IP cases and the Serbian courts

Report on handling of IP cases in Serbian courts

By Jens Feilberg, former president of the Commercial Court of Denmark, Copenhagen

Introduction

The present report is a part of the project

REGIONAL PROGRAMME ON INDUSTRIAL AND INTELLECTUAL PROPERTY RIGHTS IN THE WESTERN BALKAN AND TURKEY

The purpose of the programme is to assist the intellectual property offices of the region, in this case the Intellectual Property Office of the Republic of Serbia (in the following IPO), to support the economic development of the IPA Region through effective and adequate protection and enforcement of industrial and intellectual property rights, in line with European and international requirements.

The report concerns the activity RS. 3.2 Evaluation of the possibility to create specialized IP courts in Serbia, stage 1. The activity is described as follows:

Stage 1: Baseline study and identification of areas for improvement

- Meeting with judges to gather baseline information on the current and future number of IP cases, and how they currently are handled in the court system. Current challenges.
- Preparing report with recommendations for future system for handling IP court cases in Serbia that will ensure an efficient and professional handling of cases. It could draw on the experiences obtained in Denmark and other EU member states. Most likely several scenarios could be suggested.

Stage 2: Presentation of recommendations for IPO and courts

Presentation of report to IPO and Head of Court system, discussion of results and reaching recommendations.

The first part of stage 1 was carried out in Belgrade in the days 27th-29th September 2010. It comprised a two day session with the participation of a number of judges with special experience in the handling of IP matters in court, including judges from the
Commercial courts of Serbia, and representatives for the IPO. The next part was meetings in Belgrade on 11th and 12th November 2010 with representatives for the IPO and the judges.

The judges participating in the meeting on 27th-29th September 2010 were the following: Ms. Jelena Borovac, High Judicial Council, Belgrade, Mr. Mladen Nikolic, High Judicial Council, Belgrade, Ms. Jasmina Stamenkovic, Commercial Court of Appeal, Belgrade, Ms. Sanja Lekic, Court of Appeal, Belgrade, Ms. Vesna Todorovic, Commercial Court, Belgrade, Ms. Leposava Milecević, Commercial Court, Belgrade, Ms. Milena Živković, Commercial Court, Valjevo, Ms. Nataša Dačić, High Court, Novi Sad, Ms. Milena Jovanović, High Court, Niš.

The judges participating in the meeting on 12th November 2010 were Mr Mladen Nikolic, High Judicial Council, Belgrade, Ms. Jasmina Stamenkovic, Commercial Court of Appeal, Belgrade, Ms. Vesna Todorovic, Commercial Court, Belgrade, Ms. Milena Živković, Commercial Court, Valjevo, Ms. Nataša Dačić, High Court, Novi Sad, Ms. Marina Klarić Živković, High Court, Belgrade, Ms. Milena Jovanović, High Court, Niš.

Further, before and after the meetings with judges, meetings were held with representatives of the IPO who also were present during the meetings with the judges.

The report is mainly based on the comparatively limited amount of information and knowledge obtained during the stages in Belgrade in September 2010 and November 2010 and on previous and subsequent research. This should be kept in mind during the reading of the following.

The recommendations in the report are to a high degree influenced by the inspiring and rewarding discussions with the representatives of the IPO and the judicature. The responsibility for the recommendations, however, falls solely on the author of the report.

The report falls into three parts:

I. Description of the Serbian court system with special reference to the management of IP cases.

II. Summary of talks with judges and representatives for the IPO.

III. Recommendations.

I. Description of the Serbian court system with special reference to the management of IP cases
Serbia and the Serbian court system

Serbia covers 77,474 sq. km. and has presently approximately 7.4 million inhabitants. The GDP in 2010 has been estimated to $40 billion. Serbia is not yet member state to the WTO and accordingly not to the TRIPs. Serbia became the 28th member of EPO as of 1st October 2010.

The court system was reorganized with effect from 1st January 2010; cf. Law on Organization of Courts, No. 116/08 of 27th December 2008.

Courts of general jurisdiction are basic courts, higher courts, appellate courts and the Supreme Court of Cassation.

Courts of special jurisdiction are commercial courts, the Commercial Appellate Court, Misdemeanour courts, the Higher Misdemeanour Court, and the Administrative Court. The Supreme Court of Cassation is the court of highest instance in the Republic of Serbia.

There are 16 commercial courts in Serbia; the number and place of offices are established by separate laws. Decisions from the commercial courts may be appealed to the Commercial Appellate Court. Decisions from this court may be appealed to the Supreme Court of Cassation.

