the "unitary patent" were on the table for nearly a year, the first reading in the European Parliament was initially scheduled for 14/02/2012. No plausible reason why GRUR Association was still not submitting an official statement, contrary to its usual behavior, was given. Said specialist committee met once a year between 2008 and February 2012, in 2009 there were two meetings.[52] Also afterwards, the committee usually met on a yearly basis only.[53]

Pointing to the numerous objections raised against the plans, I again wrote to Mr *Kunz-Hallstein* and Mr *Loschelder* in March 2012, suggesting an official statement of GRUR Association (translation from German):

> *"In view of the foregoing, it would be more than welcome if GRUR could express their views on the plans and clearly mark their position in relation to the voiced criticism. I feel that this is important particularly in view of the very limited participation of the professional circles, especially of younger colleagues, in the discussion of the plans, as described above. Apart from that, I think that the monitoring of and commenting on such central legislative initiatives in the field of intellectual property matters is also a core purpose of this association."*

In his answer of 19/04/2012, Secretary General *Loschelder* did not address this (translation from German):

> *"I have immediately forwarded [your] letter to Dr Keussen. Dr Keussen has immediately collected information in Brussels. In this context, he is also acting for the chamber of patent attorneys. The situation at the moment is that, presumably, it will emerge by 30/05/2012 whether the legislative initiative is successful. Thus, there are two options: The legislative initiative fails, then it will fail for a long time. Or the legislative initiative is successful - second alternative -, then a statement at the present time does not make sense. Therefore, I will wait for the further developments."*

Upon the repeated remark that a statement would not be futile as to UPCA ratification which would become necessary should the plans be adopted, Mr *Loschelder* replied on 30/04/2012 (translation from German):

> *"For now, GRUR will, after having diligently considered all pros and cons, not give a statement. (…) At this point in time, a statement does not make any sense. We will see whether this will change after 30/06/, the end of the current Council Presidency."*

In the meantime, a person involved in the negotiations reported[54] something astonishing: According to this person, part of the PAK Board decided not to endanger the right of representation of patent attorneys at the Unified Patent Court foreseen in the "patent package". Thus, no criticism would be voiced, neither by the GRUR specialist committee chaired by patent attorney *Keussen*.

In a letter dating 06/05/2012, I brought this statement to the attention of Mr *Kunz-Hallstein* and Mr *Loschelder* and asked them to comment (translation from German):[55]

> *"If that last sentence were true, it would mean, as I understand it, that GRUR is tacitly waiving the pursuit of its statutory purpose in order not to jeopardize financial interests or financial expectations of some of its members towards a possible independent right of*

[50] Accessible at bit.ly/3us2mdX.
[51] Accessible at bit.ly/3f0VZb5.
[52] On 15/02/2008, on 26/02/2009 and 26/06/2009, on 01/03/2010 and 21/06/2011.
[53] Meetings were held on 05/06/2012, on 13/05/ and 18/09/2013 as well as on 25/06/2014 and 13/01/2015.
[54] Statement displayed in GRUR correspondence (fn. 50), p. 2.
[55] GRUR correspondence (fn. 50), p. 2.

representation before the "unitary patent court system" to be created. This would indeed be remarkable in view of the fact that the members of GRUR are not only patent attorneys from private practice but, for example, also several industrial enterprises and their employees, whose primary interest is to obtain an efficient, cost effective and high-quality system of a "community patent" and a corresponding court system which, as is known, would not be provided by an implementation of the current plans. In effect, this would mean that the creation of an insufficient system is consciously and tacitly accepted in order not to disappoint the financial expectations of some members. In principle, I would rather not believe that.

Are you in your position as GRUR's President and Secretary General, respectively, aware of the above-mentioned situation and if so, is it the decisive factor for the silence GRUR maintains so far with regard to the legislative plans? If not, how do you intend to investigate this situation?"

The reaction by Mr *Kunz-Hallstein* and Mr *Loschelder* spoke for itself. They replied – again without a material statement – in a letter of 18/05/2012 (translation from German):[56]

"We consider the style and content of [your] letter to be indecent. On the one hand, this applies to the accusations raised against Dr Keussen, all the more as this is done by way of a quotation without citing the person quoted. On the other hand, this also applies to the threat at the end of that letter stating that you intend to discuss this information with third parties if we do not comment, with you setting a deadline to that effect.