The scope of competence of the commercial courts is described as follows in article 25 in the Law on Organisation of Courts (Special IP relevant elements are underscored):

"Commercial courts in the first instance adjudicate:

1. in disputes between domestic and foreign companies, enterprises, cooperatives and entrepreneurs and associations thereof (commercial entities), in disputes arising between commercial entities and other legal entities relating to conduct of business activities of commercial entities, even where one of the parties in the aforementioned disputes is a natural person if a substantial intervener in the case.

2. in disputes on copyright and other related rights and protection and use of inventions, models, samples, hallmarks and signs of geographic origin when such disputes arise between the entities referred to under item 1 of this paragraph; in disputes relating to enforcement and securing of decisions of commercial courts, and in disputes relating to decisions of selected courts only when passed in the disputes referred to under item 1 of this paragraph;

3. in disputes resulting from application of the Law on Companies or application of other regulations on organisation and status of commercial entities, as well as in disputes on application of regulations on privatisation;

4. in disputes relating to foreign investments; ships and aircraft, sailing on the sea and inland waters, and disputes involving maritime and aeronautical law, except for disputes relating to passenger transport; protection of a company name; entry into the court register; bankruptcy and liquidation."
Commercial courts in the first instance conduct proceedings for entry into the court register of legal entities and other subjects unless this is under the competence of another body; conduct bankruptcy and reorganisation proceedings; order and undertake enforcement based on valid documents when referred to the persons mentioned under item 1, paragraph 1 of this Article, rule on and conduct enforcement and securing of decisions of commercial courts, and decisions of selected courts only when passed in the disputes specified in item 1, paragraph 1 of this Article; order and implement enforcement and securing on ships and aircraft; conduct non-litigious proceedings deriving from the application of the Law on Companies.

Commercial courts in the first instance decide on commercial offences and relative thereto on termination of a security measure or a legal consequence of the conviction.

"..."

The Commercial Appellate Court decides on appeals against decisions of commercial courts and other bodies, in accordance with law.

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It appears from this that the commercial courts adjudicate the majority of the cases concerning IP. The high courts, however, have competence in some IP matters; this follows from the above quoted words in article 25, paragraph 1: If a party does not fall under the description in the said paragraph, that is if the party is not a company, enterprise, co-operative, commercial entity etc., the high courts will be competent. But even if a party is a natural person the commercial court may be competent, cf. the final words in the said paragraph.

Besides, the competence may be different in at least some criminal cases. To this may be quoted an answer to the questionnaire sent to the Serbian counterparts before the meeting in September 2010:

"When the private (physical) persons are involved in proceedings, competence of the courts can be different what depend on the kind if proceedings. In the cases of criminal proceedings for actions where the foreseen sentence doesn’t exceed 10 years [the] competent court is Basic Court, and when foreseen sentence exceed 10 years the Higher Court is competent. In the cases of IPR infringement, where the sentences do not exceed 10 years, [the] Basic Court is [the] competent court. In the cases of civil proceedings with the involvement of private persons Higher Courts are competent and in some cases Commercial Courts. That is the general competence of the courts which is applicable also in the cases of IPR enforcement."

According to article 23 in the mentioned law, the higher courts adjudicate, inter alia,
“In civil disputes where the value of the subject of the lawsuit allows review; in cases denying or proving paternity and maternity; copyright and other related rights, protection and use of inventions, designs, samples, hallmarks and signs of geographic origin unless under the jurisdiction of another court; in disputes in respect of publishing corrected versions of published information and responses to published information and compensation for damage with respect to the publishing of information;”

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The world around the court system

As far as IP protection is concerned the Industrial Property Office (IPO) plays an important role, first of all as the registration authority, but also as co-ordinator of various activities involving the courts and other authorities.

The Market Inspectorate with about 100 market inspectors is an important feature in the IP protection in Serbia. The institution has no known parallels in the West European countries and seems to be a reminiscent from earlier economic system. Remarks from the judges present at the conference in September 2010 left the impression that the Market Inspectorate plays an important role in the surveillance of the marked, included fighting infringements of IP rights.

The custom authorities give rise to a number of cases - suspension of release - as in other countries.

The attorneys: A small number of attorneys specialize in IP matters. There is no formal training or certification of attorneys specialized in IP.

The business world must play an important role in the IP sector, but general or specific information have not been obtained.