We forwarded your letter to all persons within GRUR with whom we consider necessary a discussion about the topic you raised. We reject any accusations raised against Dr Keussen. There will be no further statement from us. We do not wish to receive an answer to this letter from you and will not continue to correspond with you in the future."

Already this attempt of said gentlemen to deal with a matter obviously uncomfortable to them, although they did not deny its substance, by simply trying to shut up a person, is very revealing about their mindset. Also the alleged "threats" and "accusations" are difficult to understand. Usually, there would be little reason for not taking a very relaxed position in relation to the envisaged discussion of said statement with third parties[57] – at least as long as it was incorrect. In that case, however, one could also simply say so and reject it as wrong. That did not happen.

In substance, the PAK's commitment to said right of representation is no secret. Since the year 2000, PAK statements on the subject Community patent and court system often contained a separate paragraph in which a right of representation for patent attorneys in the court was intensively advocated for,[58] some of them signed by Mr *Keussen* in his capacity as Vice-President of the PAK. In 2003, the PAK even published a separate position paper on the topic "right of representation".[59] Within the PAK framework such lobbying for the interests of their profession is legitimate and understandable,[60] within the GRUR Association, however, this would be ruled out already in view of the differences between the professional groups represented there,[61] which the responsible persons should be well aware of. Is this what had been perceived as threatening?

One would have expected at least a more sovereign behavior from the management personnel of the GRUR Association. In a letter of 29/05/2012, I therefore again addressed both gentlemen (translation from German):[62]

"As regards the quoted statement I should like to note that I have absolutely no preference about the independent right of representation of patent attorneys in the planned court one way or the other. I am, however, of the opinion that, in the interest of the industry, the primary efforts of all of us should go towards achieving the required high quality of the system to be created by closely monitoring the legislative procedure. (…)

Although the plans have been exposed to considerable criticism in all major European patent jurisdictions for quite some time, GRUR is maintaining its silence, thus also serving the interests of politics in not having to discuss the obvious deficiencies of the plans. Since February 2012, I have repeatedly asked you in writing about the reasons for the silence by GRUR, but only received evasive answers. If the plans in their currently planned form become law, this will have serious consequences. Instead of relying on the "unitary system", an increased use of intellectual property rights with an exclusively national effect would not be surprising, so that, instead of achieving the intended legal harmonisation, the status quo would be strengthened and a stronger integration thwarted. You will be asked where GRUR actually was when all this was decided."

I did not receive an answer.

2. Critical articles in the "GRUR" journals

Following up on this correspondence, some time after the end of the legislative proceedings on the "patent package"

[56] GRUR correspondence (fn. 50), p. 3.
[57] GRUR correspondence (fn. 50), p. 2.
[58] E. g. the statements on the Fourth Proposal for a European Patent Litigation Protocol of 08/07/2002, cipher IV., accessible at bit.ly/3vKGOJL; on the Third Proposal for a European Patent Litigation Protocol (EPLP) of 15/04/2002, cipher 5., accessible at bit.ly/3vJruNG; on the First proposal for an EPLP (European Patent Litigation Protocol) of 09/05/2001, accessible at bit.ly/3b3FVUH (all German language).
[59] Position paper "Vertretungsbefugnis der Patentanwälte in Gemeinschaftspatent-Streitigkeiten" ("Right of representation of patent attorneys in Community patent disputes") of 08/08/2003, accessible at bit.ly/33n4NCE.
[60] Cf. sec. 54 PAO.
[61] Cf. sec. 2 of GRUR Statute (German version, fn. 4).
[62] GRUR correspondence (fn. 50), p. 4 f.