The law on enforcement of IP rights

Serbia has recently passed a law concerning the enforcement of IP rights, the Law on Special Powers for the Purpose of Efficient Protection of Intellectual Property Rights, with the purpose of regulating special powers of the responsible authorities (state administrative authorities and organizations that have public prerogatives) for the purpose of efficient protection of intellectual property rights. The model for the law is the EU Enforcement Directive, (Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights). It can be expected that the law will be an important step forward in the enforcement of IP rights in Serbia.
The law comprises all intellectual property rights (copyright and related rights, trademarks, indications of geographical origin, designs, patents, petty patents (utility patents) and layout-design (topographies) of integrated circuits).

According to article 6 the responsible authorities are

1. Ministry responsible for trade, tourism and services, through market inspectorate and tourist inspectorate;
2. Ministry responsible for health, through health inspectorate and sanitary inspectorate;
3. Ministry responsible for urban planning and building through zoning inspectorate and building inspectorate;
4. Ministry responsible for finance, through tax inspectors and tax police;
5. Ministry responsible for education and sports, through education inspectorate;
6. Ministry responsible for science and technological development through its inspectorate;
7. The Broadcast Agency of the Republic.

The powers of the responsible authorities and the manner in which they are exercising their powers are described in details in article 7–17, for instance the power to seize goods found to infringe protected rights. The right holder may apply for upholding of the seizure and other measures. There are short time limits for the procedural steps: the authority shall make a decision on the upholding of the seizure not later than 15 days from the filing of the application.

Finally, the law contains very detailed provision concerning penalties.

The measures and procedures mentioned in the law are quite similar to the procedures in many other countries, including the EU-countries, for the custom authorities seizing boarder crossing goods found to infringe a rights holder.

The law does not have effect on the courts’ authorities in IP matters, including the provisional measures.

The handling of IP cases

Several judges gave figures concerning the number of cases in their court and these figures were received with gratitude. The figures were based on careful, manual counting of cases. An example is given below:

"At the table is shown unofficial data for several courts and the data are retrieved on the basis of the personal contacts in the provided courts. In the 2009 courts in Serbia have passed under thorough organizational changes and jurisdiction of courts has been changed as well as the courts themselves and there is no unique administering evidence according the cases relating to IPR yet."
For 2009 the data are available only for the Higher Commercial Court whose jurisdiction is on the second instance. In the Higher Commercial Court there were 849 litigation cases and 67 executive cases related to IPRs.

Categorization of the cases shown at the table was made manually according the notes on the file. This insight represents the number of new legal actions per year and earlier cases not finished yet are not included in it.

<table>
<thead>
<tr>
<th>Court \ IPR in question</th>
<th>2008</th>
<th>2007</th>
<th>2006</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>c</td>
<td>t</td>
<td>p</td>
</tr>
<tr>
<td>Belgrade District Court</td>
<td>48</td>
<td>8</td>
<td>9</td>
</tr>
<tr>
<td>Novi Sad District Court</td>
<td>10</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Kragujevac District Court</td>
<td>/</td>
<td>1</td>
<td>/</td>
</tr>
<tr>
<td>Kraljevo District Court</td>
<td>3</td>
<td>/</td>
<td>1d</td>
</tr>
<tr>
<td>Supreme Court of Serbia (appeals)</td>
<td>27</td>
<td>3+2d</td>
<td>7+7</td>
</tr>
</tbody>
</table>

Σ – In this column integrated number of actions shows beside actions for different IPR also recognition of foreign court decisions and actions resulting from Low on public

d – means action in regard of industrial design for which column is not foreseen

+ - in some cells there are two figures, the second one is in correlation with the related column but without registered rights (technical improvement, innovations, acknowledgment of creators)"

Further it has been informed that the numbers of legal actions related to IP rights initiated in courts within the past 6 years (until June 2010), which are based on the actions of Custom Authorities, are approximately 800.

The picture conveyed leads to the impression that there is an obvious lack of reliable statistics concerning, for instance

- Caseload at the beginning of the year
- Incoming cases
- Settled cases
- Case load at the end of the year
Reliable statistics should also indicate the types of cases, for instance

- TM cases
- Patent cases
- Design cases

Further the statistics should indicate details of the cases, as for instance the subject matter of the case in question and the date of the filing of the case, the hearings of the case or the main hearing, if any, of the case.

**Provisional measures** may be applied on the request of the right holder. There is no special court in charge for provisional measures. Pronouncement of provisional measures falls under the jurisdiction of the court where the action is initiated or should be initiated, and is on the basis of the facts represented in the request and the proofs of the other authorities (The Market Inspection, the custom authorities or the police who act ex-officio or on the requests of right holder). Deadline for the court’s pronouncement of a provisional measure is normally 15 days.

The figures and other information, however, though quite easy to understand as such, do not give a foreigner a full picture or a deeper understanding of the character or the content of the IP cases or the case management, neither in general nor in IP cases. In the IP matters as well as in other civil matters there is no comprehensive and systematic information on the number of cases, their types and further details or concerning the elapse of time from the filing of the case to the finalization (judgment, settlement, dismissal etc.).

Cases, which have been filed more than 5 years ago, are registered; no IP cases appear in this register.

It was reported that some judges had a large number of IP cases. Other judges had a very limited number of cases. Thus, it appears that the case load is distributed very unevenly. Courts as the commercial court in Belgrade and Novi Sad have the largest number of IP cases.

Most of the cases are copyright cases and the majority of these cases are simple claims for payment, the collection of smaller or bigger amounts due for the use of the claimant’s/plaintiff’s products protected by copyright.

The number of patent cases seem to be very limited, almost not existing, and the number of design cases, whether they concern registered designs or not registered designs, is of a similar size. According to some of the judges this was due to Serbia’s isolated position in recent years.
It is the impression that a comparatively small number of cases relate to the extent of the scope of protection, the likelihood of confusion and similar substantial IP questions. Most of the cases are concerning claims for payment due for the authorized or not authorized use of IP rights.

Generally speaking, IP legislation is not more complicated than other legislation, provided the judge has the necessary time to get familiar with the IP law. As to the training, attention was drawn to the newly established Judicial Academy. Further, the Intellectual Property Office in Serbia has entered into an agreement with the Judicial Academy concerning the training of judges. The activities according to the agreement may be expected to lead to a significant upgrading of the awareness and knowledge of IP law and practice in the judiciary.

**General procedure issues**

It was mentioned that many cases were delayed due to the failing appearance of the parties, often because the relevant documents had not been served to one of the parties or both. If they had been served, the consequences of non appearance of the plaintiff would be that the case will be dismissed. In the case the defendant did not appear the normal consequence would be that the hearing was held (probably on the basis of what was already in the case and what was presented to the court by the plaintiff). In small claims cases, however, the failure by the defendant will automatically lead to a judgment in favour of the plaintiff. Apparently, the Civil Procedure Code does not contain provisions concerning a summary proceeding in other cases than small claims cases, for instance so that non appearance of the plaintiff will lead directly to a judgment in favour of the plaintiff (provided of course, that his claim is not inconsistent with the information and the allegations in the case as these are given by the plaintiff).

It was further mentioned that a draft law would put bar to the presentation of new evidence in appeal cases, thereby inciting the parties to present all possible, relevant material in the first instance. Actually, there were no deliberations concerning the concentration of the presentation of evidence or allegations in first instance hearings.

**Mediation**

Mediation is an established procedure in Serbia. In practice, the use of mediation was restricted, probably due the lack of knowledge of the possibility. The judges mentioned that mediation could be very useful, also in IP matters. However, some extra costs were incurred in connection with mediation, and the courts did not get the necessary funding to cover these costs.
**Fast track**

The fast track procedure is essentially a procedure in which the number of pleading from both parties is restricted to a minimum; the hearing will take place as soon as possible after the submission of the last pleading. The date of the hearing is fixed in the initial phase of the preparation of the case.

The situation seem to be the same in Serbia as in Denmark (and other countries): Fast track procedure may be ordered by the court provided that both parties are accepting the procedure.

**Specialization**

Given the lack of a considerable number of cases with substantial IP problems if may be considered whether IP cases should be heard by all judges in the commercial courts, about 180 judges. This would be in accordance with experiences made in several other European Countries.

One of the arguments for specialization is that specialization is time saving because it makes it easier for the courts (the judges); you don´t have to start at scratch. More than that, specialized judges can enhance the quality of the work of the courts, including the most important part of the work, the judgments. Specialization is generally considered beneficial for the judges; there seems to be no serious arguments against specialization, provided that the judges in the specializes divisions have the opportunity to change their positions with regular intervals,

Besides, it is time saving because easier for the parties (the attorneys); they know that the judges have a profound knowledge of the law and practices in the relevant fields and can save many introductory remarks.

One way of obtaining specialization could be concentration of IP cases in one, two or three courts (commercial courts). It seems to be a fact that only a small number of courts have more than a few IP cases. A concentration of IP cases on a limited number of the courts would not be a dramatic change of the court system, just a practical way of simplifying the competences.