I wrote to President *Kunz-Hallstein* and Secretary General *Loschelder* anew in order discuss, apart from the reasons for the – now final – omission of an official statement, GRUR Association's way of dealing with critical articles (translation from German):[63]

> *"It will not surprise you that, in light of all this, one can get the impression that, in relation to the "unitary patent package", GRUR is lacking the required neutrality and objectivity and is unilaterally supporting statements in favour of this "package".* (…) *Do you not think that, when dealing with a legislative project such as the one on the "unitary patent," the statutory purpose of GRUR (in particular sec. 2(1), sec. 3(1) lit. a) of the GRUR Statute) necessarily requires a discussion and the promotion of a certain plurality of opinions in order for the members of GRUR to be able to form their own view?"*

The reply from Secretary General *Loschelder* was the first more detailed statement in more than two years of correspondence. The omitted statement was explained as follows (translation from German, emphasis added):[64]

> *"…the formation of opinions takes place in the specialist committees, in which anybody may partake. The General Council will take note of the specialist committees' opinion and prepares statements together with the specialist committees. Usually, these statements are the result of a majority view, while minority views are regularly taken into account in the statements if they are of some relevance. Whether and in what form a statement is issued on a specific topic is likewise for the committee to decide. If a committee does not think that a written statement is necessary and if it prefers to have discussions on certain topics in Brussels or in the ministry or elsewhere, that is for the committee to decide. In this particular case, various discussions have been held in the ministry as well as in Brussels. I participated in two of these discussions at least. During these discussions, there was certainly no one-sided preference for a certain direction."*

Therefore, it is claimed that the decision not to submit an official statement on the "patent package" was made by the specialist committee on patent and utility model law chaired by patent attorney *Keussen*. How the allegation that the decision about submitting a statement is one for the specialist committee to make can be reconciled with the clearly opposite stipulation in the GRUR Statute, according to which – as explained above – this decision is to be made by the General Council[65] and only the preparation of such statement *shall* take place in the specialist committees,[66] remains unclear.

With regard to the rejection of the submitted articles, Mr *Loschelder* merely repeated the reasons mentioned earlier and suggested I could present my opinion in the regional groups of GRUR Association and give a presentation with the working title "The deliberations on the "unitary patent" and the related court system – On the way to disaster"[67] – this roughly 1½ years after the conclusion of the legislative proceedings!

As to the alleged relevance of the specialist committees for the formation of opinions within GRUR Association, I asked Mr *Loschelder* how it was presently guaranteed that the other members of the Association, who are not a member of the specialist committee for patent and utility model law, but for whose practice the subject "patent package" is probably important nonetheless, are informed about the content and results of the committee's activities.[68]

He did not wish to comment on this in substance.

His reply to the envisaged publication of our correspondence was rather thin-skinned (translation from German):[69]

> *"As far as the publication of the correspondence is concerned, I shall limit myself to mentioning that you have to observe the statutory regulations resulting from the right of privacy as well as from copyright in this respect."*

Asked about[70] how he considered said "statutory regulations" to be affected by a publication in view of the motives set out above under cipher IV., he commented briefly (translation from German):[71]

> *"What is to be understood by limitations from the right of privacy and copyright, this is defined by the laws and case law. Thus, I do not think that I have to discuss this topic any further."*

It seems to be part of the "culture" at GRUR Association that those responsible assume rights for themselves which they refuse other members as Mr *Loschelder* had himself declared[72] in the past to forward our correspondence to third persons, apparently not considering said "statutory regulations" as an obstacle. One is left to wonder why publicity of this matter is so undesired by him that he vigorously seeks to suppress it, despite holding the opinion that any questions have been answered conclusively.

3. Critical articles in "Mitteilungen"

In October 2014, I also contacted the PAK President, patent attorney Dr *Brigitte Böhm* – who is a member of the GRUR General Council and even of its Executive Committee –, asking her to comment on the manner in which "Mitteilungen" dealt with my articles, especially with a view to the question whether the readers of "Mitteilungen" do not have a legitimate interest in being informed com-

[63] GRUR correspondence (fn. 50), p. 8.
[64] GRUR correspondence (fn. 50), p. 10.
[65] Cf. sec. 14 (1) 2 of GRUR Statute (German version, fn. 4).
[66] Sec. 18 (1) of GRUR Statute (German version, fn. 4).
[67] GRUR correspondence (fn. 50), p. 10.
[68] GRUR correspondence (fn. 50), p. 13.
[69] GRUR correspondence (fn. 50), p. 10.
[70] GRUR correspondence (fn. 50), p. 17 f.
[71] GRUR correspondence (fn. 50), p. 19.
[72] GRUR correspondence (fn. 50), p. 3.

prehensively and impartially about any developments which can be relevant for their professional activities.[73]