Specialization should be made without respect to the status of the parties – thereby so far as possible avoiding borderline cases. In the present determination of cases to the courts there seem to be distinctions concerning the status of the plaintiff, legal person or private person, business entity or not and similar distinctions. The rationale for this
does not seem sufficient. The problems of a trade mark case or patent case are the same, independent of the status of the physical or legal persons involved.

The specialized courts should hear all types of IP cases (trade mark cases, patent cases or design cases and so on) – and the other types of commercial cases. Presently, there is no need for further specialization on the court level.

Alternatively or in addition to that a concentration of cases on a number of judges in the commercial courts is could be considered. Even if the IP cases are concentrated in a small number of commercial courts it could be an advantage that a limited number of judges in these courts are specialized in the various cases, due to the complexity of the legislation, hereunder the practice (jurisprudence) of the European Court of Justice.

**Civil procedure in general**

These topics are not only of interest for the IP cases; they are of general interests for all courts and attorneys (and for the population).

**Case management directed by the judges/the courts**

It is a general accepted point of view that the judge must have a leading role in the preparation and development of the cases. It is the responsibility of the judges to see to it that there are no unnecessary delays in the proceedings, cf. the European Convention on Human Rights, article 6, concerning *inter alia* the right to a fair hearing within a reasonable time, and the jurisprudence in this connection.

I was informed by some of the judges that Serbian legislation in procedural matters was inspired by German law (as is the case in a number of other European countries). In Germany the judges normally have a leading role in the management of the case. The role of the Serbian judges in this respect is not clear to me. The following is written under the supposition that the role could be described as “not activist”.

The cases “belong” to the parties and they should be free to dispose of the cases as they like. However, when a case is filed in the court it should also be a concern for the court to secure the development of the case towards an early decision. The handling of a case makes use of the spare resources of the court system, the amount of money the government has allocated to the court system.

Experience in other countries shows that case management cannot be left to the attorneys. They need certain incitements. Besides, their clients may not be satisfied with the development of their cases but will often just get the explanation that the courts are too busy etc., whereas the real explanation can be that the attorney simply is overburdened or cannot manage the number of cases he has accepted to take.
The general practice in Serbia – based on the law on civil procedure - seems to be that the judge or judges will hold several hearings in a case – every month or every second month depending on the circumstances. In these hearings the parties will submit their pleadings, the documents and the other parts of the evidence. The parties are free to submit evidence until the closing hearing.

This practice is contrary to the common way of doing things in at least a number of other European countries. In Denmark, for instance, there is a clear distinction between the preparatory phase and the hearing. In the preparatory phase the parties will submit their pleadings and documentary evidence and the court will on the request of the parties rule about questions as technical evidence and other kind of information from outside sources (technical institutes etc.). When sufficient information has been collected the court will with the parties’ consent declare the preparatory phase to be closed and the case will be put down for trial. Latest at this point, but normally much earlier the parties will indicate the names of the witnesses and the time necessary for the final hearing. After the closing of the preparatory phase the parties will normally not be allowed to submit further evidence or to nominate further witnesses, except in rare cases especially when it is considered excusable that the evidence has not been produced at an earlier stage.

Legislation concerning injunction

It has been noticed that the legislation concerning injunctions seems to be satisfactory. Questions of injunctions are decided by the court which has competence concerning the main proceedings. The time limits for injunctions and appeals to the decisions are very short and of no importance to the swift treatment of the main case.

Introduction of assessors (lay expert judges) in IP cases or in other cases does not seem advisable. The Serbian courts do not have any experience in this field as far as civil matters are concerned. Besides, corruption is not unknown in Serbia. Undue influence on lay judges or biased lay judges might be a consequence of the introduction of lay judges. Reflections on the introduction of assessors, which has been a great success in Denmark, must be postponed to a later stage of the development.

Co-operation with the surroundings
The surroundings are primarily the business world interested in IP matters and the attorneys specialized in IP-cases. So far no more detailed information has been obtained concerning this subject.

II. Summary of talks with judges and representatives for the IPO

1. The competence of the courts seems to be well defined, with a few exceptions however. It may be questioned why the status of the party or parties involved in the matter shall be decisive for the competence of the court. Generally, the competence should preferably depend on the subject-matter of the case (IP-case, transport case or real estate case and so on), not on the status of the party (physical person or legal person for instance).

2. Further, it was questioned whether all copyright cases or the majority of copyright cases should be heard by the commercial courts. A number of copyright cases are of minor importance because they are concerning private persons’ claims for compensation or claims against such persons; such litigations do not necessitate the skills of a specialized judge.

   Similarly, other IP cases, in which the IP right is not contested, can possibly be heard by the ordinary, not specialized courts.