In a letter of 13/10/2014, patent attorney *Fitzner*, competent for “General professional matters” on the PAK Board, answered. He did not address my questions, but merely stated (translation from German):[74]

> *“However, as we have informed you already, the focus of publication in “Mitteilungen” is on decisions and articles dealing with current case law and the present legal situation. As the publisher of “Mitteilungen”, the Board considers the main task to be the information, in particular of the patent attorneys, about circumstances which can be relevant for their professional activities as well as for the exchange of opinions on such topics.”*

Also (translation from German):[75]

> *“Please understand that we did not publish in “Mitteilungen” all the six articles you submitted, since we also wanted to give other authors the opportunity for publication and since “Mitteilungen”, which address the legal practitioner, have other priorities.”*

My renewed request to reply to my questions remained unanswered.

V. Assessment

Mr *Kunz-Hallstein* and Mr *Loschelder* are no longer in office. Both have been made “Honorary Members” of GRUR Association, Mr *Loschelder* was additionally awarded a medal for the “special appreciation” of his “outstanding merits in the field of intellectual property and copyright law and its administration in the GRUR Association”.[76] President is now Rechtsanwalt Dr *Gert Würtenberger*, new Secretary General is patent attorney *Stephan Freischem*. The latter most recently, after having reviewed the above-mentioned correspondence, declared to fully share the position of his predecessor. Patent attorney *Keussen* is meanwhile also a member of the “Expert Panel” of the Preparatory Committee of the Unified Patent Court.[77]

One may wonder about the cause underlying the peculiar silence of the two most relevant German professional associations. There will certainly be a reason why their key personnel remains silent, in part aggressively opposing a discussion of this fact in public. Has this probably something to do with a decision by the Commission, Council and European Parliament to exclude the public from the negotiations on the “patent package” in order not to endanger a political agreement, as it had been reported in the past?[78] Did GRUR Association and PAK get involved in this political initiative? Did GRUR Association and PAK intend to cover the political operators’ back and to make sure that they did not have to discuss professional objections against the “patent package”? Whether intended or not, this was the consequence of their conduct.

Of course, people can hold different opinions on the “patent package” for the most different reasons, everybody is free to do so. However, a methodically doubtful situation arises when associations or their governing bodies, respectively, seem to purposefully close off general sources of information like the professional journals published by them for certain opinions, thus leaving their members deliberately in the dark about certain aspects of a legislative project relevant for them. A plurality of opinions is a fundamental condition of a free formation of opinions in a free and democratic political system and, instead of being avoided, should be cultivated by any association which is dedicated to democratic ideals and the Rule of Law.

It can legitimately be expected that said associations do promote a certain plurality of opinions in their journals and that their readers are informed in an objective and unbiased manner. They have denied doing so and have suppressed critical statements on the “patent package” by way of self-censorship, thereby exerting direct influence upon public opinion. With regard to the “landscape of expressions” thus generated, they have fostered the impression that the “patent package” was not controversial in Germany and would be welcomed unilaterally by its professional circles which – in addition to the useful effect of allowing them to avoid difficult discussions on substance – could, in turn, be sold as an implicit approval by the responsible politicians. For associations operating in a democratic political system with members part of which can claim to be “independent organs of the administration of justice” (“Organe der Rechtspflege”),[79] this is simply inacceptable.

One would wish that their members do say so very clearly, because, ultimately, the exercise of individual fundamental rights was suppressed, thereby affecting values being more important than the “patent package” can ever be. Regardless of what one’s personal position is towards the “patent package”, nobody should be willing to pay this price.

* * *

For possibilities to support my work on the European patent reform please visit www.stjerna.de/contact/?lang=en. Many thanks!

[73] PAK correspondence (fn. 51), p. 3.
[74] PAK correspondence (fn. 51), p. 5.
[75] PAK correspondence (fn. 51), p. 6.
[76] Protocol to GRUR Members Assembly of 25/09/2015, accessible at bit.ly/2Rzrtgj, p. 4 (German language).
[77] Accessible at archive.is/ywjdy.
[78] *Pagenberg*, JIPLP 2013, 480 (r. col.).
[79] Sec 1 Federal Lawyers‘ Act („Bundesrechtsanwaltsordnung“, „BRAO“), sec. 1 PAO.