   No definite position concerning these questions was reached.

3. As to the general knowledge of IP among the judges it was the opinion of the judges present at the meetings that it was not satisfying, generally speaking. The opinion of the representatives for the IPO was that a number of judges had good qualifications in IP. Due to lack of experience and insufficient theoretical background a large number of judges would not be able to deal with IP matters in a satisfactory way. Given the number of IP cases now and in the future, this was another argument for specialization.

   The future training activities of the Judicial Academy were heartily welcomed and the activities supported by the IPO should be carried on, of course. It was mentioned in this connection that the activities of the IPO were very beneficial for the courts. In general, the IPO acted as a catalyst and a generator for the courts and should have a leading role in the future training activities in IP matters.
The distribution of the comparatively few IP cases (estimated to about 5% of the commercial court cases) among a large number of judges was considered a problem. The comparatively restricted number of IP cases with substantial issues had as a consequence that the judges on the average had very limited possibilities to get accustomed to the multi-sided problems of IP. Accordingly, the IP cases should be distributed to a comparatively small number of specialized judges.

The future training activities of the Judicial Academy in the IP field should be supported and the activities supported by the IPO should be promoted further. Inter alia, there seems to be a strong need for training in patent questions, but also other fields within IP deserved much attention.

4. Statistics. There is obviously a lack of reliable statistics concerning IP cases. Court statistics should be able to give a fair and true picture of what the courts and the judges are doing in IP cases. The need for statistics does not only concern the handling of IP cases, but the management of court cases in general. The present reporting of cases did not live up to the exigencies of a modern reporting system. It was noticed in this connection that there is a general awareness of the need for improvements of the court statistics.

The advantages of good and reliable statistics were found to be many. When debating funding with the Ministry of Justice and the Ministry of Finance its important to be able to demonstrate that the clerks of courts and the judges are hard working people dedicated to their work. Besides, it is important to show the public in general that court work is done efficiently and that it is beneficial to the society, and worth of attention and support. Finally, good statistics are important for the judges’ understanding of what they are doing and for their self-esteem.

There is an improved version of a software system for registration of courts cases, the improved Mega Libra. So far, only the Commercial Appellate Court and the High Court of Niš have implemented the improved system, which improves the possibility for registration of IP cases. It was the general opinion of the judges that the improved Mega Libra system should be implemented in all courts.\(^1\) In this connection it was mentioned by the judges that specifications concerning the minimum requirements to the courts registration of the filed cases is laid down in the procedure law.

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1 The first three sentences of this paragraph have been amended after suggestions from the IPO.
5. **Concentration of cases.**

It appears from the statistics given above and from information from the judges that the vast majority of the IP cases are filed at a small number of courts. This was confirmed by the judges present at the meetings in September and November 2010. For the reasons given above, the question could be raised whether it could be more convenient to concentrate IP cases on a limited number of courts. It was suggested that IP cases in general could be heard by one division in the commercial courts of Belgrade, Novi Sad and Niš.

a. As to the **patent cases** it is generally acknowledged that these cases or at least the majority of the cases require a high degree of specialization, technically as well as legally. For a country of the size of Serbia there should only be one patent court of first instance. As the number of patent cases at present seems to be very limited, the deliberations concerning concentration of patent cases might possibly be postponed to a later stage of the development.

b. **Trade mark cases** are presently quite common - in some courts. As concentration in three or four courts already exists in practice, it might be taken under consideration that trade mark cases also legally should be concentrated in a limited number of commercial courts. If IP cases were heard by one division in the commercial courts of for instance Belgrade, Nič and Novi Sad the total number of judges dedicated to the IP cases would be around 30. As indicated above, the advantages of this could be a more uniform case management, a more uniform practice concerning, for instance, the evaluation of the likelihood of confusion, the assessment of indemnity for damages etc. For the judges the advantages would be clear: Specialization will be a motivating factor for the judges. Specialization will facilitate the work of the judges and makes the outcome of the cases more predictable for the judges as well as for the public. Besides specialization will help establishing institutions and environments which might encourage exchange of experiences and collegial competence building.

c. **Other IP cases** are rather few. It seems to be expedient for the handling of the cases and most convenient for the public and for the judiciary that other IP cases also should be heard by the same small number of courts.
6. **Cooperation with the surroundings.**

Co-operation with the surrounding world could comprise among other subjects the following:

**Co-operation with the business world:**
- Meetings with the IP owners or their organisations in order to ascertain their needs in IP matters
- Annual reports on the work in the court

**Co-operation with the attorneys specialized in IP-cases:**
- Dialogue forum
- Annual reports on the work in the court
- Publication of decisions
  - In printing
  - On websites

The judges found that improved co-operation with the surroundings could be beneficial for the courts. The benefits of such initiatives could be many:

The initiatives will contribute to the promotion of the general awareness in the public and among professionals of IP matters and to the work of the courts. The courts can build up a (justified) image of modern, open minded organisations which take the needs of their “customers” into consideration.

Further, through dialogue forums and meetings with the users and the public interested in IP matters the courts can probably get input to improvements of the case management and the practical work of the court. Further, the judges can get a clearer picture of the needs of the business life and of the attorneys interested in IP matters. It was mentioned that similar meetings in the past had been arranged by the Chamber of Commerce of Serbia in co-operation with the American Chamber of Commerce. In the future such meetings should be arranged by the commercial courts of Serbia.

The publication of decisions will be a help for the users, including attorneys, to get a better understanding of the reasoning of the judges: a better understanding of the practice of the courts and what is the law could help preventing the filing of a number of new cases that essentially are like cases already decided. Further, the publication of decisions will be a help for the judges who can learn and get inspiration from the decisions of their colleagues. Publication of decisions
on the net is quite frequent in many European countries (UK, Germany, The Netherlands and other countries) as well as USA.

As to the costs, a home page and publication of judgments on the home page is cheap compared to the costs of editing a printed law gazette or the like. Most of the work with the home page can be done by the judges and a few skilled clerks. The experiences of, for instance, the Danish Commercial Court in this respect confirms what is stated above.

It was noticed that the awareness concerning the importance of publication of judgments is widespread in the court system and that some initiatives are already planned in this field. For instance, the High Council for Judiciary is expected to issue guidelines in January 2011 concerning publication of judgments, either in electronic form or in printed versions or both.

7. **Training of practicing lawyers** in IP is not a subject of the present paper. However, it was mentioned that skilled and specialized lawyers are a great help for the courts in their daily work. A specialized lawyer can present the case in a concentrated manner, avoid unnecessary and superfluous arguments and evidence, and thereby facilitate the courts' handling of the cases. Thus, investment in training and specialization of attorneys in IP cases might be highly rewarding also for the courts dealing with the IP cases.

It was mentioned by the judges that practicing lawyers could be invited to the future courses of the Judicial Academy with IPO, thereby enjoying the benefits of the courses given. Besides, through their participation together with the judges the practicing lawyers might inspire the judges and get inspiration from them.

8. In this connection reference could be made to the institution of **European Patent Agents**. There is presently no European Patent Agent in Serbia. Encouragement from government side to training and educating a number of these highly skilled patent specialists might help the development of courts specialized in IP matters, especially patent matters. However, the education of European Patent Agents is mostly a concern of IPO.

9. The present number of judges is about 1,800. Of these, 180 judges are working in the commercial courts, including the Commercial Appellate Court. The total number of judges is fairly high compared to some, but far from all, European

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2 Inserted "with IPO" after suggestions from IPO.
countries. The number of judges is high compared to for instance Denmark or Norway. In Denmark (The Faeroes and Greenland not included) there are 373 appointed permanent judges. Besides, about 300 lawyers are working as junior judges (under education) or as assistant judges (working as judge or more frequently as specialized judge or chief of administration). In Norway the situation is similar. In Great Britain and Ireland the number of judges is (comparatively) still lower.

The comparatively high number of judges in Serbia may be ascribed to the general rules and practices of procedure; it may also as suggested by some judged to a certain degree be influenced by a higher degree of willingness in the Serbian population to take legal action and to let the proceedings run for years through a number of instances. If a tendency as described does exist in parts of the population it may indicate that the costs of lawsuits are too low, either the court fees or the salary of the attorneys.

The Serbian judges, on the contrary, found that the number of judges was insufficient the number of cases taken into consideration. It was mentioned that the number of cases referred to a judges may vary from 220 to 300 per year, and that a hard working judge will be able to finalize about 200 cases per year, so that the case load will be augmented considerably year by year. The reason for the high number of cases may, according to some of the judges, be ascribed to as what was called “the social situation in general” or to the above mentioned willingness to take legal action. It was further mentioned that rules of general procedure could attribute to the delayed finalization of some of the cases and to the growth in the number of pending cases.

As the questions dealt with in the present paragraph are of a general organizational and legal nature concerning the whole structure and working methods of the judges as laid down in the law and, besides, complicated social relations, there will not be any recommendations made in this respect.

10. **Further general procedural questions:**

Further procedural questions have been discussed such as abolishment of the many preparatory meetings replacing them with only one preparatory meeting, possibly combined with a deadline for preparation with the purpose of forcing the parties to concentrate the preparation and barring them from the submission of new evidence and arguments until the last moment before the case is set down.
for judgment. It was the impression that there is a certain need for reforms in this and other procedural fields. However, reforms in this respect cannot be separated from reforms in the general procedure law; an isolated procedural reform with regard to IP cases is not practical or realistic.

Minor procedural issues with regard to IP cases, however, might be considered, such as introduction of a fast track in IP cases, if wanted by the parties, or mediation in IP cases, equally if wanted by the parties. Such remedies are not unknown to the courts of Serbia. Fast track procedures can be introduced without any or in any case with negligible costs. Mediation will necessitate certain facilities, such as a number of rooms available for the mediation, and consequently some extra funding.

Use of mediation and fast track would be beneficial, not only for IP cases but for court cases in general. Presently, the use of mediation, though foreseen in the law, is not widespread; the reason for this was that the practicing lawyers did not have sufficient knowledge of mediation. A campaign spreading the knowledge of the institution of mediation would be beneficial.

On the basis of the above I submit the following

**III. Recommendations**

1. IP cases should as far as possible be heard by the same courts, irrespective of the legal status of the party. Overlapping of competences between for instance the commercial courts and the high courts should be avoided.

2. IP cases should be heard by a limited number of specialized courts, preferably not more than three. The specialized courts should be the commercial courts, but not all the commercial courts. A limited number (three) of commercial courts should be responsible for the IP cases.

3. At present, there is no need for further specialization; the number of court cases will not justify the establishing of, for instance, a specialized trade mark court or a patent court.
However, within a foreseeable future the court system will get more patent cases. The special features of patent cases make it recommendable to prepare for the establishing of a patent court or a patent division within one central commercial court.

4. Given the number of judges in the present commercial courts (180 judges) I recommend a specialization within the commercial court such as establishing of chambers or divisions for IP cases in general, and, on a later stage of the development, special chambers or divisions for trade mark cases and/or for patent cases.

5. The knowledge of IPR among the judges present during the sessions in September and November 2010 appears to be satisfying. However, the distribution of the comparatively few IP cases among a large number of judges must present certain problems. To cope with these problems, the IP cases should be distributed to a small number of specialized judges.

6. Besides, the future training activities of the Judicial Academy in the IP field should be supported, and the training activities of the IPO should be promoted further. Inter alia, there seems to be a need for training in patent questions in order to prepare for the expected increase in the number of the patent cases. Also, training in design questions will be needed.

7. It is recommended that the present statistical reports are supplied with more detailed reports concerning IP cases. The statistics should indicate the number of cases of the different types, indications of the issues in generic terms (distinctiveness, likelihood of confusion, patentable subject matter, equivalence etc.), the case load at the beginning and the end of a certain period, for instance a year, the closing of the case (settlement, judgment, dismissal etc.) and other circumstances relevant to give a picture of the courts’ activities in a certain period.

8. Co-operation with the business world:

   a. Regular meetings with representatives of the business world, included representatives of organisations with a special interest in IP matters, are recommended.
b. Further is recommend that each court establishes its own home page containing practical information about the court, the work of the court, included statistics and description of the work of the court, and publication of all or a selection of judgments in IP matters.

c. As an alternative to publication of judgments on the courts’ home page is recommend publication or rendering of a selection of the courts’ judgments in IP matters on the homepage of the IPO. Of course, this alternative implies the reporting by the courts of the decisions to the IPO.

9. Co-operation with the attorneys (advocates)
   a. Regular meetings (dialogue forums) between the courts and advocates with a special interest in IP matters are recommended.

   b. Further is recommend that each court establishes it own home pages with publication of (a selection of) judgments in IP cases or alternatively publication or rendering of a selection of the courts’ judgment in IP matters on the homepage of the IPO as described above.

10. Procedural Question
    Generally, there is no need for special rules of procedure in IP cases; nor will such rules be desirable. It might be taken under consideration whether there is a need for introduction of fast track rules or for making more use of mediation.

    Both procedures can be useful in all court cases, and they can be applied in some IP cases, for instance in some trade mark and design cases.

    A fast track should only be used if wanted by the parties.

    The use of mediation should be furthered. Judges and attorneys interested in mediation should get the necessary education and training and facilities for mediation should be funded by the government.

    Copenhagen, 26 November 2010³

    Jens Feilberg

³ With amendments on pages 14 and 17 of 11 January 2011.